

2006 CarswellAlta 1367, 2006 ABCA 311, 384 W.A.C. 296, 397 A.R. 296, [2007] W.D.F.L. 921, [2007] W.D.F.L. 999, [2007] W.D.F.L. 984, [2007] A.W.L.D. 779, [2007] A.W.L.D. 808, [2007] A.W.L.D. 807, 275 D.L.R. (4th) 338, 34 R.F.L. (6th) 266

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G. (A.) v. S. (L.)

A.G. (Respondent / Applicant / Appellant by Cross Appeal) and L.S. (Appellant / Respondent / Respondent by Cross Appeal)

Alberta Court of Appeal

C. Hunt, C. O'Brien JJ.A., K. Horner J. (ad hoc)

Heard: October 12, 2006

Judgment: October 12, 2006

Written reasons: October 24, 2006

Docket: Calgary Appeal 0501-0250-AC

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Proceedings: reversing in part *G. (A.) v. S. (L.)* (2005), 17 R.F.L. (6th) 244, 2005 ABQB 462, 2005 CarswellAlta 968 (Alta. Q.B.)

Counsel: D.P. **Castle** for Appellant

H.N. Hanson for Respondent

Subject: International; Family

Conflict of laws --- Family law — Support — Enforcement of foreign orders — Reciprocal enforcement legislation — General principles

Father was resident of Alberta — Father had relationship in Kazakhstan, which resulted in birth of child — Court order from Kazakhstan stated that father was to be liable for child support in amount equivalent to one quarter of income from all sources until child reached legal age — Mother's application for child support was allowed, and father was ordered to pay \$150 per month — Father appealed; mother cross-appealed on basis of quantum — Appeal allowed in part — Appeal was dismissed subject to condition that no further steps be taken in action until proof was filed that Kazakhstan order was vacated — Cross-appeal was allowed, and order as to quantum was vacated — Chambers judge should not have set quantum — Judge told parties that he would not determine quantum without hearing evidence — Judge was correct in concluding that Alberta courts had jurisdiction to make support order — Jurisdiction simpliciter and subject-matter jurisdiction were both present — Judge's conclusion on forum conveniens was not unreasonable.

Family law --- Support — Child support under federal and provincial guidelines — Practice and procedure —

2006 CarswellAlta 1367, 2006 ABCA 311, 384 W.A.C. 296, 397 A.R. 296, [2007] W.D.F.L. 921, [2007] W.D.F.L. 999, [2007] W.D.F.L. 984, [2007] A.W.L.D. 779, [2007] A.W.L.D. 808, [2007] A.W.L.D. 807, 275 D.L.R. (4th) 338, 34 R.F.L. (6th) 266

#### Jurisdiction of courts

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#### Family law --- Support — Child support under federal and provincial guidelines — Application of guidelines — General principles

Father was resident of Alberta — Father had relationship in Kazakhstan, which resulted in birth of child — Court order from Kazakhstan stated that father was to be liable for child support in amount equivalent to one quarter of income from all sources until child reached legal age — Mother's application for child support was allowed, and father was ordered to pay \$150 per month — Father appealed; mother cross-appealed on basis of quantum — Appeal allowed in part — Appeal was dismissed subject to condition that no further steps be taken in action until proof was filed that Kazakhstan order was vacated — Cross-appeal was allowed, and order as to quantum was vacated — Chambers judge should not have set quantum — Judge told parties that he would not determine quantum without hearing evidence — Judge was correct in concluding that Alberta courts had jurisdiction to make support order — Jurisdiction simpliciter and subject-matter jurisdiction were both present — Judge's conclusion on forum conveniens was not unreasonable.

#### Cases considered by *C. Hunt J.A.*:

*K-Lath v. Gemini Structural Systems Inc.* (1997), 1997 CarswellAlta 623, 200 A.R. 285, 146 W.A.C. 285 (Alta. C.A.) — considered

*Kasprzyk v. Burks* (2005), 15 R.F.L. (6th) 221, 2005 CarswellOnt 872 (Ont. S.C.J.) — considered

*P. (L.) v. E. (G.)* (1990), 75 Alta. L.R. (2d) 195, 108 A.R. 125, 28 R.F.L. (3d) 25, 1990 CarswellAlta 131 (Alta. Prov. Ct.) — considered

*Prichici v. Prichici* (2005), 2005 CarswellOnt 1952, 14 R.F.L. (6th) 425 (Ont. S.C.J.) — considered

*Welsh v. Welsh* (1974), [1975] 1 W.W.R. 369, 18 R.F.L. 306, 1974 CarswellBC 251 (B.C. S.C.) — considered

#### Statutes considered:

*Interjurisdictional Support Orders Act*, S.A. 2002, c. I-3.5

Generally — referred to

2006 CarswellAlta 1367, 2006 ABCA 311, 384 W.A.C. 296, 397 A.R. 296, [2007] W.D.F.L. 921, [2007] W.D.F.L. 999, [2007] W.D.F.L. 984, [2007] A.W.L.D. 779, [2007] A.W.L.D. 808, [2007] A.W.L.D. 807, 275 D.L.R. (4th) 338, 34 R.F.L. (6th) 266

*Parentage and Maintenance Act*, R.S.A. 2000, c. P-1

Generally — referred to

s. 16(4) — considered

**Regulations considered:**

*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)

*Federal Child Support Guidelines*, SOR/97-175

Generally — referred to

APPEAL by father and CROSS-APPEAL by mother from judgment reported at *G. (A.) v. S. (L.)* (2005), 17 R.F.L. (6th) 244, 2005 ABQB 462, 2005 CarswellAlta 968 (Alta. Q.B.), ordering father to pay child support.

**C. Hunt J.A. (for the court) (orally):**

1 The appellant L.S. ("the father") is an engineer who has spent much of his career working abroad. During an assignment in Kazakhstan, he had a relationship with the respondent/ cross-appellant A.G. ("the mother"), which led to the birth of a child on August 23, 2003 ("the child"). The mother and the child have always lived in Kazakhstan, while the father returned to Alberta where he supports several of his other children and cares for his estranged wife who is seriously ill.

2 By affidavit, the father admitted his paternity and averred that he had made voluntary monthly payments of about \$100 to the mother since the child's birth. There is some evidence to suggest that the payments commenced after the statement of claim was filed.

3 In August 2004 the mother obtained an order from the Kazakhstan courts which appears to oblige the father to pay one-quarter of his total income in support of the child. The translated order could also be interpreted, however, to require that he pay one-quarter of the mother's income by way of child support.

**Procedural Background**

4 The litigation has arrived at this Court in a convoluted fashion. The mother filed and served a Statement of Claim primarily seeking production of the father's financial records; payment of interim costs by the father; and an order of maintenance. No statutes were cited in support of the claim. In his Statement of Defence, the father noted the latter fact and asserted, *inter alia*, that the mother had not followed the necessary statutory procedures in the *Parentage and Maintenance Act*, R.S.A. 2000, c. P-1. He also stated that the courts of Kazakhstan had jurisdiction.

5 The mother then filed a Notice of Motion seeking a direction that L.S. attend for examinations, adjournment of other matters pending the examination, and a determination of interim maintenance.

6 Eventually the parties appeared in front of the chambers judge for a special hearing. The transcript suggests that another chambers judge had ordered them to appear at a special hearing to determine the issue of jurisdiction. A.B. 31-2.

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7 After hearing some argument, the chambers judge reserved his decision, stating that he intended to deal only with the issue of jurisdiction, not with the matter of quantum: A.B. 43-46. Although he invited the parties to make further written submissions within 10 days, the context makes it clear that those submissions were to relate to the matter of jurisdiction.

### Chambers Decision

8 In his written decision, the chambers judge held that the father had attorned to the jurisdiction of the Alberta courts because of paragraph 1 in his Statement of Defence. In that paragraph the father said that he was filing the Statement of Defence "to appear in the said action so that his case may be heard": A.B. F14. The chambers judge noted that the father was a resident of Alberta who had acknowledged his paternity and "it is in the interest of the child that this Court acknowledge jurisdiction.": A.B. F14.

9 He referred to the *Interjurisdictional Support Orders Act*, S.A. 2002, c. I-3.5. At paragraph 8 he said "dealing with the choice of law", the award of the Kazakhstan court was not reasonable and in any event it was unenforceable in Alberta.

10 He referred to jurisprudence that states that since a support order involves an *in personam* action, it is sufficient for the defendant to be present in the jurisdiction in order for the plaintiff to have the right to commence proceedings there, unless the defendant can show there is another more convenient forum. Without analysis, he concluded that the father had not met his onus to show there was a more convenient forum and accordingly, Alberta was the convenient forum.

11 Nowhere in his decision did he specify the statutory or other basis for his conclusion that there was jurisdiction in Alberta that ought to be exercised.

12 At the end of his decision, he addressed quantum, concluding that the *Federal Child Support Guidelines*, SOR/97-175 should not apply to children living outside Canada. He noted there was no evidence about the cost of living in Kazakhstan. He set child support at \$150/month until further review, noting that the amount was somewhat arbitrary.

13 Many issues were raised in the factums, not all of which require comment from us.

14 It is clear that the mother did not comply with the requirements of the *Parentage and Maintenance Act*, at least initially. While we do not condone the procedure that was used, we will not base our decision on that since the father's counsel did not take issue with this point before the chambers judge, a position she reaffirmed before us on the appeal.

15 We agree with the conclusion of the chambers judge that the Alberta courts have jurisdiction to make a support order in this case. An application for child support is an action *in personam*: *Kasprzyk v. Burks* (2005), 15 R.F.L. (6th) 221 (Ont. S.C.J.) at para. 12, 136 A.C.W.S. (3d) 1097; *Prichici v. Prichici* (2005), 14 R.F.L. (6th) 425 (Ont. S.C.J.) at para. 27, 139 A.C.W.S. (3d) 281; *P. (L.) v. E. (G.)* (1990), 108 A.R. 125 (Alta. Prov. Ct.) at para. 54. *In personam* jurisdiction *simpliciter* can be exercised based on a defendant's submission by agreement or attornment, his ordinary residence in the jurisdiction, or a real and substantial connection between the subject matter of the action and the forum: Castel & Walker, *Canadian Conflict of Laws*, 6th ed. (Markham, Ont.: Lexis Nexis Canada Inc., 2006) at 11-1. Jurisdiction *simpliciter* is present here.

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16 There is also subject matter jurisdiction based on the *Parentage and Maintenance Act*, the statute upon which the mother relies. It does not contain a residency requirement. This suggests that the legislature intended the Alberta courts to be able to make child support orders under the *Act* if a putative father lives in the jurisdiction, even when the mother and child live elsewhere: *Welsh v. Welsh* (1974), [1975] 1 W.W.R. 369 (B.C. S.C.).

17 The chambers judge correctly noted that the onus was on the father to show that Alberta is not the *forum conveniens*. Since that decision was discretionary, we can only interfere if it was exercised unreasonably: *K-Lath v. Gemini Structural Systems Inc.* (1997), 200 A.R. 285 (Alta. C.A.) at para. 14. Although it would have been preferable had the chambers judge explained what factors he relied upon to reach his conclusion, in this case there are factors that support both parties' points of view on *forum conveniens*. Some of the evidence is available here and some is available in Kazakhstan. Although the mother sought and obtained a court order for support in Kazakhstan, both counsel expressed the view that the order is not enforceable in Alberta. Thus there is a juridical advantage to the mother's *Parentage and Maintenance Act* application in Alberta. When the factors are weighed in this case, we cannot say that the chambers judge's conclusion on *forum conveniens* was unreasonable.

18 The father's counsel asserted that the Alberta courts should not take jurisdiction because this is a clear case of forum shopping, a practice that the courts should not permit. She also pointed out that if the *Parentage and Maintenance Act* action proceeds in Alberta, the father will be faced with the possibility of two competing court orders and will not know which one to obey.

19 This is a very valid concern on the father's part, although we think it can be answered by the undertaking made by the mother's counsel to ensure that the Kazakhstan order is vacated.

20 Accordingly, we dismiss the appeal, but on the condition that no further steps may be taken in this action until proof is filed in the Court of Queen's Bench that the Kazakhstan order has been vacated.

21 This leaves the question of how the chambers judge dealt with the matter of quantum, an issue that arises from the mother's cross-appeal.

22 We agree with the mother that quantum should not have been set in this case. It is clear from the transcript that the judge told the parties he would not determine quantum without hearing evidence: A.B. 29. At A.B. 43-4 he said he was going to reserve and that "I will give you a memorandum with respect to jurisdiction and then I will have you back at sometime in the future to determine whether or not or what amount of child support should be paid, if I find that there is jurisdiction." He invited the parties to file further material, but again it is clear that that material was relative to jurisdiction only: A.B. 45.

23 Under these circumstances it was inappropriate for him to deal with quantum in his written reasons, as it deprived the parties of the promised opportunity to make submissions on quantum and to produce evidence to meet the requirements of s. 16(4) of the *Parentage and Maintenance Act* (which requires that the amount of maintenance be set to enable the child to be maintained at a reasonable standard of living having regard to the financial resources of the parents).

24 The father's counsel submitted that the quantum order was only an interim order with which this Court should not interfere. Given the apparent findings of fact and pronouncements of law contained in the judgment, we are unable to interpret it in such a limited fashion.

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25 In summary, the appeal is dismissed subject to the condition that no further steps can be taken in this action until proof has been filed in the Court of Queen's Bench that the Kazakhstan order has been vacated. The cross-appeal is allowed and the order of the chambers judge as to quantum is vacated.

[Discussion about costs]

26 Each party will bear their costs of the appeal and cross-appeal, and in the Court of Queen's Bench.

*Appeal allowed in part.*

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