Chouhoury v. Paul, 2000 NWTSC 21

Date: 2000 03 08
Docket: 6101-02136

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

AUROVINDO CHOUDHURY

Petitioner

-and-

MITA PAUL

Respondent

MEMORANDUM OF JUDGMENT

[1] The petitioner has applied to vary an order for interim spousal support and to vacate accumulated arrears. A subsidiary issue, but one relevant to the actual quantum of arrears, is whether the interim order survives the granting of the divorce judgment.

[2] The parties were married in February, 1990. They separated in January, 1992. Of that total time, however, they actually lived together for less than four months (the complete circumstances are reviewed in my reasons for judgment on the interim support application released on April 26, 1993, and reported at [1993] N.W.T.J. No. 31). On October 19, 1992, an ex parte order was made providing for interim spousal support payable by the petitioner to the respondent of $500.00 per month. On April 26, 1993, I issued an order, after a contested hearing, varying the interim support to $150.00 per month retroactive to November 1, 1992.

[3] Nothing further happened in these proceedings until 1996 when the respondent, through counsel, applied ex parte for a divorce judgment. She had filed a Counter-Petition and had noted the petitioner in default for not filing a defence to it. By her Counter-Petition, the petitioner had sought spousal support. In her affidavit in support of the ex parte application for divorce, she stated that she was not seeking corollary relief. The divorce judgment was the sole relief requested.

A divorce judgment was issued on April 3, 1996. There was no corollary relief order.

[4] The interim support order had been registered with the Maintenance Enforcement Office. Nothing was paid on the order until January, 1999, when that office started to garnishee pension payments from the federal government to the petitioner. According to maintenance enforcement records, as of January, 2000, the accumulated arrears were $10,803.54. However, it appears that the maintenance enforcement officials were not aware of the divorce in 1996. Once they were made aware of it, they proceeded to cancel all of the arrears that accumulated since the divorce judgment ($6,750.00). So the first question is: were they right to do so? I have concluded that, as a matter of general law, they were not, but, they were right in the circumstances of this particular case.

[5] The issue is whether an interim order survives the grant of a divorce judgment. The general rule with respect to any kind of interim order is that it remains in effect until a final order is made. In this case there was no final order as to support (either continuing it or terminating it). The only final order that was made dealt only with the divorce. If we were still operating under the legislation as it existed prior to 1985 (the *Divorce Act*, R.S.C. 1970, c. D-8) then the interim support order would have been terminated by the divorce judgment. That is because s.10(a) of that Act permitted the court to make to make an interim support order but only pending the hearing and determination of the petition for divorce: *Favor v. Favor* (1971), 4 R.F.L. 352 (B.C.S.C.); *Doyle v. Doyle* (1974), 53 D.L.R. (3d) 315 (Nfld.S.C.); *Peacock v. Peacock* (1975), 20 R.F.L. 207 (B.C.S.C.)

[6] The current *Divorce Act*, R.S.C. 1985 (2nd Supp.), c.3 (as amended), provides that a court may make an interim support order pending the determination of the application for permanent support. This is found, with reference to spousal support in particular, in s. 15.2 of the Act:

> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
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> (2) Where an application is made under subsection (1) , the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic

> sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).
>
> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
>
> (Emphasis added)

[7] These provisions do not tie the interim support order to the granting of the divorce judgment. Thus, as a general rule, an interim order does survive the divorce judgment in the absence of some direction in a corollary relief order. This accords with the scheme of the *Divorce Act* which contemplates that a corollary relief claim can be a distinct proceeding brought in conjunction with the divorce proceeding or after a divorce judgment is granted (since, for example, the definition of "spouse" in s.15.2 is defined by s.15 to include a former spouse): see T.W. Hainsworth, *Divorce Act Manual* (1999), at pages 2-19 to 2-20 and 15-5.

[8] In *Boznick v. Boznick* (1993), 45 R.F.L. (3d) 354 (B.C.S.C.), Huddart J. (as she then was) analyzed the changes brought about by the wording of the 1985 Act and held that only a final determination regarding corollary relief can extinguish an interim support order (whether spousal or child support) and the interim order continues notwithstanding the granting of the divorce judgment. The *Boznick* decision has been applied in subsequent cases: *Dupont v. Dupont* (1993), 47 R.F.L. (3d) 273 (B.C.S.C.); *Higginson v. Higginson*, [1993] B.C.J. No. 2309 (S.C.); *Nordin v. Nordin*, [1996] B.C.J. No. 361 (S.C.). I respectfully adopt it as well.

[9] The result is that the maintenance enforcement officials were wrong to simply cancel arrears accumulated after the divorce judgment was granted. That fact alone does not stop the operation of an interim support order under the *Divorce Act* (I make no comment with respect to support orders under territorial legislation). In this case, however, I have concluded that in effect the interim order did cease because the respondent abandoned her claim to support. She expressly stated, in her application for the divorce judgment, that she was not seeking corollary relief. One may speculate that she said this because she knew that the interim support order would continue. This would be too clever by a long way. The affidavit stipulated by the Northwest Territories Divorce Rules for use on uncontested "desk divorce" applications requires the applicant to state what

relief is sought. It also requires the applicant to spell out any arrangements for support. The respondent's affidavit in this case also explicitly withdrew the claim for spousal support. In it the respondent said "paragraphs 11, 12 and 13 in the Counter-Petition are deleted and the respondent claims only a divorce judgment". Paragraphs 11 and 12 dealt with a matrimonial property claim while paragraph 13 was the claim for spousal support. Thus, in my opinion, the respondent abandoned her claim to support and therefore the support payments should have ceased as of April, 1996 (the date of the divorce judgment). This, however, does not take account as yet of certain other factors in this case.

[10] With respect to the actual request for a variation, the petitioner's counsel submitted that it would be unreasonable to continue any support obligations. The petitioner is over 60 years old and in poor health. He has been unemployed for many years and his income is less than $700.00 per month (from a small superannuation and C.P.P. benefits). He has been residing for some time in a shelter run by the local Salvation Army.

[11] Counsel also argued that, since the marriage was of short duration and there were no children, it would be highly unlikely that a court would have ordered indefinite spousal support. Any support would likely have been time-limited. Counsel referred me to *Gosnell v. Gosnell* (1993), 138 A.R. 205 (Q.B.), where spousal support obligations were retroactively cancelled as if they were subject to a time-limited order. There was evidence at the time the interim support order was made in this case that the respondent had secured employment and the material filed at the time of the divorce showed that she was still employed. I do not have any current information since the respondent did not respond to this application (despite being given notice of it).

[12] Pursuant to s.15.2(6) of the *Divorce Act*, the objectives of any spousal support order are to recognize the economic advantages or disadvantages to the spouses arising from the marriage or its breakdown, and to promote the economic self-sufficiency of each spouse within a reasonable time. In this case, the respondent suffered certain economic advantages and disadvantages. It was through the marriage that she was able to immigrate to Canada; it was, however, the breakdown of the marriage that caused her serious economic hardship. She was left to fend for herself in a new country. Yet it appears she was able to achieve self-sufficiency. I think that any spousal support order, therefore, would have been time-limited to serve as a transition period while she established herself economically.

[13] In my opinion, there is no reason why a divorce judgment and corollary relief could not have been sought within one year of the date of the interim order. At that time I think a further order for support would have been made for a period of 12 months. That would have taken the petitioner's support obligations up to and including the month of April, 1995.

[14] I therefore order that the petitioner's support obligations ceased as of April 30, 1995, and the interim support order is vacated as of that date. I am sure that counsel for the petitioner and the maintenance enforcement officials can work out what remains owing as arrears.

[15] I thank counsel for her submissions, in particular the additional work she went to on the issue of the continuation of the interim order.

J.Z. Vertes J.S.C.

Dated at Yellowknife in the Northwest Territories this 8th day of March, 2000.

Counsel for the Petitioner: Catherine Stark
No one appeared for the Respondent