MacLean v, Gerhardt, 2000 NWTSC 49

Date: 2000 07 07
Docket: CV 08676

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RONALD MacLEAN

Applicant

-and-

PAM ELAINE (MacLEAN) GERHARDT

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a confirmation hearing respecting a provisional order made by the Supreme Court of Prince Edward Island. The provisional order varied the terms of a Corollary Relief Order with respect to child support and discharged arrears accumulated under that Order.

[2] The procedure contemplated for this type of hearing is set out in section 19 of the *Divorce Act* (Canada). It is meant to be an *ex parte* hearing where the respondent may raise any matter that could have been raised in the *ex parte* hearing held at the behest of the applicant in Prince Edward Island. The applicant in this case, however, has now returned to live in this jurisdiction. He was present in court when this matter was called. I allowed him to present evidence and make submissions (after the respondent had done the same). In this manner I was able to hear from both sides. As a general proposition, an applicant who has obtained a provisional order has standing on the confirmation hearing: see *Piragoff v. Piragoff* (1995), 16 R.F.L. (4th) 109 (Sask. Q.B.).

[3] The Corollary Relief Order was issued by this court in 1993. It thus predates the Federal Child Support Guidelines (enacted in 1997). That Order provides for child support payable by the applicant at $250.00 per month for each of the two children of the marriage. Those payments are taxable in the hands of the respondent and tax deductible for the applicant. The terms of this Order were reached through an agreement by the parties.

[4] Up until March, 1998, the applicant lived and worked in Yellowknife. His income, however, had been steadily decreasing. He quit his employment and moved to Prince Edward Island where he and his

new wife have family and where he entered a computer education programme. He was in that programme from August, 1998, until March, 2000. He received employment insurance from May, 1998, until July, 1999, supplemented by some student financial assistance. The applicant returned to Yellowknife and a few weeks ago commenced employment with the federal Department of Indian and Northern Affairs as an information technology officer. This is a 9 month term position expiring on March 31, 2001. His income, if extrapolated to a full 12 month period, would be $49,500.00 (inclusive of benefits). This is far more than the applicant was making in the job that he quit in 1998.

[5] The provisional order made by the Prince Edward Island court on November 10, 1999, suspended the payment of child support until such time as the applicant obtained employment. It also discharged arrears that accumulated from August, 1999, until the date of the order. As of August there were no accumulated arrears.

[6] Respondent's counsel submitted that child support payments should be reinstated but at the Guidelines level commensurate with the applicant's present income calculated on an annual basis (that would result in a monthly payment of approximately $720.00, and not tax deductible by the applicant). Counsel also argued that the arrears accumulated from August through November ($500 per month for 4 months) should not have been discharged. In her view it may have been appropriate to stay enforcement proceedings but there was no evidence to suggest that the applicant could not pay the arrears over time. The same argument would apply to the arrears accumulated during the suspension period. The applicable rule, of course, is that arrears should not be rescinded unless the payor establishes that he could not pay the support in the past, cannot pay them now, and will not be able to pay them at any time in the future: *Haisman v. Haisman* (1994), 7 R.F.L. (4th) 1 (Alta. C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 86.

[7] The applicant said that he cannot afford to pay more than $500.00 per month. He is willing to pay off the arrears over time but he is afraid that if enforcement proceedings are taken (such as a wage garnishment) that will impede his ability to provide for his current family (he and his new wife have a child) as well as provide adequate support for the two children who are the subjects of these proceedings. This sounds like an undue hardship claim but there is no information before me to perform the necessary comparison of household living standards (as required by s.10(3) of the Guidelines). He also indicated his desire to increase his access to the children to something approaching a shared custody arrangement (the Corollary Relief Order provides for joint custody with day-to-day care to the respondent). Shared custody would require a consideration of all the factors listed in s.9 of the Guidelines.

[8] What was not discussed was whether this court has jurisdiction, or should exercise jurisdiction, to confirm a provisional order when the party who obtained it ------ the party who was a non-resident of this jurisdiction ------ becomes a resident of the confirming jurisdiction. This was the situation in *Laurent v. Laurent* (1997), 33 R.F.L. (4th) 290 (Man. Q.B.), where an extra-provincial provisional order for spousal support was not confirmed where the spouse who obtained that order had taken up residence in the

province where the confirmation order was sought. That case was one under provincial reciprocal enforcement legislation, but the concerns raised in that case are equally relevant to these proceedings under the *Divorce Act*. In *Laurent*, Duncan J. said (at para.15):

> To confirm this order could result in a situation which was not intended by the legislators; REMO legislation was intended to apply to parties living in two different provinces at the time of the provisional hearing and two different provinces at the time of the confirmation hearing.

[9] Similarly, the scheme established by sections 18 and 19 of the *Divorce Act* for provisional and confirmation hearings contemplate the bifurcated procedures required due to the fact that the parties reside in different jurisdictions. Also, the Act limits the range of options as to what the confirming court can do. Subsection 19(7) says that the confirming court shall confirm the provisional order without variation, or confirm it with variation, or refuse confirmation. I suppose one could be creative and come up with all sorts of variations and still confirm the provisional order but at some point one could vary it out of all recognition (or to put it another way, how much variation is acceptable before it becomes nothing less than an implicit refusal to confirm in an attempt to do something completely different). In this case, I may be inclined to vary the provisional order by lifting the suspension and reinstating the arrears. But that is no different than refusing confirmation. My point in all this is that sections 18 and 19 of the Act provide a set of comprehensive (albeit awkward and inefficient) procedures to deal with a variation application that straddles two jurisdictions. The confirming court is limited in what it can do. It does not have the wide-ranging powers of variation that a court has under s.17 of the Act. Now that the parties are both resident in this jurisdiction that is the section under which a variation application should proceed. I do not think that in the limited role this court plays under s.19 of the Act I can, *ex proprio motu*, convert this proceeding into a s.17 variation application.

[10] I have therefore decided to refuse confirmation of the provisional order.

[11] Even if I were to exercise jurisdiction I would still refuse confirmation. I say this for a number of reasons.

[12] First, I agree with respondent's counsel that there was no basis on which to discharge arrears. It seems to me that it would have been preferable to stay enforcement proceedings until the applicant had secured employment and then establish some orderly repayment scheme. There is no evidence to establish that the applicant will not, in the future, be unable to pay those arrears. To the contrary, his economic prospects, with his new education, only appear brighter. And I think that is to his credit.

[13] Second, the respondent's request to raise the monthly support to the Guidelines amount for the applicant's current salary is in effect a cross-application to bring the support payments into the Guidelines regime. This in turn raises questions about (a) the discretion enjoyed by the court to refuse to do that, (b)

the comparative financial circumstances of the parties , and (c) the appropriate calculation of the applicant's income.

[14] A court making a variation order respecting child support must do so in accordance with the Guidelines whether acting under s.17 or s.19: see ss. 17(6.1) and 19(7.1) of the *Divorce Act*. Section 14 of the Guidelines set out the circumstances for variation for purposes of s.17 of the Act. One of those is the mere fact that the order to be varied was made prior to the enactment of the Guidelines. There has been a great deal of controversary recently over whether a court has the discretion to refuse to harmonize a pre-guidelines order with the Guidelines if one of the parents seeks to do so. In two early cases, I held that the enactment of the Guidelines was sufficient to vary an order: *Williams v. Williams,* [1997] N.W.T.R. 303; *Hoover v. Hoover*, [1998] N.W.T.R. 209. In a series of subsequent decisions, several appellate courts held that the court maintains a discretion not to vary a previous order despite the coming into force of the Guidelines: *Wang v. Wang* (1998), 39 R.F.L. (4th) 426 (B.C.C.A.); *Sherman v. Sherman* (1999), 45 R.F.L. (4th) 424 (Ont. C.A.); *Laird v. Laird* (2000), 76 Alta. L.R. (3d) 1 (C.A.). Another appellate court rejected that position and held that the court has no discretion but must vary the previous order to comply with the Guidelines: *Dergousoff v. Dergousoff* (1999), 48 R.F.L. (4th) 1 (Sask. C.A.). Very recently, however, the Ontario Court of Appeal, which upheld a discretion in the *Sherman* case (cited above), reversed itself and expressed the opinion that *Sherman* was wrongly decided: *Bates v. Bates*, 2000 CarswellOnt 2091(June 19, 2000). It held that, if a party requests it, a court must bring a previous order within the Guidelines regime. The only discretion available to judges is the limited one provided by subsections 17 (16.2) and (16.4) of the *Divorce Act*. Those subsections contemplate provisions that may not be in accordance with the Guidelines but subject to an agreement of the parties (something that may be relevant here). While I may agree with the analysis in *Bates* (not surprisingly in light of my earlier decisions), this is an issue that should be explored in depth and not as an afterthought on a confirmation hearing. It is apparent from the transcript of the Prince Edward Island proceedings that no analysis was made of the question of harmonizing the Corollary Relief Order with the Guidelines.

[15] Further, there is incomplete information before this court to make a reasoned assessment of the applicant's undue hardship claim. Also, is it fair to base support on a salary which, as far as we know now, will only last for the next 9 months? If it is, then should there not be a corresponding retroactive reduction of support to coincide with the applicant's reduced earnings while he was in school? All of this would be fertile ground for examination on a full-blown variation application, with both parties present, and with detailed financial disclosure on both sides. This could not be done on what the respondent's counsel expected was going to be an *ex parte* confirmation hearing.

[16] Accordingly, for all of these reasons, I refuse confirmation.

[17] Where does this leave the parties? This, in my opinion puts them in the same position as if the provisional order was never made. The Corollary Relief Order is still in effect. The applicant's obligation to pay $500.00 per month continues. The arrears that were provisionally rescinded are reinstated. In other words, he owes $500.00 per month from August, 1999, to today. There is no stay of enforcement.

[18] I suggest to the parties that they bring this matter back to court on a variation application pursuant to s.17 of the Act. The question of the arrears can be reconsidered at that time. I also suggest, however, that this application not be brought until several months have elapsed. This would allow time for the parties to try to negotiate some long-term access arrangements, to exchange complete financial disclosure for their respective households, and also perhaps by then the applicant will have a clearer indication of his long-term employment prospects. In the meantime it may be a sign of good faith on the part of both parties if, on the one hand, the applicant voluntarily paid a little extra each month to reduce the arrears and, on the other hand, the respondent withheld taking any enforcement measures. These are suggestions, not directions, but such measures would certainly diminish any conflict or antagonism between the parties.

[19] The over-riding principles are that both parents have an obligation to support their children and everything the parents do must be done with a view to the children's best interests. I am confident the parties appreciate these points and will act accordingly.

[20] Subsection 19(12)(c) of the *Divorce Act* requires that I give written reasons for refusing confirmation of the provisional order. These are my reasons. I direct that respondent's counsel prepare a formal Order for entry and that the Clerk of the Court forward a copy of that Order and these reasons to the appropriate officials in Prince Edward Island.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 7th day of July, 2000.

To: Jill A. Murray
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