D.H.B. v. A.A.B, 2002 YKSC 29

Date: 20020515
Docket: S.C. No. 97-B0051
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

D.H.B.

PETITIONER

AND:

A.A.B.

RESPONDENT

REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON

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[1] This is an application brought on by the respondent. The relief sought is to vary an order made in the Supreme Court of British Columbia on November 23, 1995 by Mr. Justice Drake. In particular, the respondent seeks:

- a reduction of monthly child support payments for the four children from $200.00 per child to nothing per child;
- an order cancelling all arrears;
- an order staying the enforcement of all arrears of child support;
- an order declaring that all writs of garnishment and writs of continuing garnishment issued by the Director of Maintenance Enforcement be set aside;

- an order declaring that S.A.B., born 20 April 1983, is no longer a child of the marriage;

- an order declaring that A.R.B., born 18 April 1989, and A.H.B., born 1 August 1991 are not children of the marriage; or in the alternative, an order requiring that the parties, and A.R.B. and A.H.B., submit to a blood test to determine paternity;

- an order that the petitioner provide her current address and keep the respondent informed if she changes her address so that he may contact the children and provide the petitioner with reasonable notice as to when he wishes to have access in accordance with the terms of the order;

- an order for substituted service by service on the Director of Maintenance Enforcement, Whitehorse.

[2] The evidence herein is by affidavit and the facts disclosed by the respondent's affidavit are as follows:

1. The parties were married on July 3, 1982 in Halifax, Nova Scotia.

2. There are four children born to the marriage, namely, S.A.B., born 20 April 1983; A.M.B., born 4 August 1985; A.R.B., born 18 April 1989; and A.H.B., born 1 August 1991.

3. The Petition for Divorce was filed in the Supreme Court of British Columbia and resulted in a divorce “order” which, in addition to ordering a divorce also gave other relief by way of collateral orders.

4. The petitioner gained custody of the children and the order obliged the respondent to pay $200.00 per month per child, for a total of $800.00.

There have been no changes to the order.

[3] At the time of his marriage, the respondent was in the military. He paid child support as ordered until February 1997. After the divorce the respondent went to Yugoslavia to work with the military.

[4] At the time of the divorce the couple was indebted in the amount of $35,000.00, which debts the respondent undertook to pay. The last time the respondent actually saw his wife and children was around February 15, 1995. At this time, he learned that his wife was living with an old friend and that she had had an affair with him well before the break-up of his marriage.

[5] The respondent returned to Yugoslavia with the military in 1995. When he returned from Yugoslavia for the second time, the respondent was struggling with depression and underwent psychiatric treatment. The respondent names the psychiatrist who was treating him.

[6] Because of his depression the respondent applied for and gained a retirement from the military. In June 1996, he received a payout of $25,992.00. This payout was used to open a restaurant in Victoria. The restaurant failed and he lost his investment.

[7] In 1997 an unsuccessful attempt was made to vary the child support order. The respondent was unrepresented.

[8] Since July 1997 there has been a Writ of Continuing Garnishment, which has resulted in some monies being paid against the arrears.

[9] In the years 1997, 1998, 1999 and 2000 the respondent had short-term employment as a cook at various locations in the Yukon. When not working he went on Employment Insurance.

[10] In 2000 he began to experience pains in his arms. As a result, he left his employment and consulted with Dr. Watson, whose opinion and report is annexed to the affidavit of the respondent. Briefly put, the doctor's view was that while the pains being experienced by the respondent were negatively affecting his ability to work, the more serious aspect was that he appeared to be suffering from post-traumatic stress disorder. This, he believed, was related to a violent incident that the respondent witnessed while on duty in Europe. There is no suggestion that the respondent is a malingerer.

[11] The respondent has therefore not voluntarily paid any support since 1997 as his income was not sufficient to enable him to do so. His pay rate has been approximately $11.00 per hour.

[12] A statement of arrears has been filed as of January 23, 2002, showing $21,917.33 in arrears. The opening balance of this statement dated September 5, 1997 is $10,400.00, which represents 13 payments of $800.00. This would roughly coincide

with the evidence of the respondent that he began experiencing financial setbacks and disabling pain around that time.

[13] The respondent, through his counsel, seeks a final order relating to the relief he seeks, in particular the cancellation of the arrears. He obtained an order for substituted service on the petitioner from this court, such substituted service to be by service upon the Director of Maintenance Enforcement. There was clear evidence that the Maintenance Enforcement office was in touch with the petitioner. On the basis of that, the order for substituted service was granted.

[14] In the absence of an appearance, therefore, the respondent asserts that this court has jurisdiction to make a final order notwithstanding that the petitioner is not a resident of the Yukon and, in fact, has never been here. None of the children, to the knowledge of the respondent, have ever been to the Yukon and there is no evidence to the contrary.

[15] Therefore, the issues in this application are:

1. In such an application where there has been a form of service on the opposite party, does the court have jurisdiction to make a final order or should the order be made provisionally, to be confirmed by a court in the opposite party's province of residence?

2. If there is jurisdiction, what order should be made with respect to the arrears and the continuing payment of child support?

3. What is the effect of the order for continuing garnishment and should it be cancelled?

4. Is the child born April 20, 1983 still a child of the marriage?

5. Does the court have any jurisdiction to entertain an application, in light of all the facts to declare a child, previously ordered to be a child of the marriage, to not be a child of the marriage, arising out of indications of actual other parentage and to order the provision of blood tests for the purpose of determining paternity?

FINAL ORDER OR PROVISIONAL ORDER

[16] As to this issue, the respondent has filed three authorities, namely: *Attrill v. Green*, [1994] A.J. No. 448 (Q.B.) (QL); *Gartner v. Gartner*, [1993] A.J. No. 613 (Q.B.) (QL) and *Ralph v. Ralph*, [1994] N.J. No. 267 (S.C.) (QL).

[17] Ms. Sheri Hogeboom, a member of the Yukon Bar in the employ of the Government of Yukon appeared, having been served with this application. She indicated that she had no instructions but offered to assist as *amicus curiae.* This offer was accepted and with respect to the issue as between a final order and a provisional order, has filed some material. Ms. Hogeboom has also filed material relevant to the paternity issue.

[18] The cases filed by Ms. Hogeboom are: *Bray v. Bray,* [1997] B.C.J. No. 2598 (S.C.) (QL); *Hersey v. Hersey*, [1993] B.C.J. No. 2269 (S.C.) (QL); *Bailey v. Bailey*, [1997] N.B.J. No. 124 (C.A.) (QL).

[19] The statutory provisions under consideration are ss.17.1 and 18(2) of the *Divorce Act,* R.S.C. 1985, c. 3, as amended, dealing with child support orders and varying, rescinding and the suspending of them prospectively or retroactively. Section 17.1 reads as follows:

> Variation Order by Affidavit, etc.
> 17.1 Where both former spouses are ordinarily resident in different provinces, a court of competent jurisdiction may, in accordance with any applicable rules of the court, make a variation order pursuant to subsection 17(1) on the basis of the submissions of the former spouses, whether presented orally before the court or by means of affidavits or any means of telecommunication, if both former spouses consent thereof.

[20] The other relevant provision is s.18(2) reads as follows:

> Provisional order
> (2) Notwithstanding paragraph 5(1)(a) and subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and
> (a) the respondent in the application is ordinarily resident in another province and has not accepted the jurisdiction of the court, or both former spouses have not consented to the application of section 17.1 in respect of the matter, and
> (b) in the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19,
>
> the court shall make a variation order with or without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and, where so confirmed, it has legal effect in accordance with the terms of the order confirming it.

[21] The above two subsections were introduced to the *Act* in 1993 and provided a basis for proceeding where parties lived in different provinces or territories which basis was not in the *Act* previous thereto.

[22] The argument is essentially that ss.17.1 and 18(2) clearly mandate that there must only be a provisional order when applications to vary support orders are made and the applicant and the ex-spouse live in different jurisdictions. Of the cases cited by the respondent, the case of *Attrill v. Green, supra,* is decided on its own facts and in any event is not one that I would follow. Essentially in that case, by reason of the evidence of the non-custodial parent, the respondent with regard to the application, the court found there to be a constructive consent and thereby held that s.17.1 of the *Divorce Act, supra,* had been complied with.

[23] *Gartner, supra,* was released on August 18, 1993, shortly after s.17.1 and s.18(2) came into force. It is my view that the effect in s.17.1 and s.18(2) was misconstrued in this judgment or was not presented to the court. In any event, the case fell to be decided simply on the basis of fairness. It is my view that the provisions of the *Divorce Act, supra*, being referred to make it mandatory that there be a provisional order in the first instance.

[24] *Ralph, supra,* an order emanating from Newfoundland as it then was, went by a provisional order with the judge's discretion being exercised differently than in *Gartner, supra.* There was in fact a finding of *forum conveniens* in favor of the non-resident party. A provisional order was made which would be transported to the other jurisdiction for finalization or confirmation and returned.

[25] Of the cases cited by the *amicus curiae*, *Bray, supra,* very specifically finds that s. 18(2) of the *Divorce Act, supra,* provided that variation orders in respect of non-resident, non-attorning respondents where provisional orders had no legal effect until confirmed in a proceeding under s. 19.

[26] In *Bailey, supra,* it was felt that the objective of the 1993 amendment was to provide a specific regime to deal with support issues where the parents were ordinarily resident in different provinces. The New Brunswick Court of Appeal found that the motions judge had acted without jurisdiction by neglecting to consider the application of ss. 17.1 and 18(2). In *Hersey, supra,* the Court said:

> Clearly the previous practice of making a final order on proof of service is no longer applicable. Variation of support orders, where the respondent is ordinarily resident in another province, must now be provisional, whether or not the respondent is served, unless the respondent accepts jurisdiction or both parties consent.

[27] In my view, the law is correctly stated in the last three cases. This will therefore be treated as a provisional application and the result of it, if a variation is ordered, will be a provisional order. I shall deal with my decision on variation before proceeding on to the other issues.

[28] The evidence before me discloses that there have been changes in circumstance which would justify a variation order. The first of these is the enactment of the Federal Child Support Guidelines and the second, but related circumstance, is the failure of the health of the respondent and the effect on his employability.

[29] The respondent presently lives in a wilderness area in a cabin and is paying $600.00 per month room and board, which is approximately the assistance that he is receiving from the Territorial Government. The evidence of his disability (and I accept it), is to the effect that his condition has deteriorated physically and mentally to the point where he cannot be expected to extend an effort which would do more than enable him to live a subsistence life. He is undertaking treatment and it is to be hoped that he will one day return as an active member of the work force.

[30] The Federal Child Support Guidelines came into law, May 1, 1997. I have taken September 1, 1997, as a commencement date for calculation. To that point, according to the exhibits filed, there were thirteen months due at the rate of $800.00 making arrears in the amount of $ 10,400.00. From that point on, taking the figures of 44 hours per week x $11.00 per hour, I arrive at a rough monthly income of $2,000.00, therefore an annual income of $24,000.00. The guideline amount of monthly support payment for four children would be $506.00.

Arrears pursuant to Exhibit H		$7,576.22
Plus four months in 1997 at $506.00	$2,024.00	
Plus twenty-four months in 1998 & 1999 at $506.00	$12,144.00	
Plus ten months in 2000 at $506.00	$5,060.00	$19,228.00
Total		$26,804.22

[31] The total obligations would be $19,228.00 added to which would be the $7,576.22 as arrears, making a total of $26,804.22.

[32] It is at November 1, 2000, according to the evidence, I judge that the respondent became incapacitated to the extent that his income would not reach $10,600.00 the

commencement point for payments for child support under the guidelines for four children. This situation continues.

[33] The total payments made to Maintenance Enforcement or taken by them amount to $18,905.81 a difference of $7,898.41.

[34] I bear in mind that the income of $24,000.00 is for a year's work when, in fact, it was rare that on the evidence he achieved a full year's work and for the balance of the year was on Employment Insurance. To adjust for this factor, I would deduct $5,000.00, and would therefore arrive at a conclusion that the arrears should be reduced to $2,898.41.

[35] These arrears should be paid at the rate of $100.00 per month, such payment to commence October 1, 2002, to allow time for the respondent to continue his treatment without the pressure of going to work.

[36] With respect to the Writs of Garnishment, it is not clear to me how these monies have continued to be deducted under the *Garnishee Act*, R.S.Y. 1986, c. 78, which only allows for one renewal of each order. However, this is not before me, but in view of the order I am making, it is appropriate that I provisionally order that all Writs of Continuing Garnishment issued by the Director of Maintenance Enforcement in this matter be set aside. In addition, it is my direct order that the garnishment orders be forthwith suspended until further order.

[37] I declare that S.A.B. is no longer a child of the marriage, which declaration may be reviewed upon evidence that S.A.B. is still necessarily in the care of his mother or dependent upon her.

[38] This court cannot deal with the application with respect to the desired declaration of lack of paternity with respect to two of the children. There are several bars to this:

a) there has been a consent order of the British Columbia Supreme Court to the contrary;

b) there is no authority under the *Divorce Act, supra,* for this court to consider this application in a petition brought under the *Divorce Act, supra;*

c) the children and the mother, the petitioner, have no connection with the Yukon whatsoever and notwithstanding the order for substituted service made, I decline to consider this matter on the basis of a lack of territorial jurisdiction.

[39] I cannot find that I have the authority to require the petitioner to provide her address. This part of the application is dismissed.

[40] In summary, it is my order that the arrears in this matter be reduced to $2,898.41. The arrears shall be paid at the rate of $100.00 per month commencing on October 1, 2002. All proceedings for the enforcement for payment of arrears to be stayed until such time as there is a failure to comply with this order. All Writs of Garnishment and Continuing Garnishment are set aside. Further, it is declared that S.A.B. is no longer is a child of the marriage.

[41] I emphasize that except for the suspension of garnishment order, this is provisional order pursuant to s. 18(2) of the *Divorce Act, supra.* There are no costs to be ordered.

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Hudson J.

No one appearing for the Petitioner

Counsel for the Respondent	Ms. Elaine Cairns
Amicus curiae	Ms. Sheri Hogeboom