K (JW) v K(KC), 2019 NWTSC 54

Date: 2019 12 09
Docket: S-1-FM-2019-000 064

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *Divorce Act*, RSC 1985, c 3 (2nd Supp)

BETWEEN:

K (JW)

Applicant

-and-

K (KC)

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application to confirm a provisional order from the Supreme Court of Nova Scotia, varying child support, prospectively and retroactively, under the interjurisdictional variation provisions found in ss. 18 and 19 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp).

[2] The parties married in 2000 and separated in 2013. They executed a separation agreement in 2014. A divorce judgment and corollary relief order were issued in Nova Scotia in April of 2015.

[3] The parties have one child. She is currently16 years old.

[4] The corollary relief order granted JW specified access. However, KC moved to Yellowknife shortly afterward, in June of 2015, and the child moved with her. This is important to note because part of JW's application to reduce child support is based on a claim of undue hardship due to unusually high access costs. JW continues to live in Nova Scotia.

[5] The corollary relief order required that JW was to pay $350.00 per month in child support. This was expressly recognized as being below the amount specified under the *Federal Child Support Guidelines,* SOR/97-195, which was $464.51 per month at his income at the time in the amount of $55,176.00. The lower child support amount was based expressly on the "[…] understanding that [JW] will pay for any extracurricular activities, school supplies, and be responsible for transportation during access".

[6] JW's income has decreased since the parties divorced, although it is unclear when this happened. At the time of the provisional proceedings in Nova Scotia, which occurred in December of 2018, it was set at $44,043.00 annually.

[7] The divorce judgment and corollary relief order were made with JW's written consent. Neither party was represented by legal counsel in the previous proceedings. It appears that JW was represented in the provisional proceedings in Nova Scotia. KC remains unrepresented.

[8] Three days after JW consented to the divorce judgment and corollary relief order, the parties entered into a further agreement under which KC agreed that she would accept $300.00 on April 13, 2015 as the final child support payment from JW. They further agreed that they would each be responsible for their daughter's costs while she was in their respective care. The agreement was hand written and it does not appear that either party had legal advice before signing it.

[9] JW deposed that he did not make a claim to KC's pension because she was willing to forebear from seeking child support. I note, however, that the agreement is silent on the issue of any property claim. The only consideration mentioned was, as noted, that JW would not seek child support from KC for the time the child was in his care. JW relied on the agreement to argue that the arrears which accumulated under the corollary relief order, in the amount of approximately $13,000.00, should be eliminated.

[10] KC deposed that she fully intended to adhere to the agreement to forego child support. Upon moving to Yellowknife, however, their daughter experienced a change in circumstances. KC says the child went from being shy and introverted to becoming active in dance and competitive volleyball. The costs of those activities were much higher than KC had anticipated.

[11] JW also sought spousal support in this application. No spousal support was ordered in the provisional proceedings, nor could it have been. Paragraph 6 of the corollary relief order states "Neither party is required to pay spousal support to the other". Accordingly, there was no order for spousal support. I agree with the conclusion reached by the Saskatchewan Court of Queen's Bench in *Thom v Jamerson,* 1994 CarswellSask 35, 119 Sask R 76, 2 RFL (4th) 61, that ss. 18 and 19 of the *Divorce Act* expressly apply to variation proceedings and not to new applications.

[12] The provisional order was made on December 12, 2018. It ordered JW to pay ongoing support, beginning December 4, 2018, in the amount of $291.67 and to pay $75.00 per month in extraordinary expenses. The amount of $291.67 was calculated by taking the Guideline amount of $375.53 per month and subtracting the cost of air travel, which was set at $1000.00 per year, or approximately $83.00 per month. The total monthly payment is $366.53.

[13] In a separate, interim order, the Nova Scotia court suspended enforcement of arrears pending further order.

[14] Pursuant to s. 19(7) of the *Divorce Act*, this Court can confirm the provisional order as is, confirm it with variation or refuse to confirm it.

[15] For reasons set out below, the amount of ongoing support will be confirmed with variation. The ruling with respect to arrears will not be confirmed.

[16] Turning first to the arrears, the Nova Scotia court held they should be eliminated, for the following reasons:

> [KC], sitting on it for three years, before seeking retroactively to collect it in my view clearly meets the abuse of the system. Unless, of course, on her end of it, it appears that she has been during that period of time impecunious or of such poor financial circumstances that [P] has been disadvantaged by the fact that she has not been paying spousal support to [JW], and has kept her pension, which, maybe if she is not in the military anymore, she has cashed in. In either event, I am satisfied that it is in the best interest of the child of the marriage to forgive the arrears of child support [...].

[17] It is important to bear in mind that KC's evidence was not before the Supreme Court of Nova Scotia during the provisional proceedings. Now having the benefit of both parties' evidence, I conclude there are three reasons that it

would be inappropriate for the arrears to be reduced or eliminated through a retroactive variation or otherwise.

[18] First, KC was not "sitting on" or hoarding arrears. It is her evidence that she did not remain silent about child support and that asked JW on numerous occasions over the past three years to provide financial support. She also states that she told JW that if he did not provide financial support, she would file the corollary relief order with Maintenance Enforcement.

[19] Second, and regardless of how long it took KC to act on the arrears, the law is very clear that JW cannot rely on the parties March 30, 2015 agreement as a basis to forgive them. Unlike spousal support, which *can* be waived, it is well established that child support is the right of the child and it cannot be bartered away by either parent. *Richardson v Richardson*, 1 SCR 867 at 869; *DBS v SRG*, 2006 SCC 37 at para 104, [2006] 2 SCR 231.

[20] Third, there is nothing in the record to demonstrate that JW could not pay the support at the time, nor that he will be unable to pay the arrears in the future.

[21] With respect to ongoing child support, JW argued that the amount should be reduced by reason of unusually high access costs. Accepting this, the Nova Scotia court reduced his child support obligation by approximately $83.00 a month.

[22] The Guidelines create fairness and certainty for parents and children. They also recognize that in some cases, insisting on strict adherence to the Guideline amount may create undue hardship.

[23] Determining undue hardship is a two-step process. JW must first prove the specific facts that have created the hardship. A list of things that may amount to undue hardship is set out in the Guidelines and includes unusually high access costs. If he discharges that burden, he must move to the second step, which requires him to demonstrate his household will have a lower standard of living than KC's home unless the amount of support is reduced. *Mingo v Faulkner*, 2013 NWTSC 83; *Newman v Bogan*, 2010 NWTSC 69.

[24] The threshold to establish undue hardship is high. Mere economic difficulty in meeting the burden is insufficient to meet the threshold. "[A] claimant […] must satisfy the court that the difficulty, suffering or pain is excessive or disproportionate". *Barrie v Barrie*, [1998] ABQB 291 (CanLII) at para 23.

[25] JW says he has been flying his daughter to Nova Scotia from Yellowknife twice a year since 2015, at a cost of $300.00 to $500.00 each time. Appended to his affidavit are copies of plane ticket receipts from February 22, 2016 and July of 2016. The former is for approximately $555.00 and the latter was booked using a travel reward program.

[26] I accept that the cost of transportation for access is approximately $1,000.00 a year. In the circumstances, however, and having the benefit of both JW's and KC's evidence, I do not find it unusually high, nor can it be said that it is too much for JW to bear.

[27] In the confirmation proceedings before this Court, KC pointed out that the summary of monthly expenses that JW submitted in support of his application shows that he has a monthly surplus of $1,416.00. This amounts to far more than the yearly cost of airfare and does not include a claimed expense of $116.00 a month for access costs, which are not currently being incurred. Further, according to KC, JW has not exercised access for the past two years, so he has not, in fact, incurred the expense. This has not been explained in his evidence and, given the surplus shown in his evidence and the fact that he has paid no support since May of 2015, it cannot be inferred that JW has been prevented from exercising access by the cost of airfare. Finally, JW made no support payments after May of 2015.

[28] Considering all of the evidence, I am not satisfied that JW has met the threshold test. It is therefore unnecessary to move to the second step and compare standards of living.

[29] With respect to extraordinary expenses for competitive volleyball, the provisional order directs JW to pay $75.00 a month towards these. This conclusion was reached after consideration that JW would ordinarily be responsible for somewhere between 25% and 33% of this expenses. Given JW's limited income, however, the Nova Scotia court capped the amount at $75.00 per month, so long as the child remains in volleyball. I see no reason to disturb this conclusion.

[30] The provisional order is confirmed with variation, on the following terms:

a. Child support of $350.00 per month is confirmed as between May 1, 2015 and November 30, 2018;

b. Paragraph 1 of the provisional order is varied to read:

> Commencing December 4, 2018 and continuing until further order or until the child is no longer a child of the marriage, whichever occurs first, JW shall pay child support to KC, in the amount of $375.00 per month.

c. Paragraph 2 of the provisional order is confirmed.

K.M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
9th day of December, 2019

Counsel for the Designated Authority: Mark Ishack

The Respondent was self-represented

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MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE K.M. SHANER