Bosgra v. Squires, 2001 NWTSC 24

Date: 2001 03 05
Docket: CV 07765

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOANN M. BOSGRA

APPLICANT

-and-

FRED K. SQUIRES

RESPONDENT

MEMORANDUM OF JUDGMENT

[1] This matter came before me in regular Chambers as an application to confirm a Provisional Order varying the terms of child support contained in an earlier Corollary Relief Order. The history of these proceedings is not a very commendable example of the procedure on confirmation hearings.

[2] The parties were divorced in 1992. A Corollary Relief Order directed the respondent to pay child support of $300.00 per month for one child born in 1990. On March 2, 1998, the applicant brought a motion in the Court of Queen's Bench of Alberta, Judicial District of Red Deer, to provisionally vary the amount of child support so as to bring it in line with the Child Support Guidelines. Based on the information provided, the presiding judge made a provisional order varying basic child support to $606.00 per month plus ordering additional support of $227.50 per month for child-care and extraordinary extracurricular expenses. The total support pursuant to the provisional order therefore is $833.50 per month. The formal order was entered in Alberta on March 31, 1998.

[3] The record reveals that the support figures were calculated on the basis of an *estimated* guideline income of $70,000.00 for the respondent. This was based on an assumption by the applicant based on information received from, what she described in her affidavit, as "mutual friends and acquaintances".

[4] On May 19, 1998, the file documents were forwarded from the Maintenance Enforcement Office of the Government of Alberta to the Clerk of the Supreme Court in Yellowknife for confirmation. A confirmation hearing was set for July 24, 1998, and the respondent was served with notice. The court clerk's minutes reveal that on July 24, 1998, the respondent appeared by counsel and the matter was adjourned *sine die*. There is a further notation that "counsel" (presumably counsel for the respondent) was to speak to the clerk for a "date" (presumably meaning a date for a special chambers hearing). At this point things appear to have simply stopped.

[5] On November 3, 1998, the applicant's counsel wrote directly to the clerk asking where the matter stood. She was advised of what transpired on July 24th. Then on May 31, 1999, the Clerk of the Court of Queen's Bench in Red Deer wrote asking for a status report. Again there was a response outlining what had transpired. There was further correspondence. Apparently contact was made with the respondent's counsel (not the same one, I point out, as the one who appeared before me). Counsel (at the time) simply advised that no court date had yet been set. Things continued to stand still. On June 20, 2000, the Alberta court clerk again inquired as to the status. The clerk in Yellowknife wrote to the respondent's counsel. Another lawyer in that firm responded as follows:

> Further to your fax of today's date, as I recall, this matter was before the court about a year ago. At that time, the court found that the material presented by the Applicant was insufficient to satisfy the requirements of the statute. As such, the court adjourned it *sine die.*
>
> Since the carriage of the action is in the hands of the Applicant, there is really not very much that I can do. Further, there is no particular reason why my client would want to have this action proceed, in any event, since it is an application to require him to pay more child support.

These comments betray two conceptual flaws.

[6] First, there is nothing on the court record to indicate that the matter was adjourned *sine die* because the applicant's material was insufficient. It was adjourned so the respondent's counsel could obtain a special date (something required by the Rules of Court if the hearing is likely to take more than 30 minutes).

[7] Second, carriage of the action is not in the hands of the applicant. Unfortunately in this type of procedure it is really not in the hands of anyone. And this reveals the fundamental problem with this procedure.

[8] The legislation provides for provisional hearings in one jurisdiction and confirmation hearings in another jurisdiction. Both hearings are usually, indeed they are meant to be, *ex parte*. Documentation is transmitted from one government office to another government office. But, no person in the confirming jurisdiction is actually charged with the responsibility of making sure that the matter progresses in an orderly fashion. As counsel's letter (quoted above) so frankly notes, it is not in the respondent's interest to move this matter along. The court, and by extension the court's staff, cannot be expected to supervise (or babysit) litigation on behalf of one of the parties. In my opinion, if government feels it is a public need and its public duty to provide these reciprocal arrangements, then government should assign some legally trained personnel to make sure that the objectives of the legislation are met. I do not think court clerks should be expected to ride herd on lawyers.

[9] I have no doubt that the specific problem in this case is that the respondent's lawyer at the time never followed up to obtain a hearing date. But the root of the problem is this haphazard procedure (where governments legislate a procedure but do nothing to assist in making sure that it works as planned).

[10] As a result of the delay, and after further requests from Alberta for progress reports, the matter was unilaterally set down by the clerk for February 6, 2001. At that time new counsel appeared for the respondent and the matter was adjourned for two weeks to allow the respondent time to file some current financial information.

[11] Counsel has now filed further financial information for the respondent. This indicates that for the year 2000 he earned $30,950.00 from working as a miner and $19,556.00 was received from Workers' Compensation. A current financial statement lists his monthly income as $3,177.00 (with $2,607.00 coming from Workers' Compensation and the balance as various living allowances). The statement also lists

$3,841.16 in monthly expenses. I was told that he is supporting a second family. He has apparently been keeping up the support payments as required by the Corollary Relief Order.

[12] At the most recent appearance before me, counsel made two requests.

[13] First, counsel asked that I remit this matter to the Alberta court for further evidence (as permitted by sections 19(6) and (8) of the Divorce Act). Counsel, quite appropriately in my view, submitted that the information provided by the applicant in Alberta is now three years old and circumstances may have changed. Furthermore, counsel will need information about the applicant's current financial circumstances so as to consider an undue hardship application under s.10 of the Child Support Guidelines.

[14] Second, counsel asked that I adjourn the confirmation proceedings to await further and better financial particulars from the respondent. Apparently he has not filed income tax returns for some years. An accountant is preparing all of the necessary information, information which should give a clearer picture as to the respondent's pattern of income, and that should be available in the next month or so.

[15] In my opinion, both requests are reasonable.

[16] I will therefore direct the clerk of this court to remit this matter to the Court of Queen's Bench of Alberta in Red Deer for the purpose of taking further evidence. How that is done is of course within the discretion of that court, however, I would be satisfied with evidence in affidavit form from the applicant. That evidence should contain a current financial statement, the information necessary to effectively make a comparison of household standards of living (as per the test set out in Schedule II of the Guidelines), and a detailed breakdown of child care, extracurricular, and any other special expenses claimed (as per s.7 of the Guidelines).

[17] I further direct that as soon as such further evidence is received by the clerk from the court in Alberta then copies of such evidence (whether in affidavit form or otherwise) are to be forwarded to counsel for the respondent. It will be counsel's responsibility to perform the standards of living comparison once that information is received (if an undue hardship claim is to be advanced).

[18] I also direct that further and better particulars of the respondent's financial circumstances be filed in this court, under oath, by no later than April 20, 2001. If any portion of the respondent's income is received from Workers' Compensation benefits or other tax-exempt sources, then counsel should submit the necessary gross-up calculations (as contemplated by s.19(1)(b) of the Guidelines).

[19] In the meantime I think it would be appropriate to order an interim adjustment to the support payable (pursuant to s.19(9) of the Act). After all, the $300.00 obligation has not changed since 1992. The variation under consideration was made in 1998. I think it only makes sense to make an adjustment at least on an interim basis. Further adjustments can be made when all the facts are known.

[20] Based on the respondent's total self-reported income for 2000 of $50,506.00 (without attempting to calculate a gross-up for the part that was paid by Workers' Compensation), the monthly Guideline support figure is $447.35. I therefore order that the respondent pay that amount as interim support effective as of February 1st, 2001, and continuing until further order. In order to maintain some semblance of control over these proceedings, I direct that this matter be placed on the regular chambers list for Friday, May 4, 2001, at 10 a.m., for a status review and possibly the confirmation hearing if counsel is ready and the further evidence has been received. I do not consider myself as being seized of these proceedings.

[21] Finally, I make these further specific directions:

(a) respondent's counsel is to prepare and file a formal order within 7 days setting out the various directions contained in this memorandum;

(b) the clerk of the court is to transmit a copy of this memorandum and the formal order to the clerk of the Court of Queen's Bench of Alberta in Red Deer with a request that further evidence be taken as indicated in this memorandum; and,

(c) the clerk of the court is to forward a copy of this memorandum to the applicant's counsel in Alberta (as per the correspondence on file) for the applicant's information.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 5th day of March, 2001.

To: B.A. McIlmoyle
Counsel for the Respondent