Newman v. *Bogan*, 2010 NWTSC 69

Date: 2010 08 23
Docket: S-1-CV-1992-3853

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARGARET NEWMAN

Respondent

- and -

MARK BOGAN

Applicant

MEMORANDUM OF JUDGMENT

[1] This is another application for variation of the child support order made in these proceedings.

[2] The applicant is the father of a young man who is now 18 years old. The son lives in Alberta with his mother and has done so since 1997. The applicant is also the father of another boy, who is now 13 years old, and who lives in Ontario with his mother.

[3] The applicant has continually used these proceedings to voice his complaints about how the courts, in this jurisdiction and others, have done nothing to assist in his compelling pursuit of establishing contact with his sons, of fostering a meaningful relationship, and indeed, so he claims at every instance, the courts have allowed the mothers of his sons to flout court orders and generally to alienate his sons from him. He has a long litany of complaints about what he terms the repressive conduct of maintenance enforcement officials (since he owes significant arrears on his support obligations to both sons).

[4] The applicant, who is self-represented, fails to comprehend that this court has no jurisdiction to deal with custody or access issues with respect to either son, since both of them are domiciled in other jurisdictions. Yet, the applicant has again insisted, at the latest hearing before me, that he will not pay support unless and until the court rectifies what he sees as an unfair situation to him and one that has put his children at risk due to their alienation from their father.

[5] Turning to the son who is the subject of the support order made in this jurisdiction, court proceedings date back to 1992 when an interim order was made granting custody to the respondent mother. That order was made permanent after a trial in 1994. At that time supervised access was granted to the applicant. In 1996, I issued an order requiring the applicant to pay child support of $300.00 per month. It appears that support was paid only sporadically since, by 2009, arrears had accumulated totalling in excess of $44,000.00.

[6] That son has also been the subject of proceedings in Alberta. In 2002, an order was made by the Provincial Court of Alberta directing custody to the respondent and access to the applicant but "only at the agreement and consent" of the son. The order went on to provide that the mother was to "use her best efforts" to encourage contact between the son, his father and his father's extended family. Apparently this was not satisfactory and further litigation ensued with, ultimately, an order being issued by the Alberta Court of Queen's Bench in 2008 prohibiting the applicant from bringing any further applications without leave of the court.

[7] The applicant, as I noted previously, has used the platform provided by these support variation applications to air his grievances and concerns. He says that there is "overwhelming evidence" that his son is at risk, that he's suffered for years from suicidal ideation, all because of the lack of a meaningful relationship with his father. Yet, the applicant is a highly unreliable reporter in this regard when one looks at other evidence.

[8] For example, the applicant stated, in an affidavit filed with this court on April 29, 2009, that he has been in contact with a Mr. Edward Garrick of the Stony Plain/Spruce Grove Alberta Child and Family Services Centre because his son has "been in and out of his office for the past decade". In front of me he repeated that his son underwent counselling at Stony Plain between the ages of 10 and 13 and that it was here that his son exhibited suicidal ideation. Yet, in an affidavit filed in the Alberta Court of Queen's Bench on September 3, 2009, the respondent states

that she and her son met with this Mr. Garrick, as a result of these allegations, and that Mr. Garrick confirmed to her that he had never met her son before.

[9] The applicant complains that the respondent has "brainwashed" and "alienated" his son from him. Yet, in an affidavit filed in the Alberta Court of Queen's Bench on September 3, 2009, the son makes the following statements under oath:

> 4. That I was very frustrated to learn that again Mark Bogan, my biological father, has made reference to a social worker who supposedly counselled me for a lengthy period of time. I had no recollection of this man's name and no recollection of ever being suicidal. On August 14, 2009, to confirm my recollection or lack thereof, my mother and I attended the office of Mr. Ed Garrick, who is the manager of the Stony Plain and Spruce Grove Social Services offices. Mr. Garrick confirmed the fact that he had never met me prior to that day. He also confirmed that my file did not state that I was suicidal, as was my memory. As well, he told me that Mark had requested I be apprehended as he is of the belief that I have been brainwashed. Mr. Garrick assured me that I did not present that way and seemed like a well-adjusted young man. He thanked me for coming in to meet with him.
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> 5. My mother has generally given me control over access. She has also respected my feelings in most situations. It is my belief that my mother has treated me with respect and has raised me fairly and has been very open in her communication with me regarding most things. I do not believe that I have been brainwashed. We do not spend inordinate amounts of time talking about Mark, unless he chosses to cause problems for us, as has been the case on many occasions. My mother has not given me more details than I have requested and if I have been uncomfortable with any information that she has given me, I have said so. She has also respected that.

[10] I repeat all this, even though it is not material to the support issue, because it was the central focus of the applicant's arguments on this variation application. Also, because it demonstrates the obvious. The applicant picks and chooses in his submissions and ignores any evidence contrary to his perception of the circumstances.

[11] I want to make something very clear for the applicant in these reasons. One of the fundamental propositions underlying family law legislation in this country is that a child should have as much contact with each parent as is consistent with the

best interests of the child. This is stated explicitly in s. 16(10) of the *Divorce Act* (Canada) and is implicit in the considerations going into a determination of best interests in the *Children's Law Act* (Northwest Territories). I am sure it is extremely frustrating for the applicant that he does not have a meaningful relationship with his son. Why that is so is not for me to say. But, it is also clear that whatever problems or issues may exist with respect to custody or access do not affect or limit a parent's support obligations. Support payments and access are not tied together. The jurisprudence across Canada makes clear that child support is the right of the child and it is not to be eroded or qualified by reason of the alleged misconduct of the custodial parent or because of difficulties in exercising access.

[12] The other thing I want to make clear is that a court cannot do whatever the applicant may think is just or necessary. Issues of custody, access and support are regulated by legislation. The role of a court is to interpret legislation in a manner consistent with its purpose and then to give effect to that interpretation in the particular case before it. If the legislation is clear and unambiguous, then a court has no option but to apply it. If the applicant believes the legislation is misguided then his recourse is to lobby the legislators for changes. It is no justification to avoid his support obligations.

[13] Returning then to the support issue, my 1996 order remained in place until last year when the applicant brought his first variation application. On April 14, 2009, I issued a provisional variation order setting his ongoing child support at $233.00 per month and rescinding the sum of $17,460.00 from the accumulated arrears. My reasons are cited as 2009 NWTSC 23. On September 9, 2009, that provisional order was confirmed by the Alberta Court of Queen's Bench with the additional proviso that the applicant pay $100.00 per month towards the remaining arrears.

[14] In March, 2010, the applicant brought this further variation application claiming undue hardship and seeking a stay of his obligations until his access rights are restored. It is apparent that this was prompted by various enforcement measures undertaken by the Administrator of Maintenance Enforcement. On May 20, 2010, I ordered a stay of enforcement proceedings (until July 22) and directed the applicant to provide to the Administrator an itemized list pertaining to his financial status accompanied by supporting documentation.

[15] On July 22, 2010, when this matter came back before me, I was told that the applicant had not done as directed. Instead he repeated his grievances about the justice system, how it has failed his son, and how the court ignores the problems affecting him, his son and extended family. The applicant also produced a hand-drawn list of his debts:

(a) $26,009.01 in support arrears for his eldest son;

(b) $44,000.00 in support arrears for his second son in Ontario;

(c) $11,520.58 owing on a CIBC credit card;

(d) $7,537.15 owing on an RBC credit card;

(e) $20,000.00 owing on an Ontario student loan;

(f) $4,500.00 owing on a Northwest Territories student loan; and,

(g) $1,200.00 owing as a retainer to a lawyer in Ontario.

[16] When it became apparent that I was going to dismiss his application for lack of evidence, the applicant asked for a further week so he could provide documentation to back-up his claim. The adjournment was granted but once again with the direction that he was to provide the documentation to the Office of Maintenance Enforcement and meet with them prior to the return date.

[17] On the return date, July 29, 2010, I was told that once again the applicant did not do as directed. He pleaded the constraints of his work obligations. When asked if he had any submissions, the applicant provided a hand-written document which again set out his grievances and concluded with a demand that support payments remain stayed until there is proof that the respondent is fostering a renewal of his relationship with his son. When asked for any financial data, the applicant provided credit card statements verifying the balances outstanding.

[18] Ordinarily I might say that the applicant betrays a profound lack of appreciation as to how courts function. He seems to think he can get relief without providing evidence in support of his position. But, I know that the applicant has

experience in the courts. Indeed one of his major complaints is that he has been financially ruined because of his continuing involvement in litigation here and elsewhere. So I can only conclude that he chooses deliberately to present as much or as little evidence as he wishes, irrespective of whatever the applicable law stipulates. For example, when told that an undue hardship requires an assessment of household income, and therefore he would have to produce financial information from his current partner, the applicant refused to do so saying it should be irrelevant.

[19] I will now turn to some specific aspects of this application.

[20] The applicant says that the Maintenance Enforcement officials are acting in a "repressive" manner because they are basing support payments on his gross income. But that is what the *Child Support Guidelines*, enacted in 1998 under the *Children's Law Act*, mandate. Section 16 of the Guidelines states that "a parent's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 General form issued by the Canada Customs and Revenue Agency". For employment income, this means gross income. But, it should be noted, that it also includes all sources of income, for example, wages, commissions, Employment Insurance and even social assistance. So there is no basis for the applicant's complaint.

[21] The applicant says that I erred in my April 14, 2009, decision in calculating the arrears to be rescinded. For the year 2005 there was no employment income information and I assessed his obligation at the then required amount of $300.00 per month. The applicant says that he was unemployed that year and so I should adjust the amount remitted.

[22] The difficulty is that the applicant offers no evidence. He said he tried to get a T4 slip from Revenue Canada but none was disclosed to him. But all that shows is that Revenue Canada has no records for that year. That does not mean that he earned nothing. I note that in an affidavit sworn by the applicant on April 6, 2009, he states that he "worked as a stay at home dad to two children" from September 2003 to May 2006. But again that does not mean that he received no income from any source. Considering the all-encompassing requirements of s. 16 of the Guidelines, the applicant has an obligation to present cogent evidence as to his lack of income. Furthermore, he offers no explanation as to why he was a "stay at

home dad" instead of continuing with his employment. I do not fault his choice but that choice was made in the face of an existing support obligation. He at least should explain the reasonableness of his decision and why he could not make the support payments. In the absence of such evidence this claim fails.

[23] The applicant also seeks a variation due to undue hardship. There is no doubt that the applicant has large outstanding debts. He has a family relationship with a new partner and her two sons. But the Guidelines set out a very specific and rigid test for determining undue hardship. This is found in s. 12:

> 12. (1) A court may, on application, award an amount of support that is different from the amount determined under any sections 4 to 7, 10 or 11 where the court finds that a parent of the child in respect of whom the application is made, or the child in respect of whom the application is made, would otherwise suffer undue hardship.
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> (2) Circumstances that may cause a parent or child to suffer undue hardship include the following:
>
> (a) the parent has responsibility for an unusually high level of debts reasonably incurred
>
> (i) to support the parents and their children before the separation, if the parents lived together with the child, or
>
> (ii) to earn a living;
>
> (b) the parent has unusually high expenses in relation to exercising access to a child for whom the parents are both legally responsible;
>
> (c) the parent has a legal duty under a judgment, an order or a parental or separation agreement to support any person;
>
> (d) the parent has a legal duty to support a child, other than a child for whom the parents are both legally responsible, who is:

> (i) a minor, or
>
> (ii) the age of majority or over, but who is unable, by reason of illness, disability, pursuit of reasonable education or other cause, to withdraw from a parent's charge;
>
> (e) the parent has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.
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> (3) Notwithstanding a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent or child in respect of whom undue hardship is claimed would, after determining the amount of support under any of sections 4 to 7, 10 or 11, have a higher standard of living than the household of the other person with whom the standard of living is compared.
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> (4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule B.

[24] As can be seen, an applicant who seeks a reduction on grounds of undue hardship must satisfy a two-stage test. The first stage requires the applicant to prove specific facts establishing the undue hardship. Section 12(2) sets out a non-exhaustive list of circumstances that may (and I emphasize may, not must) give rise to such a claim. The second stage requires that an applicant show that his or her household income would have a lower standard of living than the household of the recipient parent should support not be reduced. And this requires an analysis, as stipulated in Schedule B of the Guidelines, referred to in s. 12(4), of the incomes of all members of each household.

[25] This is a very stringent test. The objectives of the Guidelines, as set out in s. 1, are "to establish a fair standard of support for children that ensures that they benefit from the financial means of each parent" and "to ensure consistent treatment of parents and children who are in similar circumstances". Such objectives would

be defeated if the courts apply a broad definition of "undue hardship" or if such applications become the norm rather than applying only to exceptional circumstances. That has been the consistent message of the courts across Canada since child support guidelines were enacted.

[26] For example, in *Barrie* v. *Barrie*, [1998] A.J. No. 460 (Q.B.), Perras J. stated (at para. 23):

> It is clear, in my view, that the wording of s.12 places the onus to establish undue hardship upon the person claiming such. It is also clear that this safety valve is also very narrow in scope as the legislation mandates the establishment of not just hardship but undue hardship. "Hardship" in various main stream dictionaries is defined as "difficult, painful suffering" while "undue" is generally defined as "excessive, disproportionate". Hence, in order for a claim of undue hardship to be made out, a claimant of such must satisfy the court that the difficulty, suffering or pain is excessive or disproportionate - - a very steep barrier under the circumstances.

[27] In *Jackson* v. *Holloway*, [1997] S.J. No. 691 (Q.B.), McIntyre J. considered the specific circumstances of a payor's obligation to a second family. He wrote (at para 19):

> Insofar as the respondent argues he cannot afford to pay the table amount of support given his new family unit this cannot constitute undue hardship without identifying and establishing a specific basis for a claim of undue hardship....A separated spouse with a child support obligation enters into a new family unit knowing he or she has an obligation and is expected to organize his of her affairs with due regard to that obligation. A general or generic reference to the overall expense of a new household will not give rise to a claim of undue hardship. To permit such a claim would in many instances mean that if the claimant could establish a lower standard of living then a claim to undue hardship must succeed. This is not the test.

[28] The issue of second families giving rise to a claim of hardship also arose in *Messier* v. *Baines*, [1997] S.J. No. 627 (Q.B.). After setting out the objectives of child support guidelines, Wright J. stated (at para. 10):

> These objectives will be defeated if courts too readily deviate from the presumptive rule set out in s.3 of the Guidelines absent compelling reasons for doing so. Second families, and the associated legal duty to support a child of that family, are not uncommon. The assumption of such new obligations may by necessity create a certain degree of economic hardship. That hardship is not however necessarily "undue". Similarly, the mere fact that an applicant's household standard of living is lower than that of the other spouse, due in part to the applicant's legal duty to another child, does not automatically create circumstances of undue hardship.

[29] It is evident from these authorities, and others, that the burden of establishing undue hardship is an onerous one. The hardship must be more than inconvenient or difficult. It must be excessive, exceptional, or disproportionate in the circumstances. Further, it is not sufficient that the payor parent has obligations to a new family, or to other children, or has a lower standard of living than the payee parent. The applicant must specifically identify the hardship that is said to be undue. A general claim regarding an inability to pay will not suffice. This point was made by the British Columbia Court of Appeal decision in *Van Gool* v. *Van Gool* (1998), 166 D.L.R. (4th) 528 (at para. 51):

> The onus is on the party applying under [s.12] to establish undue hardship; it will not be presumed simply because the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.

[30] In the present case the applicant has led no cogent evidence to even meet the threshold test for undue hardship. I know he has significant debts; I realize he has current family obligations; but, I also know that he is employed. What I do not know, and what the applicant has failed to provide, are details as to his household's total income and expenses. There is no evidence as to what it costs the applicant and his family to live. There is no evidence to explain why he has consistently not made the support payments he knew for years he had to make. Again, this seems

to me to be more a matter of him making choices that suit his circumstances and not those that are required by existing court orders. Certainly there was no evidence presented as to why paying the current modest amount of child support would create an undue hardship rather than a mere inconvenience.

[31] Finally, I have not overlooked the fact that the applicant's son turned 18 on August 14, 2009 (18 being the age of majority in Alberta). Section 4(2) of the Guidelines provides that for a child who has attained the age of majority but, according to s.57 of the *Children's Law Act*, is unable by reason of, among other things, pursuit of reasonable education to withdraw from a parent's charge, the amount of support is either (a) the amount determined by the Guidelines as if the child were a minor, or (b) if the court considers that approach to be inappropriate, the amount that the court considers appropriate having regard to the condition, means, needs and other circumstances of the child and the ability of each parent to contribute to the support of the child.

[32] In this case I have no direct evidence of the factors necessary to make a determination under (b) above. I have some evidence, from the affidavit material filed on the confirmation proceedings in Alberta in September 2009, that the son is still in his mother's care; that he was still in high school at that time; and, that he was expecting to go to university this fall. There is also evidence that the respondent does not work full-time due to health problems and that her husband was recently unemployed for a lengthy period of time. The applicant has offered no contradictory evidence. Based on the meagre evidence before me, I cannot say that the guideline amount is inappropriate.

[33] For these reasons, the application to vary the support order is dismissed. In the circumstances, there will be no order as to costs.

[34] The stay of enforcement proceedings is hereby vacated.

[35] I ask counsel for the Administrator of Maintenance Enforcement to prepare the formal order for my review. There is no need to obtain the applicant's approval as to form and content. I also ask counsel to forward a copy of these reasons to the respondent at her address on file.

J.Z. Vertes
J.S.C.

Dated this 23rd day of August 2010.

To: Mr. Mark Bogan (Applicant)

Trisha Soonias
Counsel for the Administrator of
Maintenance Enforcement

(No one appeared for the Respondent)

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