C.A. No. 126458

NOVA SCOTIA COURT OF APPEAL
Cite as: Wray v. Wray, 1996 NSCA 173

Freeman, Hart and Pugsley, JJ.A.

BETWEEN:

CLARENCE STANLEY JOSEPH WRAY Greg B. Collins	)	for the Appellant
Appellant	)	
- and -	)	Respondent did not appear
BARBARA HILDA WRAY (a.k.a. MacKENZIE)	)	
Respondent	)	Appeal Heard: September 13, 1996
	)	Judgment Delivered: September 20, 1996

THE COURT: The appeal is dismissed without costs as per reasons for judgment of Hart, J.A.; Freeman and Pugsley, JJ.A., concurring.

HART, J.A.:

The parties to this appeal were married in Nova Scotia on June 3, 1978, and were divorced in Ontario on September 5, 1988. There were three children of the marriage; Winter Candace, born November 29, 1979; Amber Sophia, born March 20, 1981 and Robin Alexa, born October 14, 1982. In July 1988 the respondent gave birth to another child but the father was admittedly the man she subsequently married after her divorce.

The appellant was a member of the Armed Forces of Canada stationed in Nova Scotia until the summer of 1988 when he was transferred, with his family, to Petawawa, Ontario. After only a short stay there the parties separated and the wife returned to Nova Scotia with her children and has since remained in this Province.

The parties agreed to minutes of settlement of their divorce in 1988 and these terms were incorporated into the final decree of Divorce granted by Judge K.A. Flanigan in the Ontario Supreme Court. The wife was granted custody of the three children of the marriage and the husband agreed to pay $175.00 per month for the support of each child, making a total of $525.00, which would be reduced as each child reached a certain age or otherwise ceased to be entitled to support. The father was granted access to the children and there was no maintenance payable to the wife.

The appellant remarried shortly after the divorce and he and his new wife have children of their own.

In July 1994 the appellant was still paying support payments for Amber and Robin who were living with their mother. He decided to suspend payment, however, as he had come to believe that Robin was not his child but rather that

of the man the respondent subsequently married. He calculated that he had paid seven years of child support for Robin that he should not have been required to pay amounting to $14,700. He justifies his cancellation of Amber's support on the ground that his overpayment should be credited against the amount he would otherwise be paying for her maintenance in the future while she remains entitled to support. Accordingly nothing has been paid since 1994.

In order to obtain judicial approval of his unilateral alteratIon of the corollary relief provisions of his divorce decree he applied to the Ontario Court to obtain custody of the two older children and for a variation of the support provisions of the Order. That Court referred the matter to Nova Scotia since the mother and the two youngest children had always lived there.

The matter came on for hearing before Mr. Justice Nathanson in March 1996 based upon an application filed December 8th, 1995. By this time the appellant had abandoned his claim for custody of the children and sought only the following relief:

> "1. An Order to set aside or, in the alternative, to vary the Judgment of Judge K.A. Flanigan dated August 5, 1988, regarding ongoing child support and to terminate any further support for any of the children of the marriage, namely, Winter Candace Wray born November 29, 1979, Amber Sophia Wray born March 20, 1981 and Robin Alexa Wray born October 14, 1982;
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> 2. An Order rescinding, or alternatively varying, all arrears that have accrued under the August 5, 1988 Judgment;
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> 3. An Order requiring the Respondent, Robin Alexa Wray and the Applicant to undergo blood tests to determine whether or not the Applicant is indeed the father of Robin Alexa Wray;
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> 4. An Order suspending any further payments of

child support until the question of Robin Alexa Wray's paternity is established;

5. An Order directing the Respondent to repay any monies deemed owing to the Applicant for overpayment of support monies due to the fact that he is not the father of Robin Alexa Wray born October 14, 1982 and any interest owing on such monies;

6. Costs, including punitive costs for misleading the Courts and the Applicant as to the paternity of Robin Alexa Wray;

7. Such other relief as this Honourable Court deems just."

In support of his application the appellant filed an affidavit of himself and his present wife setting forth their reasoning for believing that Robin was not his child.

The respondent did not appear at the hearing but sent a letter to the judge explaining that all three children were living with her and they had been getting along without any support payments from her former husband. She saw no purpose in blood tests because the appellant had always treated Robin as his daughter until he suddenly decided to cancel support payments in 1994. She says that the appellant and his new wife can keep the money as she is not asking for any further support. She merely wants to have nothing further to do with the matter and get on with her life.

During the hearing before Nathanson J. counsel for the appellant stated that there was no power in Nova Scotia for the court to order blood tests without the consent of all parties. He argued that since that consent was not forthcoming the judge would have to rely upon the evidence in the affidavits and the inference to be drawn from the refusal to have blood tests in order to grant

the relief sought, that is, the cancellation of all past and future maintenance payments and arrears, based upon a finding that Robin was not the appellant's daughter.

In his discussion with counsel, the Chambers judge stated:

> ".....But it seems to me to be unfair and wrong to in effect illegitimatize a child on the basis that her mother didn't show up for a Chamber's Application. And even more, on the basis of what I consider to be weak, circumstantial and hearsay evidence. I'm not prepared to grant your Application in its present form or perhaps I should say based on the evidence and the form of the Affidavit that you've provided here.
> MR. COLLINS: Well My Lord, what about the issue of the request for the maintenance to cease which has been acknowledged and stated by the other side in her letter?
>
> . . . . .
>
> THE COURT: In her letter. Seems to me that I read something along those lines. As far as Mr. Wray requesting an Order rescinding the child support payments, Mr. Wray has already done that himself. He has never paid a dime. No. I'm not going to grant the Application. He is in arrears. He's in breach of an existing Court Order. I'm not going to order that at all. The most that I would be prepared to do would be to hold the file in abeyance pending either further evidence or steps on this Application. I don't deny the possibility that there may be something here."

The judge then took time for consideration and in his decision he stated:

> "THE COURT: In addition to the comments which I previously made earlier this morning, I've given further consideration to this matter. And particularly to your request that the Court draw an inference that the child is not the child of the Applicant. And I've come to the conclusion that I'm not prepared to go that far. I'm not prepared to draw that particular inference from the fact of the non-appearance of the mother at these proceedings. I think that to draw that inference would be stretching matters too far because there are other possible inferences that could be drawn. And in the light of the admittedly unsworn letter from the mother dated January 26th which is in the file, there is no reason to

go that far.

I appreciate that the mother does not explicitly state that the child is his child. But there are some hints in the letter that can be interpreted to the view that she is not acknowledging that the child is not his child.

In any event, I'm not prepared to draw the inference of illegitimacy of the child from the fact that the mother has failed to appear.

I believe it follows from that, that there is no basis on which I can therefore order a variation of the existing Judgment of Judge Flanigan in Ontario or rescind or vary any existing Order for the payment of child support for that particular child.

As you have already acknowledged, the Court has no authority to, under the Divorce Act, to Order that the child undergo blood tests to prove her paternity. I must therefore come to the conclusion that the Application should be refused but in light of the fact that the wife, the former wife, has not appeared, there will be no costs.

I make this decision without prejudice to the former husband's right to apply again in the event that there is substantially better evidence on which the Court might be willing to rely."

The appellant now appeals from this decision on the following grounds:

"1. That the learned trial Judge erred by not making the proper inferences from the Respondent's lack of consent to the request for blood tests.

2. That the learned trial Judge erred in not properly applying the best evidence rule in regard to the affidavit evidence and with request for blood tests.

3. That the learned trial Judge erred in making improper inferences from the Respondent's failure to appear for the interlocutory application.

4. That the learned trial Judge erred in not varying the corollary relief consented to between the parties.

5. That the learned trial Judge erred in the weight given to the affidavit evidence of the Applicant and the unsworn evidence of the Respondent.

6. Such other grounds as may appear in the transcript of the application."

The first three grounds of appeal dealing with the inferences that should be drawn from the refusal to take blood tests were argued together. It is well to have before us the argument presented to the Chambers judge when considering these grounds:

> "MR. COLLINS: Well My Lord, our position is that evaluated we suggest there is sufficient evidence here. We have made a request for blood tests, the blood tests have been refused for ... have not responded. The proper inference can be made from that. Weigh that with all the other information, the only information that one can provide in these matters. What we're left with is the likelihood that this is not the father. And without her responding, we have not information from her. She choose not to respond. She acknowledges that it's here. She chooses not to respond and not to deal with it. That shouldn't be held against my client because she won't, you know, she won't come in here. There is authority for the inference to be drawn when blood tests are requested.
> THE COURT: What is it? I see nothing. You're filed a Pre-Trial Brief. There are no cases cited in it. There's no authority. No reference to a Statute. If there's authority you haven't presented it.
> MR. COLLINS: I haven't provided written authority My Lord.
> THE COURT: Give it to me orally. I'll check.
> MR. COLLINS: My Lord, I don't have a case cite to refer to. I mean, I've been looking through all my notes here.
> THE COURT: There may very well be a way to do this. I have no idea off hand what it is. You may, for example, be able to get an order for an independent medical examination under the Civil Procedure Rules. That immediately comes to mind. But I'm not aware of any authority that I have to order a child to give a blood sample on an Application under the Divorce Act. Maybe an Application under some other Statute or some other Rule.
> MR. COLLINS: That's not requested My Lord now. When she failed to show, we know that there's nothing we can do without agreement on that matter.
> THE COURT: Yes.

> MR. COLLINS: So... and that was what I was trying to set out in my Pre-Trial Brief and also in my oral comments here that where she didn't show up, we acknowledge that there's no authority for that. We're not claiming there is My Lord.
> THE COURT: What are you claiming?
> MR. COLLINS: We're saying that we have requested it, she has not answered to it, therefore the inference can be drawn proper inference can be drawn that my client is not the father."

At the hearing before us counsel for the appellant properly admitted that there is a presumption of legitimacy when a child is born in wedlock and to rebut this presumption a strong preponderance of evidence is necessary and not merely a balance of probabilities.

Counsel then states that there are no Nova Scotia statutes governing blood tests for married couples.

Reference is then made to **C.(M.) v. C. (L.A.)** (1990), 24 R.F.L. (3d) 322 (B.C.C.A.) where Locke, J.A., speaking for the Court in a case where the Chambers judge had refused to make an order for a blood test, stated at pp. 328-330:

> "There were three arguments advanced by the respondent in the case at bar:
>
> (a) The evidence of non-paternity (of access to the wife by N.) was flimsy and the wife denied it.
>
> (b) There was no specific legislation authorizing this intrusive test, and considering its nature and far-reaching results surely the legislature would have done so.
>
> (c) In all the circumstances it might bastardize the child and thus could not be for its benefit.
>
> (d) The result of ordering this comparatively expensive test would be to open the floodgates to any recalcitrant father asked to pay maintenance and would make litigation more expensive.
>
> First, as to "flimsy" evidence what is presented on this

interlocutory application is far from conclusive. But the facts show a history, and apparently an opportunity, even though denied by the wife. The child was born after separation and has never been acknowledged by the appellant as his child. I am unable to say that this application is frivolous, or has no grounds.

Second, while Ontario found it advisable to pass a specific statute regarding blood tests (see *H. v. H.* (1979), 9 R.F.L. (2d) 216 (Ont. H.C.)) there the power to order is still discretionary. Our Court of Appeal has sanctioned the tests under R. 30(1), but the order is still discretionary; and in *Bauman v. Kovacs* this was made very clear. I do not agree a special statute is required.

Third, as to benefit to the child, I agree there is in this case risk of the proceedings not being in the child's monetary interest. However, to go further is to indulge in philosophical speculation. I agree with the House of Lords in *S. v. S.* and in particular with the statement of Lord Denning in the Court of Appeal at (sub nom. *S. v. McC.*) [1970] 1 W.L.R. 672, [1970] 1 All E.R. 1162 at 1165, quoted by Lord McDermott in his speech at p. 117:

> 'Finally, I must say that, over and above all the interests of the child, there is one overriding interest which must be considered. It is the interests of justice. Should it come to the crunch, then the interests of justice must take first place . . . In my opinion, when a court is asked to decide whether a child is legitimate or not, it should have before it the best evidence which is available. It should decide on all the evidence, and not on half of it. There is at hand in these days expert scientific evidence - by means of a blood test - which can in most cases resolve the issue conclusively. In the absence of strong reason to the contrary, a blood test should be made available. The interests of justice so require.'

There is no specific evidence to the contrary in this case.

I note *J. v. N.*, [1976] 5 W.W.R. 211, 28 R.F.L. 234, 69 D.L.R. (3d) 347, a decision of the Manitoba Court of Appeal. This was before the Charter. The court found a right of privacy not modified by any appropriate statutory enactment and dismissed the application. In British Columbia R. 30(1), as noted, has been held to apply. No Charter argument was raised before us.

The last argument related to opening the floodgates. I am not impressed by the argument and where the evidence can be conclusive, to deny it just cause because it is new or

> comparatively costly does not accord with the statement of Lord Denning. I have already mentioned that the child in this case was born after the separation of the parties and has not been acknowledged by the appellant father. No frivolous or vexatious applications would succeed and judges hearing these applications will, over a period of time, establish appropriate tests based upon the various circumstances which will arise so as to prevent any possibility of an improper flood of motions.
>
> I am sure that even the threat of a test will in many cases result in the collapse of a case. I am also sure most applications will be by the father, and I would think the chambers judge would make it a condition that he pay. I also point out that the test has been ordered in this province for some years, though perhaps not in the peculiar circumstances of this case. But the great safeguard must surely be the ultimate discretion of the judge.
>
> In my opinion, the chambers judge erred in law and a blood test should here be ordered. The pleadings show that the issue of paternity and thus support is squarely before the court. To deny the use of the best evidence to the court would be wrong unless overriding considerations show it to be to the child's detriment. This case is clearly distinguishable from *M. v. W.* where a stranger sought to disrupt a family unit. The importance of the status of legitimacy has diminished in this province: see Law and Equity Act, R.S.B.C. 1979, c. 224, s. 56. The issue is not custodial, but falls within ancillary jurisdiction of this court.
>
> For these reasons I think the chambers judge was wrong and I would allow the appeal."

This British Columbia case deals with the power of the court to order blood tests and since we have similar rules of court for medical examination in this Province, it may be that such test could be ordered here. In fact, Justice Nathanson invited the appellant to follow that route. Counsel for the appellant, however, refused and chose to rely solely on an inference that could be drawn from a refusal to submit.

To support his position, counsel refers to **H. v. H.** (1979), 9 R.F.L. (2d) 216 (Ont. S.C.) 231. In that case Walsh, J. made an order for blood tests under

an Ontario statute. He then discussed the required consents at p. 221:

> "It should be noted that the term 'child' as used in the Children's Law Reform Act is not subject to any age restriction. Accordingly, since the respondent has pleaded that there are five children of the marriage, as defined in the Divorce Act, none of the alleged children are excluded from this application under s. 10(1) from being a 'child' within the meaning of the Children's Law Reform Act. It must be noted, however, that the court cannot compel those children who are 16 years of age or more to submit to a blood test, nor can it compel the respondent to have any of the children who are under the age of 16 submit to blood tests. The children named in this order who are 16 years of age or more must first give their consent to any blood test. Similarly, the wife, on behalf of the children who are under 16 years of age, must consent on their behalf to any blood test, as, indeed, must the respondent herself consent to submitting to a blood test.
>
> However, in the event that such consents are not forthcoming, then, leave having been granted, the court hearing the divorce proceeding may draw such inferences as it thinks appropriate from any refusal to submit to a blood test."

It should be noted here that Mr. Justice Walsh was referring to refusal to take a test that had already been approved by the court when he suggested the inference that may be drawn from such refusal.

In the present appeal, the Court was not asked to order the tests just to draw the inference. The Chambers judge did not have before him evidence upon which he was prepared to draw such inference and in my opinion his discretion was properly exercised not to do so. I would therefore reject the first three grounds of appeal.

The fourth ground of appeal relates to the Chambers judge's refusal to alter the support provisions of the decree even though the respondent had

said she no longer was seeking support payments.

The Chambers judge was faced with a situation where there had been a unilateral cessation of child support for a period of more than two years. There was no evidence before him of any change in the circumstances of the children from the time of Judge Flanigan's order. In my opinion he would not have been justified in altering that order in these circumstances.

I would therefore reject this ground of appeal.

The fifth and last ground of appeal has been withdrawn and I would, therefore, dismiss the appeal without costs.

Hart, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.

C.A.. No. 126458

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CLARENCE STANLEY JOSEPH WRAY		
	Appellant	
- and -		REASONS FOR JUDGMENT BY:
BARBARA HILDA WRAY (a.k.a. MacKENZIE)		
		HART, J.A.
	Respondent	