McLaren v. *Brunner*, 2005 NWTSC 68

Date: 2005 08 04
Docket: S-0001-CV2004000025

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JO-ANN MARY McLAREN

Applicant

- and -

RONEY EUGENE BRUNNER

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant seeks an order varying certain terms of a consent order issued in the Ontario Superior Court of Justice on January 23, 2004 ("the Consent Order"). Specifically, the Applicant seeks to vary four provisions of the Consent Order, pertaining to the quantum of child support payable by the Respondent, a prohibition against the Applicant filing the Consent Order with any maintenance enforcement agency, the Respondent's entitlement to deduct access costs from child support payments and the Applicant's entitlement to make travel arrangements for the children before and after the Respondent's access periods. The Respondent was personally served with notice of this application in Ontario and was represented by counsel for purposes of taking the position that this Court ought to decline jurisdiction over the application.

[2] The affidavits filed by the Applicant indicate that she and the Respondent divorced in 2002 in Ontario. A Divorce Order, issued August 8, 2002, in the Ontario Superior Court of Justice, provides that the Applicant has sole custody of the three children of the marriage and the Respondent has access. The Divorce Order anticipated that the Applicant and the children would be moving to the Northwest Territories, which they did in 2002. It is unclear whether both parties thought the

Applicant's residence in the Northwest Territories would be indefinite as she initially came here on a one year teaching contract. She has, however, remained here, while the Respondent has remained in Ontario.

[3] There were problems about access soon after the Divorce Order issued and the Respondent sought to revisit the issue of custody. The Respondent made various applications to the Ontario Court, including applications that the Applicant be found in contempt for not making the children available for access. This ultimately led to a court hearing being scheduled in Ontario in January 2004. Shortly before that hearing was to take place, the Applicant applied to this Court for an order superceding an order of the Ontario Court that required that she bring the children to Ontario; that application was dismissed.

[4] On January 23, 2004, in the proceedings in Ontario, the Consent Order that the Applicant now seeks variation of was issued. It is stated to be a final order on consent, varying the Divorce Order issued in 2002. Both parties were represented by counsel in the January 2004 proceedings. The Consent Order contains very detailed provisions as to the Respondent's exercise of access, his entitlement to deduct the costs of same from child support payments, and other matters.

[5] The Applicant takes the position that this Court should exercise jurisdiction to hear her variation application and make a final, not provisional, order. She relies on the fact that the Consent Order has been registered in the Northwest Territories and is now an order of this Court. She also submits that since the children have been living here since 2002 and the best evidence of their circumstances is here, this Court should exercise jurisdiction over matters pertaining to them.

[6] The Respondent takes the position that registration of the Consent Order here does not necessarily confer jurisdiction on this Court to deal with the issues in the variation application. He points out that there have been serious problems about access in the past, all dealt with by the Ontario Court. It is his position that this Court should decline jurisdiction.

[7] Since this is an application to vary, s. 5(1) of the *Divorce Act* applies:

> 5.(1) A court in a province has jurisdiction to hear and determine a variation proceeding if

> (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or
>
> (b) both former spouses accept the jurisdiction of the court.

[8] Section 5(1) must, however, be read in conjunction with s. 18(2), which provides:

> 18.(2) Notwithstanding paragraph 5(1)(a), and subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and
>
> (a) the respondent in the application is ordinarily resident in another province and has not accepted the jurisdiction of the court, or both former spouses have not consented to the application of section 17.1 in respect of the matter, and
>
> (b) in the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19,
>
> the court shall make a variation order with or without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and, where so confirmed, it has legal effect in accordance with the terms of the order confirming it.

[9] Section 17(1), referred to in s. 18(2), provides that a court of competent jurisdiction may make an order varying a support order or a custody (including access) order.

[10] Section 18(2) applies to support orders only, not custody or access orders.

[11] Under s. 5(1), in my view, this Court has jurisdiction to deal with variation of the non-support issues because the Applicant is ordinarily resident in the Northwest Territories. The only part of the Consent Order that the Applicant seeks to vary that does not relate to support is the part providing that the Respondent will make the access travel arrangements.

[12] The remaining provisions of the Consent Order that the Applicant seeks to vary all deal with support: the quantum of support, the prohibition in the Consent Order against registration with any maintenance enforcement office and the Respondent's right to deduct access costs from support. The Respondent is resident in Ontario, so the issue under s. 18(2) is whether he has accepted the jurisdiction of this Court.

[13] The Consent Order was registered in the Northwest Territories on April 22, 2004, pursuant to paragraph 1(q) of the Consent Order, which provides:

> The Applicant shall make application in the Northwest Territories to file this Order for recognition and enforcement, at her expense, and shall provide the Respondent with proof of having done so within 90 days of January 23, 2004

[14] The paragraph immediately following 1(q) in the Consent Order provides that the police of any jurisdiction where the children can be found including the Northwest Territories are authorized and directed to enforce the access provisions of the Order. The Respondent argues that this was the reason for requiring registration of the Consent Order in this jurisdiction. In my view it is clear that registration was for the Respondent's benefit and by requiring that the Consent Order be registered, he is, in effect, seeking the assistance of this Court in having it recognized and enforced. In so doing, in my opinion, he has attorned to the jurisdiction of this Court to deal with issues arising from the Order.

[15] The situation in this case is similar to that in *Muzechka v. Muzechka*, [2002] A.J. No. 1313 (Q.B.), in which Murray J. held that by filing and registering a decree nisi in Alberta with the Court and Alberta Justice (maintenance enforcement), the ex-wife doing so had effectively invited the Court to deal with her claims under the decree nisi and sought to invoke the powers of the Court and Alberta Justice to recover monies allegedly owed by the ex-husband under the decree nisi. Murray J. held that such acts on the part of the ex-wife, who was not resident in Alberta, constituted attornment on her part to the jurisdiction of the Alberta Court. Accordingly, he found that the case fell under s. 5(1)(b) of the *Divorce Act* and that the Alberta Court had the power to make a final variation order rather than merely a provisional order.

[16] In this case, while the Respondent did not file the Consent Order with this Court, the requirement that the Applicant do so was clearly for his benefit. Effectively, therefore, he has sought to invoke this Court's powers to enforce the

provisions of the Consent Order. Had the Applicant filed the Order for her own purposes and without being required to do so for the benefit of the Respondent, there would be no attornment by him and under s. 20(4) of the *Divorce Act*, notwithstanding registration, the procedure in s. 18(2) would likely apply.

[17] I note that paragraph 1(n) of the Consent Order states that the jurisdiction for any action required to be brought as a result of the Applicant's failure to abide by its access provisions, including the revival of the previous contempt allegations, shall be the Ontario Court. That Court's jurisdiction was preserved by consent only for that specific issue. There is no indication that the application before this Court arises as a result of any failure by the Applicant to abide by the access provisions.

[18] The only other provisions of the Consent Order that deal with jurisdiction or applications to vary are paragraphs 1(o) and (p), which collectively require that the Applicant pay $10,000.00 in costs to the Respondent and that pending complete payment, the Applicant may not, for any reason, nor in any jurisdiction, make a variation application. The Applicant deposes in her affidavit that she has paid those costs and there is no suggestion to the contrary.

[19] I find nothing else in the Consent Order that contemplates that the Ontario Court should have exclusive jurisdiction. Furthermore, I note that the Consent Order is expressed as a final order, so this is not a case where proceedings are ongoing in Ontario.

[20] For all of the above reasons, I find that the Respondent has attorned to this jurisdiction. Therefore, s. 18(2) does not apply and this Court has jurisdiction to make a final order of variation of all the issues raised, including support.

[21] The only other issue is whether this Court should decline to exercise jurisdiction because of the history of this matter in Ontario. In that regard, although the issues between the parties have been dealt with in the Ontario Court for the past three years, it does appear that the main orders have been reached through negotiation rather than a trial or hearing. The Consent Order that the Applicant now seeks to have varied was reached by consent through negotiation according to her affidavit and the Divorce Order states on its face that it was issued on the basis of minutes of settlement between the parties. Thus, it does not appear that there is likely to be a significant

evidentiary record in Ontario. Nor does it appear that the same judge has heard the various applications that have resulted in the orders issued in the Ontario Court.

[22] The Applicant and the children have resided in the Northwest Territories for almost three years now. From the material before me, it appears that the Respondent has the higher income of the two and although he is required to pay child support, he has made significant deductions from that support for access costs; whether they are permissible deductions under the Consent Order is an issue . The Applicant has the main burden of supporting the three children. In the circumstances, the Respondent appears better placed to respond in this jurisdiction than the Applicant does in Ontario.

[23] In the circumstances, I do not consider it appropriate for this Court to decline the jurisdiction it has to make a final variation order with respect to the issues raised by the Applicant's notice of motion. I do not consider myself seized of this matter and counsel may bring it back on before any judge of this Court to deal with the merits of the application.

Dated this 4th day of August 2005.

V.A. Schuler,
J.S.C.

Heard at Yellowknife, NT
July 29, 2005

Counsel for the Applicant: Michelle Staszuk

Counsel for the Respondent: Katherine R. Peterson, Q.C.

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