C.A. No. 02830

NOVA SCOTIA COURT OF APPEAL

Jones, Freeman and Roscoe, JJ.A.

Cite as: Gorman v. Gorman, 1994 NSCA 61

BETWEEN:

TERRY AUSTIN GORMAN Appellant - and - WINNIFRED COLLEEN GORMAN Respondent	)	Michael Cooke, Q.C. for the Appellant Samira Zayid for the Respondent Appeal Heard: January 26, 1994 Judgment Delivered: March 7, 1994

THE COURT: Appeal allowed without costs; the matter is remitted to the Supreme Court for a hearing of the Notice of Objection after the proper record is filed in accordance with Rule 35.03; and, the respondent's cross-appeal is adjourned without day, per reasons for judgment of Roscoe, J.A.; Jones and Freeman, JJ.A. concurring.

ROSCOE, J.A.:

This as an appeal from a decision of a Judge of the Supreme Court who confirmed a Report and Recommendation of a Family Court Judge that child support payments pursuant to the **Divorce Act** be increased.

Mrs. Gorman made an application in Family Court for a variation of child support payable pursuant to a Divorce Decree dated April 5, 1983. The application was heard by Hubley, J.F.C. who filed a recommendation with the Supreme Court that the child support be increased. Mr. Gorman filed a Notice of Objection which was heard and dismissed by Hall, J.

The original decree provided for child support payments of $125.00 per month when the father was working and $100.00 per month when unemployed. The child was at that time 4 years old. Judge Hubley recommended a gradual increase commencing October, 1992. By January, 1993 the payments were to be $330.00 monthly when the appellant was employed and $200.00 when he was unemployed. In his decision the Family Court judge found that there had been a change in circumstances since the original order in that the appellant's income had increased substantially and that the expenses of the child had increased over the nine years. He found that the reasonable monthly expenses of the child were $440.00, that the appellant's monthly income was $2322.00 and that the respondent's monthly income was $811.87. He recognized that the appellant's work was seasonal and thus continued the two tiered order.

At the hearing of the Notice of Objection, the appellant indicated that he could not pay the increased support because of his other bills. Justice Hall asked the appellant several questions concerning his employment and income and heard argument from Mr. Gorman and from counsel for Mrs. Gorman. Counsel for Mrs. Gorman also provided some information regarding the child's expenses and explained what in her view Judge Hubley had taken into account in making his
recommendation. Justice Hall found that Judge Hubley's recommendation was "fair" and adopted it.

The appellant now submits to this Court that it was an error of law for the Supreme Court judge to adopt the report since neither the transcript of the evidence nor the decision of the Family Court was filed in the Supreme Court in accordance with **Civil Procedure Rule** 35.03(1). It is also submitted that there was no evidence of a change in circumstances justifying an increase in child support, that the Supreme Court judge erred in law by not giving reasons for adopting the report and that the Supreme Court judge erred in disregarding the appellant's inability to pay the increased order.

The application before Judge Hubley was made pursuant to **Civil Procedure Rule** 57.30, the relevant subsections of which are as follows:

> "57.30(7) An application to the court to vary or rescind an order for corollary relief or for leave to issue an execution order to enforce such an order may be made by filing an application in form 57.30A, an affidavit and financial statements with the Family Court on such terms as to notice, if any, as the Family Court may determine.
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> 57.30(9) Where the Family Court, on application under Rule 57.30(7), is satisfied that
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> (a) the circumstances have changed, and
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> (b) the order for corollary relief should be varied, rescinded or suspended, or
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> (c) an execution order should issue, limited to such maximum amount to be collected under the execution order as the Family Court recommends,
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> the Family Court shall file the application and a report thereon with the prothonotary within thirty (30) days of the hearing and, except in a provisional proceeding, serve a copy of the application and of the report and a copy of the notice in Form 57.30B on the parties as provided by Rule 10.12.
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> 57.30(10) Except in a provisional proceeding where the court may immediately deal with the report, after a period of twenty (20) days has expired from the date the prothonotary receives the report of the Family Court, the court may deal with the report in the same manner as a report of a referee as provided in rule 35.03."

Rule 35.03 provides:

> "35.03(1) The report of a referee, together with a copy of any evidence taken on the trial or inquiry and any exhibits used

> thereat, shall be filed with the prothonotary, and a copy of the report served on each party.
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> (2) A referee in his report may submit any question or issue arising therein for the decision of the court, or make a special statement of facts from which the court may draw such inferences as it thinks just.
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> (3) On receipt of a referee's report, the court may itself or on the application of any party,
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> (a) adopt the report in whole or in apart;
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> (b) vary or reverse the report or any finding therein;
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> (c) require a supplemental report from the referee;
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> (d) remit the reference or any part thereof for further consideration to the same or any other referee;
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> (e) decide any question or issue referred to the referee on the evidence taken before the referee, with or without any additional evidence;
>
> (f) vary or reverse any previous direction on the court;"

There is no reference in the Rules to the Notice of Objection. It is referred to only in the Form 57.30B and in the Practice Memorandum No. 24, dated April 30, 1981. Although Rule 35.03(1) says that the report of the referee should be filed "together with a copy of any evidence taken on the trial", the Practice Memorandum indicates that transcripts of the Family Court proceeding should not be ordered without consultation with the Supreme Court judge. The Practice Memorandum also indicates that if the Supreme Court judge determines that there is no merit apparent on the face of the Notice of Objection that it may be dealt with without further notice to the parties. This policy is consistent with the statement made by this Court in **Krizsan v. Krizsan** (1984), 65 N.S.R. (2d) 169 at page 170:

> " It seems clear to me that the trial judge is empowered to adopt the report of the referee in whole or in part and to render judgment based on it and this is so regardless of the fact that the appellant has filed a notice of objection. This does not mean that the trial judge should ignore the objection and thus become a rubber stamp for the findings of the referee, but rather that he is not compelled to accede to it unless the objection has merit."

It is not clear however, from the **Krizsan** decision whether the "report" that was before the Supreme Court judge in that case included a transcript or summary of the evidence taken in the Family Court or a copy of the reasons for the recommendation.

The policy and procedure outlined in the Practice Memorandum makes practical sense. The Family Court hears hundreds of these applications yearly and in the vast majority of cases, no objection is taken by either party. Many of these hearings in the Family Court are lengthy and the cost and delay involved in the preparation of transcripts is not warranted if no objection is taken to the report.

The Supreme Court is given the jurisdiction pursuant to sections 2(1) and 3(5) of the **Divorce Act, 1985** to hear and determine variation proceedings. Section 17(4) indicates that before the court makes a variation order, "the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances.... and, in making the variation order, the court shall take into consideration that change." It is submitted that in this case, Justice Hall could not have satisfied himself that there had been a change in circumstances without having the benefit of a copy of the Family Court judge's reasons for the recommendation or a copy of a transcript of the evidence. I agree that in order to be **satisfied**, the Supreme Court judge has to have an evidentiary basis for the decision. The Family Court judge's decision should contain a summary of the evidence respecting the change in circumstances, the incomes and expenses of the parties and the needs and abilities of the parties to contribute to the support of the child. That decision, along with the affidavits and financial statements required by Rule 57.30(7) could provide an evidentiary basis for the finding that must be made by the Supreme Court judge. A judicial decision cannot be made in ignorance of the evidence. (See **Jeffs v. New Zealand Dairy Production and Marketing Board**, [1967] 1 A.C. 555 (P.C.))

In this case neither a transcript of the evidence heard in the Family Court nor the decision of Judge Hubley was filed with Justice Hall. Nor was any evidence presented before him at the hearing. The appeal should be allowed

on the grounds that there was insufficient evidence before the Supreme Court judge to properly exercise his jurisdiction pursuant to section 17(4) of the **Divorce Act**. Without reasons for the decision of Justice Hall, this Court is unable to assess the other grounds of appeal. The transcript of the evidence is not before this Court either; therefore, it is impossible to assess the recommendation to determine if there were sufficient changes in the circumstances to vary the order and whether the respective needs and abilities of the parties justify the increase in the order.

The appeal should be allowed without costs. The matter should be remitted to the Supreme Court for a hearing of the Notice of Objection, after the proper record is filed in the Supreme Court. The respondent has cross-appealed, seeking a greater increase in the child support. Argument on the cross-appeal was adjourned without day, since the appellant had not been notified of the cross- appeal. It was agreed by counsel that in the event that the appeal was allowed, it would not be necessary to hear argument on the cross-appeal.

Roscoe, J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.