



**SUPERIOR COURT OF JUSTICE**  
**COUR SUPÉRIEURE DE JUSTICE**

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**FAX COVER SHEET**

**Date:** April 9, 2010

**TO:**

John Schuman

**FAX NO.:**

416-449-7071

**FROM:** The Hon. Madam Justice Spies

**TOTAL PAGES (INCLUDING COVER PAGE):** 5

**MESSAGE:**

***Martinez v. Basail***

➤ Please see Endorsement of today's date in the above noted matter attached.

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**CITATION:** Martinez v. Basail, 2010 ONSC 2038  
**COURT FILE NO.:** FS-10-357800  
**DATE:** 20100409

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** R. Martinez, Applicant

**AND:**

K. Basail and B. Rodriguez, Respondents

**BEFORE:** Justice Spies

**COUNSEL:** *John Schuman*, for the Applicant

*John Schuman*, for the Respondents

**HEARD:** April 6, 2010

**ENDORSEMENT**

[1] The Applicant, R. Martinez, brings this motion seeking an order that the divorce that was granted to him and his former wife, B. Rodriguez, in Cuba, be recognized as a valid divorce in Ontario. Although the court office required that the application be issued with Ms. Rodriguez and Mr. Martinez's current wife, K. Basail, as Respondents, in fact they are all Applicants, represented by Mr. Schuman, and they all seek this relief. I granted an order to amend the Title of Proceedings to reflect this. After hearing submissions from Mr. Schuman, I advised him that I was prepared to recognize the Cuban divorce as valid in Ontario and I signed a formal order to that effect. I advised him that I would provide reasons for my decision. These are my reasons.

[2] Mr. Martinez and Ms. Rodriguez were both born in Cuba and resided there until their marriage, in Cuba, in June 2004. They had a child there as well. Mr. Martinez immigrated to Canada in July 2006 and Ms. Rodriguez followed, with their daughter, in October 2006.

[3] The parties separated in May 2007. They were both ordinarily resident in Ontario at this time and were both permanent residents of Canada. The parties believed that because they were married in Cuba that they had to be divorced in Cuba. They did not consult with lawyers in Ontario.

[4] In October 2007, the parties travelled to Cuba. They retained Ms. Carmen Diaz, Lawyer and Notary, who assisted in procuring a divorce in Cuba. An English translation of the "Divorce Through a Notary" states that Ms. Diaz is a Notary with national jurisdiction and with an office

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at the Special Notary of the Ministry of Justice in Havana City. It recites that both Mr. Martinez and Ms. Rodriguez disclosed the fact that they were residents of North York, Ontario and had only received permission to remain in Cuba until November 18, 2007. The recitals also reflect that the parties appeared freely and under no duress. The document refers to their marriage in Cuba and attaches a copy of the registration of the marriage in Havana City. The document also refers to the birth of the couple's daughter which was also registered in Havana City. Finally the document goes on to provide for dissolving of the marriage effective on the date this document was signed, namely October 17, 2007, and goes on to reflect terms the parties agreed to in the Petition for Divorce. The terms include custody and access, waiver of spousal support and require the Mr. Martinez to pay child support in the amount of \$300 Canadian per month. The document is signed by both parties.

[5] Mr. Martinez and Ms. Rodriguez returned to reside in Ontario and believed that they were properly divorced. Mr. Martinez has made the child support payments that were part of the terms of their divorce and in fact has voluntarily increased the amount of support.

[6] Mr. Martinez developed a relationship with Ms. Basail, whom he met in Cuba. They were married in Cuba in December 2009. They married in good faith, believing that he was properly divorced in Cuba. Mr. Martinez then applied for Ms. Basail to immigrate to Canada. However, Immigration Canada would not recognize his Cuban divorce as valid in Canada as neither he nor Ms. Rodriguez were ordinarily resident in Cuba when they applied for divorce there. As a result Immigration Canada took the position that he is not legally married to Ms. Basail which has put her immigration application in jeopardy. As a result all three parties retained Mr. Schuman to bring the application and this motion.

[7] Mr. Schuman provided a factum setting out the relevant case law. Neither subsections 22(1) nor 22(2) of the *Divorce Act* apply to the facts of this case as both Mr. Martinez and Ms. Rodriguez were not habitually resident or domiciled in Cuba when the divorce was applied for. Accordingly, the issue is whether or not the Cuban divorce should be recognized at common law pursuant to subsection 22(3) of the *Divorce Act*.

[8] It should only be in very rare circumstances that a foreign divorce, properly obtained pursuant to the laws of that jurisdiction, should not be recognized as being valid: see *Powell v. Cockburn* [1977] 2 S.C.R. 218 (SCC) at para. 32, *Janes v. Pardo* (2002) 24 R.F.L. (5<sup>th</sup>) 44 (Nfld. S.C.) at para. 21 and *Jahangiri-Navaneh v. Taheri-Zengekani* (2003) 39 R.F.L. (5<sup>th</sup>) 103 (Ont. S.C.J.) at para 23.<sup>1</sup> At common law, foreign divorces may be recognized on various bases but the only basis applicable to the facts of this case is that Cuba had a "real and substantial" connection to either Mr. Martinez or Ms. Rodriguez at the time the divorce was granted: see *Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.), followed in Canada on a number of occasions including *Janes v. Pardo* at paras. 14 and 18.

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<sup>1</sup> This case was overturned by the Court of Appeal but only in relation to the issue of summary judgment.

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[9] This is a somewhat unusual case as both parties to the divorce maintain that it was a valid divorce. I accept the explanation offered by Mr. Martinez in his affidavit as to why the parties went to Cuba for their divorce. There is no evidence of any breach in Cuba of the rules of natural justice nor is there any evidence of forum shopping. In particular there is no evidence to suggest that Mr. Martinez intended to avoid his legal responsibilities upon the breakdown of the marriage. He is voluntarily paying an increased amount for child support and should that ever become an issue, Ms. Rodriguez will have a remedy pursuant to the *Family Law Act*.

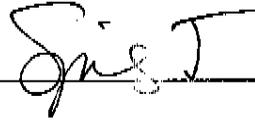
[10] Although I have no evidence about Cuban law, there is a presumption that foreign divorces are valid: see *Powell v. Cockburn* at para. 14. Since the Cuban notary who granted the divorce was clearly informed that the parties reside in Ontario, it is reasonable to assume that she was of the view that she had authority to grant a valid divorce to the parties pursuant to Cuban law. There is no evidence of jurisdictional fraud. On the evidence I find that this was a genuine divorce.

[11] In my view, the parties had a real and substantial connection with Cuba at the time that they applied for a divorce. They were born in Cuba, were married in Cuba, lived in Cuba for most of their lives and at the time they applied for the divorce were still Cuban citizens. Their one child of the marriage was born in Cuba and Ms. Rodriguez's family continued to reside there. The facts are very similar to the facts in *Indyka*. In that case, the spouses were married in Czechoslovakia, the husband moved to England (and acquired a domicile there) but the wife remained. A divorce was granted in Czechoslovakia even though the husband was not domiciled there. The husband then remarried in England. The Court held that the husband, as a Czech national and because he was married in that country, had a real and substantial connection to Czechoslovakia sufficient to recognize the Czech divorce.

[12] It was not necessary for Mr. Schuman to make his alternative arguments, and in particular his argument that I should declare the marriage of Mr. Martinez and Ms. Basail to be valid in Ontario, in light of my decision to recognize his Cuban divorce. However, I will add that even if I had not found that this case satisfied any of the common law grounds for recognizing a foreign divorce, that would not necessarily have settled the issue: see *Schwebel v. Ungar*, [1964] 1 O.R. 430 (C.A.). If I were to consider the validity of the marriage in Cuba between Mr. Martinez and Ms. Basail, I would have to consider Mr. Martinez's capacity to marry Ms. Basail *in Cuba* at the time. Although the facts of this case are not on all fours with *Schwebel*, in that Mr. Martinez was not domiciled in Cuba at the time of the marriage, some of the reasoning is helpful. As Mr. Martinez had been divorced in Cuba prior to his marriage to Ms. Basail, if his status to marry had been called into question, no doubt the Cuban authorities would have considered that he was entitled to marry and that his marriage to Ms. Basail is valid. If the marriage is valid in Cuba, arguably it should be recognized as valid in Ontario. While this conclusion is not in keeping with the common law conflicts of law rule that capacity to marry is governed by the ante nuptial domicile of each spouse, it is in keeping with one of the overarching policy considerations in this area of the law: preventing limping marriages. As the Court of Appeal noted in *Schwebel*, at para. 30, not recognizing this divorce "would result in the social evil referred to by Lord Watson, in the *Le Mesurier* case of a person being regarded as married in one jurisdiction and unmarried in another."

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[13] For these reasons I granted an order pursuant to subsection 22(3) of the *Divorce Act* that the divorce between Mr. Martinez and Ms. Rodriguez, granted on October 19, 2007, in Havana, Cuba is recognized as a valid divorce in Ontario.

  
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SPIES J.

**Date: April 9, 2010**