Herrington v. Herrington, 2002 YKSC 22

Date: 20020327
Docket: S.C. No. 01-B0082
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

JEANETTE MARY HERRINGTON

PETITIONER

AND:

LYALL DOUGLAS HERRINGTON

RESPONDENT

REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON

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[1] In this matter, the respondent, Mr. Herrington applies for an order varying the child support order made by Mr. Justice Houghton in Salmon Arm, British Columbia, on the 31 day of March 1982. By this order, Mr. Herrington was ordered to pay for the support of the three children of the marriage, the sum of $150.00 per child per month.

[2] Mr. Herrington brings his application for a provisional order pursuant to the governing provisions of the *Divorce Act*, R.S.C., 1985, c.3, which are as follows:

> 5. (1) A court in a province has jurisdiction to hear and determine a variation proceeding if
>
> (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or

> (b) both former spouses accept the jurisdiction of the court.
>
> …
>
> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> …
>
> 18. (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 proceedings under this section and section 19,
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> 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.

[3] I am proceeding in this matter pursuant to s. 18(2) of the *Divorce Act*.

[4] Mr. Herrington has provided an affidavit to indicate what has happened in his life since the divorce was ordered and the child support order came into effect.

[5] He states that from 1982 until 1989, he suffered from severe alcoholism or alcohol addiction. He describes working over the years in question but only to get room and board and other basic necessities. In December of 1989, he sobered up, took

treatment and counseling and has been sober since that time. He has gone to educational institutions to find his way and has become a fully trained addictions counselor. He swore before me that he never intended to avoid paying child support, however his addiction and the problems associated to it, in effect, prevented him from doing so. In this instance, having heard his testimony, I am inclined to accept what he is implying, although not saying directly by way of an excuse, that his addiction was a disease that he has now placed in remission.

[6] From 1982 until 1991, he made no child support payments. In 1997, when the obligation ceased, he had paid approximately $17,000, much of it on the basis of garnishments against his income during the life of the order. Since 1997 he has paid a further $3,000, making a total payment of $20,960. This is against a total obligation under the order of $64,650.

[7] When Mr. Herrington testified, he appeared to be completely under control with a clear view of his situation. I can readily accept his assurances that he is maintaining his sobriety.

[8] He has had no contact with the petitioner. His youngest child, a daughter named Christine who is now 24 years of age, filed an affidavit. This affidavit describes her early years, which appear to have been marked by her mother's alcoholism. Apparently the support money received went to purchase alcohol. Christine stated that she was self-supporting at the age of 18 and provided sums to the petitioner by way of a loan, which has never been paid back. I am taking from her evidence that rather than the

mother supporting the child, the child was supporting the mother, at least to some extent. She swears that her two brothers both left home before they were 18.

[9] There is evidence that the stated balance owing of $43,023 is not accurate. Apparently when the federal government withholds money pursuant to a garnishment order, it takes up to six or seven weeks for the money to find its way to the Maintenance Enforcement office in British Columbia and then on to credit the records of the Maintenance Enforcement office in Whitehorse. Mr. Herrington pointed out instances where the federal government was deducting over $400 every two weeks from his Employment Insurance entitlements, however substantially less was finding its way to the Maintenance Enforcement office.

[10] An estimate was made that there is a shortfall of over $1,000 that has not been credited to Mr. Herrington's file. Mr. Herrington has been trying for years to get appropriate responses to his inquiries regarding these credits.

[11] Mr. Herrington is out of work at this time, but is in receipt of an offer of employment to which will commence in the spring. This offer, however, is conditional upon the employer, a First Nation, getting funding. The job, should it materialize, will pay $40,000 per year.

[12] The court is entitled, pursuant to s. 17(1) of the *Divorce Act,* to vary the support order by rescinding it, by suspending it, prospectively or retroactively.

[13] I am impressed by the affidavit of the daughter. It is clear that on the basis of the minimal income of the applicant that the obligations imposed upon him, in hindsight,

related to his income, were somewhat excessive. Other changes have occurred in that his children left the petitioner's care early in life, before their 19th birthdays and that rather than the petitioner using whatever money was received to support the children, she took money from the children to support herself and her habit or her illness.

[14] I have been referred to the case of *Ralph v. Ralph*, [1994] N.J. No. 267 (S.C.) (QL), which deals with an application for an order varying a child and spousal support order and elimination of arrears of support totaling approximately $22,000. The judge states at paragraph 5 of the judgment:

> The power of the court to vary that order is dependent on the applicant being able to establish that there has been a "change in the condition, means, needs or other circumstances … since the making of the support order", within subsection 17(4) of the Divorce Act.

[15] In his affidavit, Mr. Herrington states that at the time that the divorce order was made and the support became payable, he was "a chronic alcoholic, living on the streets." He said he appeared without representation at the time of the divorce, although he had retained a lawyer, and never agreed to the amount in question. However, he did not appeal the order. He then ended up living on the streets and shelters and wherever he could for the next few years.

[16] It is my finding that there is a material change of circumstances when the total lack of income extends for an extensive period. There are further material changes of circumstance in the passing of the Federal Child Support Guidelines, in his recovery, his rehabilitation to the point where he is becoming self-sustaining and his strong desire to reunite with his children

[17] He will not be making a lot of money but intends to do what he can to assist his children. Pursuant to s.17(4):

> Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Section 17(6.2) states:

> Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied
>
> …
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

[18] The approach taken by the learned judge in the *Ralph* case is set out at paragraph 33 of the judgment:

> One must, of course, look at the present circumstances of Mr. Ralph but those circumstances should be reviewed in light of the events which have occurred in the past, in order to determine whether at the current time, it is fair and reasonable that he be relieved retroactively from his prior obligations.

[19] At paragraph 41 of that judgment the court states:

> Applying the factors set out in Tremblett, I am satisfied that Mr. Ralph has no present ability to pay the accumulated arrears and that the court ought not to make an order that wold [sic] be impossible to perform. That would justify a stay

> of enforcement but necessarily a cancellation of some or all of the arrears.

[20] There were undoubtedly expenses of raising the children that were defrayed by the petitioner, notwithstanding the evidence of the daughter. Nonetheless, the history of this matter, the efforts of the applicant to overcome his addiction, the fact that the petitioner no longer needs the money to support the children, as well as the evidence that indicates that the arrears are overstated persuade me that I should allow the application retroactively, to the extent of reducing the arrears to $8,000. I also order that all proceedings for the enforcement of these arrears be suspended for a period of six months or until this order is confirmed by the courts in British Columbia, whichever occurs first.

[21] For clarity, I provisionally order is that the child support arrears be cancelled, except for $8,000.

[22] I also provisionally order that these arrears be repaid at the rate of $200 per month forthwith upon confirmation, should that occur.

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Hudson J.

For the petitioner	No one appearing for the petitioner
For the respondent	Mr. Lyall Herrington, self-represented