NOVA SCOTIA COURT OF APPEAL
Citation: S.S. v. D.S., 2010 NSCA 74

Date: 20101013
Docket: CA 322845
Registry: Halifax

Between:

S. S.

Appellant

v.

D. S.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge(s):	Fichaud, Beveridge, Bryson, JJ.A.
Appeal Heard:	October 5, 2010, in Halifax, Nova Scotia
Held:	Appeal is dismissed without costs per reasons for judgment of Fichaud, J.A.; Beveridge and Bryson, JJ.A. concurring.
Counsel:	S. S., the appellant in person Coline Morrow, for the respondent

Reasons for judgment:

[1] Ms. S. and Mr. S. have two children, born in September, 2000 and July, 2008. The couple separated and are undergoing divorce. The children have resided primarily with their father since the summer of 2009. Mr. S. applied for interim child support, pending the corollary relief judgment in the divorce.

[2] On December 14, 2009, after a hearing, Justice Legere-Sers of the Supreme Court (Family Division) issued an oral ruling awarding interim child support of $1,033 monthly, payable by Ms. S. to Mr. S. beginning January 1, 2010. Ms. S. appeals that ruling and seeks to eliminate or reduce the interim child support.

[3] Ms. S. applies to add new evidence in the Court of Appeal. The principles governing the reception of fresh evidence on appeal are well established: see *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Murphy v. Wolkowicz*, 2005 NSCA 147; *Quigley v. Willmore*, 2008 NSCA 33; *R. v. West*, 2010 NSCA 16. There is no need to elaborate on these principles. The only item of fresh evidence to which Mr. S. objects is the transcript of an earlier proceeding before Justice Scanlan. Ms. S. submits that transcript to show that Justice Scanlan directed Mr. S. to pay child support. In my view, this transcript is irrelevant to the present appeal. As I will discuss, the issue of set off of any support from Mr. S. is for the upcoming trial in the Family Division, not for the interim application or this appeal from the interim application. I do not accept the transcript of fresh evidence.

[4] This is an appeal from an interlocutory ruling for interim child support in a divorce. Section 21 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) permits this court to hear an appeal from an interim ruling, and s. 21(5)(b) permits the court to order a new hearing to correct a substantial wrong or miscarriage of justice. Section 21(6) says that, except as otherwise provided, the appeal proceeds in accordance with the Court of Appeal's normal practice. Generally, the Court of Appeal overturns an interlocutory ruling only if the judge has applied a wrong principle of law or if a patent injustice would result from the decision under appeal.

[5] The judge referred to the evidence and found that Ms. S.'s income was at least $74,000 per annum. At that income level, the Child Support Guidelines prescribe support payments of $1,033 monthly for two children. So the judge ordered interim support of $1,033 monthly.

[6] The judge noted Ms. S.'s submission that Mr. S. had failed to make earlier support payments. The judge left that matter, along with "any claims made by Ms. S. or Mr. S. for any retroactive child support", for the final divorce hearing. Similarly the judge said that, if Mr. S.'s employability became an issue, that would be addressed at the final divorce hearing. The financial aspects of the divorce are to be tried later this month.

[7] There is no error in legal principle in the judge's interim ruling, and no patent injustice from its result.

[8] The Child Support Guidelines directed that the amount of the judge's award be paid by a non-custodial parent, who earns Ms. S.'s income. The income of the recipient custodial parent generally is not a factor. Ms. S. filed no affidavit for the hearing under appeal. There was insufficient evidence at this interim hearing for the judge to properly consider hardship. That matter was properly left for the final divorce hearing, as were the issues of retroactive support and the proof or set off of any unpaid support owing by Mr. S..

[9] Ms. S. declared bankruptcy in October 2009. She says this justifies a reduction in her support obligations. Section 68(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and the Superintendent of Bankruptcy's Directive No. 11R2 (Surplus Income) under s. 68(1), deduct non-discretionary payments such as child support, in the calculation of the bankrupt's surplus income that is payable to the trustee in bankruptcy. From the material in the record and Ms. S.’s acknowledgment in the appeal hearing, it appears that currently there is no amount from Ms. S.’s salary paid as surplus income to her trustee in bankruptcy. I do not see Ms. S.'s bankruptcy as justifying a recalculation of her child support. I note that, at the interim hearing, the judge was made aware of Ms. S.’s bankruptcy.

[10] The judge made no appealable error under this court's standard of review. I would dismiss the appeal. As Mr. S. has not requested costs, there should be none.

Fichaud, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.