IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.S.A.O* v. *R.B.*, 2005 YKSC 20

Date: 20050412
Docket No.: S.C. No: 03-B0031
Registry: Whitehorse

Between:

R.S.A.O.

Plaintiff

And

R.B.

Defendant

Appearances:
Malcolm E.J. Campbell — For the Plaintiff
David J. Christie — For the Defendant

Before: Mr. Justice L.F. Gower

MEMORANDUM OF RULING

INTRODUCTION

[1] The defendant has applied to cancel all child support arrears accumulated under an order made by Hetherington J. on September 18, 2003 (the "Hetherington order"). That order arose from an application by the plaintiff mother, who then believed that the defendant was the biological father of the child, J.R.A.O. That has since been determined not to be the case and the defendant therefore argues there is no basis in law for him to be liable for that child support.

[2] The plaintiff objects to the application, arguing that the arrears accumulated while the order was valid and in force. Therefore, they are properly due and owing and should not be set aside.

[3] Two weeks prior to the hearing before me, the Hetherington order was set aside by Veale J., and the defendant was declared not to be the father of the child. The question of child support arrears was adjourned until now.

ISSUE

[4] The issue is whether there is a legal basis for continuing to hold the defendant liable for the arrears of child support which accumulated while the Hetherington order was in force.

POSITIONS OF THE PARTIES

[5] The parties agree that the defendant has never acted in the place of a parent to the child.

[6] Plaintiff's counsel also conceded the defendant should not be liable for those arrears which accumulated after the defendant filed this application on November 8, 2004.

Defendant's Position

[7] The defendant's position is that the Hetherington order was made under the authority of the *Family Property and Support Act*, R.S.Y. 2002 c. 83 (the *"Act"*). In order for a child support obligation to arise under that *Act*, the payor must be either a biological or adoptive parent of the child: see sections 1 and 32. The defendant is neither; he has never been an adoptive parent and he has been excluded as a biological parent to the child as of February 2005. Defendant's counsel says that the latter is new information

which was not available to Hetherington J. and can be taken into account on this application pursuant to section 44(3) of the *Act*.

[8] Sections 44(3) and (4) of the *Act* state:

> "(3) In the case of an order for support of a child, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines or that evidence not available on the previous hearing has become available, the court may
>
> a. discharge, vary, or suspend a term of the order, prospectively or retroactively;
>
> b. relieve the respondent from the payment of all or part of the arrears or any interest due on them; and
>
> c. make any other order for the support of a child that the court could make on an application under section 34.
>
> (4) A court making an order under subsection (3) shall do so in accordance with the child support guidelines."

[9] Thus, the Court is authorized to discharge a child support order retroactively and relieve a party of the payment of all arrears, if there has been "a change in circumstances" within the meaning of the *Yukon Child Support Guidelines*, or if evidence has become available which was not available at the previous hearing.

[10] As can be seen in sections 44(3) and (4), the child support provisions of the *Act* are interconnected with the *Yukon Child Support Guidelines*, Y.O.I.C. 2000/63, which are a regulation arising from the *Act*. The connection begins with section 36(1) of the *Act*, which authorizes a court to order child support "in accordance with the child support guidelines", and continues in sections 44(3) and (4).

[11] Section 1(a) of the *Guidelines* states that an objective of the guidelines is "to establish a fair standard of support for children that ensures that they benefit from the financial means of both ***parents*** if the ***parents*** separate…" (emphasis added). Section 2(1) of the *Guidelines* defines child support as "support that a ***parent*** is obligated … to

provide to their child" under the *Act* (emphasis added). "Parent" is defined in section 1 of the *Act* as either the birth parent or adoptive parent of a child.

[12] Finally, section 12 of the *Guidelines* authorizes a variation of a child support order if the amount of child support was originally made in accordance with the table (which is the case here) and if there has been "any change in circumstances that would result in a different order for the support of the child". Accordingly, defendant's counsel argues, if Hetherington J. had known that the defendant was not a biological parent of the child, she would not have made her original order. Therefore, there has been a change in circumstances which would result in a different order for the support of the child, that is, no order for support and the consequent cancellation of all child support arrears.

[13] Thus, defendant's counsel concludes that there is no basis in law for the defendant to be liable for support for the child, neither prospectively nor retroactively to the date of the Hetherington order.

Plaintiff's Position

[14] Plaintiff's counsel concedes that the Hetherington order was made on the basis of incomplete evidence and would not have been made had Hetherington J. known that the defendant was not the child's biological father. However, plaintiff's counsel says the reason that evidence was not before Hetherington J. was the defendant's own negligence. He further argues that Hetherington J. had jurisdiction to make the order that she made, based upon the evidence which was then available. Therefore, the order has to be followed until steps are taken to set it aside.

[15] The plaintiff relies on *R.* v. *Gaudreault* (1995), 105 C.C.C. (3d) 270 (Que.C.A.). That case had a rather complex procedural history. In simple terms, it involved an

underlying charge of disobeying a court order, contrary to section 127 of the *Criminal Code of Canada*, as well as related charges of breaching an undertaking, contrary to section 145(3) of the *Code*. The accused argued that the original section 127 charge was a nullity. Therefore, he submitted there was no basis for him to be placed on the undertaking and consequently the undertaking was invalid and he could not be breached for it.

[16] Although the Quebec Court of Appeal did overturn the conviction for the section 127 charge, it did not find that charge to be a nullity. Further, the Court rejected the accused's argument with respect to the breaches of undertaking, based primarily on the application of the Supreme Court of Canada decision in *Canada (Canadian Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892. *Taylor* essentially held that a court order continues to stand until it is set aside. The ultimate invalidity of an order is no defence to an allegation that an order has been disobeyed. Orders thought to be illegal, or made without jurisdiction, must be set aside through legal process, but obeyed in the interim.

[17] McLachlin J., as she then was, at paragraph 180, wrote for the minority that the order in that case continued to stand until set aside, unaffected by the challenge to it:

> "… This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders ***set aside through the legal process***, not in disobeying them." (emphasis added)

[18] At paragraph 90, of *Taylor* Dickson C.J.C., for the majority, quoted with approval O'Leary J. in *Canada Metal Co.* v. *Canadian Broadcasting Corp.* (No. 2) (1974), 4 O.R. (2d) 585 (H.C.):

> "The duty of a person bound by an order of a court is to obey that court order ***while it remains in force*** regardless of how flawed he may consider it or how flawed it may, in fact, be. Public order demands that it be ***negated by due process of the law***, not by disobedience." (emphasis added)

[19] Thus, plaintiff's counsel argues that the Hetherington order should have been obeyed by the defendant and the arrears which accumulated under that order should not be cancelled.

[20] Plaintiff's counsel also made the following points:

1. To cancel the arrears completely would be unfair to the child and the test is what is in the best interests of the child.

2. The defendant has no explanation for his failure to take any steps to vary the Hetherington order for over one year. That is the case, even though he knew that the plaintiff had made paternity an issue at the time of that application. Therefore, the defendant does not come to court with clean hands and should not be granted equitable relief.

3. The public would perceive unfairness if the application were to be granted. To cancel the arrears completely would be to reward the defendant for his lack of diligence in seeking to resolve this matter. Further, the defendant never made any voluntary payments pursuant to the Hetherington order, even though he was working from time to time.

4. To cancel the arrears would also be unfair to the natural father of the child, in the event he is identified and located, because he may then have to pay a significant amount of retroactive child support.

5. The defendant should seek indemnification from the natural father, for child support payable by the defendant.

ANALYSIS

[21] The primary flaw in the logic of plaintiff's counsel's argument is that he is making an apples and oranges comparison. In *Gaudreault*, the accused was charged with separate and distinct criminal offences of breaching an undertaking. That context might be analogous to the one at bar if the defendant was cited for civil contempt for failing to pay child support. If such an application for contempt were made, even after overturning the original order of Hetherington J., it is conceivable that the defendant might be held liable for contempt, but not for the child support.

[22] Thus, the *Gaudreault* situation is distinguishable from the context of child support arrears. Here, the legislation clearly contemplates that new information can be taken into account to constitute a change in circumstances. Further, arrears can be varied retroactively and can be cancelled completely. Finally, and most importantly, the legislation simply does not provide for anyone but a biological parent or an adoptive parent to be liable for child support. Therefore, there is no basis in law for which the defendant can be obliged to pay child support, either from this point forward, or retroactively during the period in which the Hetherington order was in force.

[23] The defendant has applied to have the Hetherington order "set aside through the legal process", to use the language of McLachlin J., as she then was, in *Taylor*. While it is correct to say the defendant ***was*** liable to pay child support while the Hetherington order remained in force, the defendant now seeks to "negate" that order "by due process of the law", to reflect the language adopted by Dickson C.J.C. in *Taylor*. It is the setting

aside and negating of the Hetherington order by due process of law that obtains the result sought by the defendant. It is as if the defendant seeks to rescind or undo that order. If this is done, and I agree that it should be done, there is simply no other alternative under the legislation but to cancel all arrears. This Court could not allow a portion of the outstanding arrears to remain payable, without any legal foundation to justify that liability.

[24] Although it is not strictly necessary for this decision, I will also address the remaining arguments of plaintiff's counsel:

a) The test here is not what is in the best interests of the child. Rather, the guiding principles are those set out in section 1 of the *Yukon Child Support Guidelines*.

b) As for the argument that the defendant does not come to court with clean hands, this is not a situation where the defendant is seeking equitable relief. Rather, he is seeking relief under the legislation.

c) As for the public perception argument, I note from the affidavit material that the defendant has paid $1,274.16 to the child to date, albeit involuntarily through enforcement proceedings. As I understand it, the defendant does not seek to have those monies returned. This is a significant sum for someone in the defendant's position, who apparently is employed on a somewhat irregular basis and appears to be of meager means. While the defendant admittedly was less than diligent in taking steps to set aside the Hetherington order, he has paid a financial price for that delay. To my mind, this tends to neutralize the risk of adverse public perception envisioned by plaintiff's counsel. In any

event, while the public perception argument might be relevant to a policy based decision, it is not capable of countering the mandatory impact of the legislation in this case.

d) As for the impact of this decision upon the natural father, that is largely speculative at this point. As I understand it, the identity of the natural father is currently unknown and may never become known. Further, the argument that the natural father may have to pay a significant amount of retroactive child support, if he is ever identified, is undermined by the plaintiff's alternative submission that the defendant should seek indemnification for the child support from the natural father. Either way, the natural father would theoretically and ultimately be held responsible for the child support, as he should be.

CONCLUSION

[25] There is no basis in law to hold the defendant liable for the arrears of child support under the Hetherington order. Therefore, those arrears are entirely cancelled.

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GOWER J.