Date: 2009 05 22
Docket: S-0001-FM-2009000043

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MICHAEL ANTHONY CARRUTHERS

Applicant

- and -

JUDY MABEL DIXON

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

Michael Carruthers was the Respondent in divorce proceedings that were dealt with in Ontario several years ago. A Divorce Judgment and Corollary Relief Order were issued in 1986. One of the terms of the Corollary Relief Order was that he pay child support for his two children. He did so for a number of years, and ceased his payments in 2001, after the youngest child turned 18.

Seven years later Mr. Carruthers received correspondence from maintenance enforcement authorities advising him that he owed a significant amount of child support arrears. It appears those arrears are said to have accrued since 2001. In this Application, Mr. Carruthers seeks to have this Court declare that his obligation to pay child support ceased as of July 2001 and that there are no existing arrears.

B) BACKGROUND

Mr. Carruthers filed two affidavits in support of his application. In the first one, sworn March 24, 2009, he sets out in some detail the chronology of events, including details of his communications with maintenance enforcement officials about this matter. In the second affidavit, sworn May 14, 2009, he provides information about his children's educational pursuits and where they lived at various points in time.

Pursuant to the Corollary Relief Order made in 1986, the two children of the marriage, A.D., born June 3, 1982, and A.M., born July 12, 1983, were placed in the custody of their mother in Ontario. Mr. Carruthers was ordered to pay child support.

The child support order was registered with maintenance enforcement authorities in Ontario and in the Northwest Territories. Mr. Carruthers paid child support through the maintenance enforcement program for a number of years.

In January 2000, Mr. Carruthers received correspondence from maintenance enforcement officials in the Northwest Territories, advising that his obligation to pay support for A.D. would end in June 2000, and that his obligation to pay support for A.M. would end in July 2001. He ceased child support payments in July 2001. For several years, it appears he received no communication from maintenance enforcement agencies in either the Northwest Territories or Ontario.

Almost seven years later, in March 2008, Mr. Carruthers received correspondence from the maintenance enforcement office in the Northwest Territories advising that his file had been reopened and that he owed $27,526.34 in arrears. There is no evidence as to what prompted the re-opening of his file at that particular point in time. Mr. Carruthers deposes that he "took steps to look into the matter" but does not provide any details as to his communications with maintenance officials at the time. He also deposes that to his knowledge, no actions were taken to garnish his wages for payment of the arrears.

In March 2009, a maintenance enforcement officer employed with the Government of the Northwest Territories contacted Mr. Carruthers and advised him that his file had been reviewed and was being closed. That same month, however, Mr. Carruthers received correspondence from maintenance enforcement officials in Ontario advising that they had directed his employer to start garnishing his wages

immediately, at the rate of 50% of his net income.

Mr. Carruthers' wages are not being garnished at this time, and his understanding is that they will not be unless the Northwest Territories maintenance office becomes involved again and takes steps to collect the arrears.

The application came before this Court on April 30, 2009. Counsel appeared as agent for the lawyer who acts for the children's mother in Ontario. The mother does not attorn to the jurisdiction of this Court and she contests the merits of the application. No further details were provided about the position she intends to advance.

C) ANALYSIS

Absent consent of both parties, this Court does not have jurisdiction to vary an Order for child support made under the *Divorce Act* by a Court in another jurisdiction. *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.), s. 17.1. Since there is no such consent here, the only relief that Mr. Carruthers can obtain in this Court is a Provisional Order, which would be subject to confirmation proceedings, as set out at sections 18 and 19 of the *Act.*

Both children are now adults and are working. The question of whether any arrears accumulated after July 2001 depends on when Mr. Carruthers' child support obligations ended. The 1986 Order is silent on that point. But considering that section 15.1 of the *Act* gives a court jurisdiction to make orders for the support of "children of the marriage", in my view, it is implicit in the 1986 Order that its intent was that the support obligation would continue until the two children were no longer "children of the marriage" within the definition of the *Act*.

Section 2 of the *Act* defines "child of the marriage" as follows:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or obtain the necessaries of life;

Pursuant to section 2 of the *Act*, the age of majority is determined in accordance with the laws of the jurisdiction where the children habitually reside. A.D. and A.M lived in Ontario, so they reached the age of majority when they turned 18. *Age of Majority and Accountability Act*, R.S.O. 1990, c. A-7, s. 1.

Age is an important factor in determining whether a child is still a "child of the marriage" for the purposes of the *Act*, but it is not determinative. A child who has not attained the age of majority is presumptively a "child of the marriage", but a party who wishes to assert otherwise can adduce evidence to show that the child withdrew from his or her parents' charge before reaching the age of majority. Conversely, a child who has attained the age of majority is no longer presumptively a "child of the marriage", but again, it is open to a party to adduce evidence to show that a child has not withdrawn from the parents' charge and is unable to do so by reason of illness, disability or other cause. "Other cause" includes the pursuit of higher education. *Giorno* v. *Giorno* (1992), 39 R.F.L. (3d) 345 (N.S.C.A.); *Large* v. *Large* 2007 NWTSC 57, at para.3.

Mr. Carruthers' affidavit sworn May 14, 2009, provides certain details about where A.D. and A.M. lived at various points in time. He deposes that A.D. moved out of her mother's home when she was 16. She lived with her boyfriend for approximately two years, and then returned to live with her mother. She resumed her studies and lived with her mother for the first year of her nursing degree. She then moved to another city and completed her degree there.

As for A.M., she had a summer job after she finished high school. She went to university for 4 months in North Bay, and returned to live with her mother after that. She took some nursing courses online, and moved away the following Fall to complete her degree.

Although no details were provided about the scope and nature of the mother's opposition to the relief that Mr. Carruthers seeks, given the children's current age and based on the evidence before this Court, the issue that seems to emerge from the evidence is whether the children's educational pursuits prevented them from withdrawing from their parents' charge when they turned 18.

While there is evidence that both children lived with their mother for periods of time after they turned 18 and while they were pursuing higher education, there is no

evidence about the cost of their studies and living expenses, the income they generated from their employment, whether they benefitted from student loans or other types of financial assistance from other sources. I find that the evidence does not establish conclusively that the children were unable to withdraw from their parents' charge after they reached the age of majority. That being the case, I conclude that they ceased being "children of the marriage" when they turned 18, and that this was when Mr. Carruthers' child support obligation ended.

Although it is not determinative, this seems to be how the Northwest Territories maintenance enforcement authorities viewed the situation as well. In their letter to Mr. Carruthers dated January 17, 2000, (Exhibit "G" to his affidavit sworn in March 2009), they advised him that his obligation to support each child would end in the month and year corresponding to each child's 18th birthday.

It also seemed to have been, for a time at least, how the maintenance enforcement authorities in Ontario viewed things, since there is no evidence that those authorities took any steps to continue enforcing the child support order when Mr. Carruthers ceased his payments in 2001. As I have already stated, there is no evidence before this Court that explains why there was this seven year gap in the enforcement of the child support order, or why the matter was revived in 2008.

It must be remembered that at this stage, the evidence adduced by Mr. Carruthers is not tested in any way. It is also important to note that the mother has not yet presented any evidence. It may well be that additional evidence about the status of the children at the material time, or evidence shedding a different light on what transpired, will be adduced when this matter is back in the Ontario courts for a confirmation hearing. At this stage, though, I must decide the application based on the evidence that has been filed in this Court.

Although the application was framed as one seeking, in part, to vary the Ontario Order, the relief that Mr. Carruthers seeks is really a determination of when the Order ceased to have effect as far as the child support was concerned. In my view, this can be achieved by way of declaratory relief, and there is no need to vary the 1986 Order.

For these reasons, a Provisional Order will issue, declaring that:

1. Mr. Carruthers' child support obligation with respect to A.D. ceased on June 3, 2000;
2. Mr. Carruthers' child support obligation with respect to A.M. ceased on July 12, 2001; and
3. There are no existing child support arrears.

I direct that, in accordance with Subsection 19(3) of the *Divorce Act*, the materials referred to in that provision be sent to the Attorney General of the Northwest Territories so that those documents can be forwarded to the appropriate authorities in Ontario. In addition to the copies of the Order itself, copies of the Originating Notice, the two affidavits filed by Mr. Carruthers, and this Memorandum of Judgment, should be included in the materials.

L.A. Charbonneau
J.S.C.

Dated this 22nd day of May, 2009.

Counsel for the Applicant: Trisha Soonias.

Agent for the Respondent's counsel in Ontario: Katherine Peterson, Q.C.

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