NOVA SCOTIA COURT OF APPEAL

Citation: *Westhaver v. Swinemar*, 2017 NSCA 16

Date: 20170209
Docket: CA 452825
Registry: Halifax

Between:

Paul Arthur Westhaver

Appellant

v.

Dawn Marie Swinemar

Respondent

Judges: Farrar, Hamilton and Van den Eynden, JJ.A.

Appeal Heard: January 30, 2017, in Halifax, Nova Scotia

Held: Appeal dismissed with costs to the respondent in the amount of $2,000 (including disbursements) payable directly to Nova Scotia Legal Aid per reasons for judgment of Farrar, J.A.; Hamilton and Van den Eynden, JJ.A. concurring.

Counsel: Appellant in person
Ashlea Richard, for the respondent

Reasons for judgment:

[1] The appellant, Paul Westhaver, and the respondent, Dawn Marie Swinemar, were in a relationship starting in 2010, and ending in October, 2013. They have a 5-year-old daughter together.

[2] They entered into a consent order on March 28, 2014, agreeing, among other things, that Mr. Westhaver's income was $90,069 for the relevant provisions of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 (*MCA*) and *Child Maintenance Guidelines* (the *Guidelines*), N.S. Reg. 59/98, as amended, N.S. Reg. 29/2007. Mr. Westhaver has been employed with Nova Scotia Power throughout the parties' relationship and to the present.

[3] The March 2014 Consent Order also set out the parenting arrangements between the parties, including the transportation of their daughter, stating:

> Paul Arthur Westhaver shall be responsible for all transportation of Payton Nichole Westhaver to and from his parenting times and shall pick the child up from the daycare provider on his Friday and return her to the care of her mother on Sunday. All Transitions, other than those from daycare, shall take place at the Oak Island Inn parking lot at Western Shore.

[4] On May 5, 2015, the appellant filed an application to vary the March, 2014 Order. On June 11, 2015, Ms. Swinemar filed a response to the variation application which included her own variation request, centered on the parenting schedule and child support (including child care expenses).

[5] Mr. Westhaver also gave verbal notice that he intended to make an "undue hardship" argument under s. 10 of the *Guidelines*.

[6] The matter was heard on January 27, 2016, by Judge William Dyer in Bridgewater. By decision dated April 11, 2016, and Order dated June 3, 2016, the application judge dismissed Mr. Westhaver's applications. He allowed Ms. Swinemar's variation on the basis that her income had decreased and her child care expenses had increased.

[7] The application judge found that Mr. Westhaver's 2015 income was $90,100 for *Guideline* purposes (which was almost identical to the amount Mr. Westhaver agreed to in the 2014 Order). This resulted in child maintenance of $759 per month (the same amount as the March 28, 2014 consent order). The application judge also fixed Mr. Westhaver's proportion of special or extraordinary expenses

at $283 per month. Finally, he made some minor changes to the parenting schedule.

[8] Mr. Westhaver was self-represented below and is self-represented on this appeal. He seeks from this Court, essentially, the same relief that he sought before the application judge.

[9] On October 13, 2016, Mr. Westhaver filed a motion and affidavit to introduce fresh evidence on this appeal. In response, Ms. Swinemar filed her own fresh evidence application. She sought to introduce an expert accounting opinion if the fresh evidence of Mr. Westhaver were to be accepted.

[10] For the reasons that follow, I would dismiss both fresh evidence motions. I would also dismiss the appeal with costs to Ms. Swinemar in the amount of $2,000 to be paid directly to Nova Scotia Legal Aid.

Issues

[11] Although not clearly identified in his Notice of Appeal or written submissions, in argument Mr. Westhaver identified a number of reasons why he should be granted relief, including:

1. the application judge erred in the calculation of his income for 2015 by taking into consideration workers' compensation benefits he received in that year;
2. the expenses he incurs in exercising his parenting time with his daughter are prohibitively high;
3. since the hearing before Judge Dyer his daughter has been diagnosed with Type 1 diabetes which has caused him to incur greater expenses which should be taken into account in determining his support obligations.

[12] Unfortunately, Mr. Westhaver fundamentally misunderstands the nature of an appeal. As I will explain, there are three issues that arise on the record before us. They are – whether the application judge erred:

1. in finding that Mr. Westhaver had not established a material change in circumstances that would justify a change to the order issued on March 28, 2014;
2. in allowing Ms. Swinemar's variation application; and
3. in finding Mr. Westhaver had not established undue hardship.

[13] Before turning to the standard of review and the issues, I will address Mr. Westhaver's fresh evidence application.

Fresh Evidence Application

[14] Mr. Westhaver's attempt to introduce fresh evidence illustrates his misunderstanding of the role of an appellate court. An appeal is not a retrial for an unsatisfied party to attempt to relitigate the issues or to introduce new issues that were not before the application judge (see *Children's Aid Society of Cape Breton-Victoria v. A.M.*, 2005 NSCA 58, ¶26). Through his application to introduce fresh evidence and his submissions, Mr. Westhaver is asking us to hear his application anew and come to a different conclusion. That is not our role.

[15] The test to introduce fresh evidence at a court of appeal is well-settled. *R. v. Palmer*, [1980] 1 S.C.R. 759 sets out the following principles:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[16] The evidence sought to be introduced by Mr. Westhaver does not come even close to meeting the criteria set out in *Palmer*.

[17] To illustrate by way of examples (and this is not an exhaustive list), he seeks to introduce:

(a) evidence which was available at the time of trial but was not introduced;

(b) receipts for gas and other expenses he has with respect to the exercise of his parenting time with his daughter;

(c) medical records of his daughter relating to her diabetes diagnosis, which was made post-January 27, 2016;

(d) information about his income after January, 2016;

(e) correspondence from his accountant and other documentation which was prepared after the application on January 27, 2016.

[18] In my view, none of the evidence sought to be introduced is fresh evidence as contemplated by *Palmer*. All of the evidence either post-dates the application below or could have been adduced at trial.

[19] It may be that some of what Mr. Westhaver seeks to introduce on appeal would be appropriate for a variation application. For example, the evidence of his daughter's diabetes diagnosis may be relevant to his maintenance issues. However, that would be for the judge on the variation application to determine.

[20] I have no hesitation in concluding the proposed fresh evidence is not properly admissible. I would dismiss the fresh evidence motion.

[21] In light of the dismissal of Mr. Westhaver's fresh evidence motion, it is not necessary for me to address Ms. Swinemar's request to introduce fresh evidence as it was contingent upon Mr. Westhaver's evidence being admitted.

Standard of Review

[22] This Court has consistently stressed the need to show deference to application judges in family law matters. In the absence of some error of law, misapprehension of the evidence or an award that is so clearly wrong on the facts, we will not intervene. Judges must be given considerable deference by appellate courts when their decisions are reviewed (*Hickey v. Hickey*, [1999] 2 S.C.R. 518, ¶10-12).

[23] All of the issues for determination by the application judge in this case must be given deference. To warrant intervention I would have to be satisfied that he made a material error in reaching his conclusions.

Issue #1 Did the application judge err in determining that Mr. Westhaver had not shown a material change in circumstance since the Order of March 28, 2014?

[24] Mr. Westhaver's argument focused on the application judge's treatment of the income he received from workers' compensation. The parties agree that Mr. Westhaver's income for 2014 was approximately $78,200.00 of which $13,211.26 was from workers' compensation and for 2015 it was $78,637.36 of which

$31,800.24 came from workers' compensation. The parties also agreed that income received from workers' compensation is not taxable. Where they part ways is whether the non-table income received from workers' compensation increases Mr. Westhaver's income for the purposes of the *Guidelines*.

[25] The application judge did not gross up the workers' compensation benefits for income tax as he could have done under the *Guidelines* which provide:

> **Imputing Income**
>
> 19(1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstance include the following:
>
> …
>
> (b) The parent is exempt from paying federal or provincial income tax;

[26] The rationale for grossing up non-taxable income is quite simple – the *Guidelines* are based on income before taxes, i.e., gross income. Mr. Westhaver's gross income in the March 28, 2014, consent order was approximately $91,000. In 2015, Mr. Westhaver's income, at first glance, appears to drop to $78,200. However, that includes approximately $31,800 of non-taxable income. In order to accurately compare Mr. Westhaver's income in 2015 to the amount he agreed to in 2014, it was necessary to gross it up for income tax purposes.

[27] The application judge did not do an income tax gross-up calculation. Rather, relying on the incomplete financial information provided to him by Mr. Westhaver, he simply added what he thought Mr. Westhaver had received from workers' compensation to the amount shown on Mr. Westhaver's pay statement.

[28] In his decision, the application judge says:

> Turning to 2015, a pay statement submitted by the father shows gross income of approximately $78,200. But, I find that does not include approximately $13,200 more he received as workers' compensation benefits. Accordingly, I find the father's 2015 income is unlikely to be much different than it was in 2014 – in the range of $90,100 - $91,400. Putting the best light on his position, I am prepared to impute the lower income figure to him. This, in turn, sustains my finding that there was no significant change in 2014 for **Guidelines'** purposes. And, looking ahead, with his return to full-time employment, I find there is no credible evidence that his 2016 gross income will be any less.

[29] The application judge actually makes two errors in this statement. First, the workers' compensation benefits are included in the $78,200. Secondly, he is

mistaken that the amount Mr. Westhaver received from workers' compensation in 2015 was approximately $13,200. As noted above, Mr. Westhaver actually received non-taxable workers' compensation benefits in the amount of $31,800 in 2015.

[30] Although the application judge may have been mistaken in determining that the $78,200 did not include $13,200 in workers' compensation benefits, that error is not material and is of no consequence. I say this for two reasons:

1. If the non-taxable workers' compensation benefits were grossed up for income tax purposes, Mr. Westhaver's income would exceed $90,100 which is the amount the application judge set for his income for 2015. The calculation is relatively easy to do. (It is outlined in Family Law Practice Tips, Issue No. 11). If the application judge had performed the calculation he would have seen that Mr. Westhaver's income, for *Guideline* purposes, after gross-up would be approximately $16,000 more than $78,200, or $94,000; and
2. Perhaps more importantly, the application judge's conclusion that there had been no material change in Mr. Westhaver's income does not rest solely on this math. He also relies on the failure by Mr. Westhaver to show there had been a material change. This is clear from the following passage in his decision:

> Leaving everything else aside, simply put, I find there is no foundation in the evidence for the father's position that his line 150 income has decreased since the last order to sustain his downward variation requests. If anything, the historical record is that his income has been under-stated; and the evidence is that his current and foreseeable Line 150 income will remain the same, or may be higher.

(Emphasis added)

[31] The application judge was not satisfied that Mr. Westhaver had shown that there had been a reduction in his income. To the contrary, for *Guideline* purposes, his income had increased. For this reason he dismissed this aspect of the application saying:

> Under the **Guidelines**, a change in the payor's income may constitute a change for the purposes of section 37 of the **MCA**. As will be apparent from my fact findings, there has been no material change in the father's income since the last order; and no measurable change is foreseen. On that basis, his application to

> reduce his basic child support obligations should be dismissed, subject to the section 10 analysis.

(The Section 10 analysis referred to by the application judge is the undue hardship argument which I address below).

[32] I am satisfied that Judge Dyer did not commit any error when he concluded that Mr. Westhaver had failed to establish a material change in his income. His conclusion is amply supported by the evidence.

Issue #2 Did the application judge err in allowing Ms. Swinemar's variation application?

[33] The application judge then turned his mind to Ms. Swinemar's variation application which centered on the parenting schedule and child support (including child care expenses). With respect to this application, the mother was suggesting some relatively minor changes to the parenting schedule. She was also seeking an increase in the amounts payable for maintenance and child care expenses as a result of a reduction in her income and an increase in child care expenses. The application judge, on the evidence, was satisfied that the changes in these circumstances were not trifling, insignificant or temporal. As a result, he could review all of the circumstances to determine what was in the best interests of the child. He held:

> If on the evidence there is a finding from either perspective that there have been changes in the circumstances which are not trifling, insignificant or temporal, the Court may review all the prevailing circumstances and order the changes, if any, required in the child's best interests. I am prepared to make that determination. And in any case, there is common ground where some changes can and should be made.

(Emphasis added)

[34] He went on to order what he called "modest but constructive proposals to the parenting schedule". It does not appear from the record that Mr. Westhaver opposed those changes.

[35] He further concluded that it was necessary to adjust Mr. Westhaver's contribution to the child care expenses as they had increased. He determined that Mr. Westhaver's proportionate share would be 80% of those expenses or $283 monthly. Finally, based on the *Guidelines*, and his finding that Mr. Westhaver's income for 2015 was $90,100, he determined child maintenance to be $759 per

month. His determinations on these issues are amply supported by the record as are his modest changes to the parenting schedule provisions of the order.

[36] Once again, I am satisfied the application judge did not commit any error in his determination of these issues.

Issue #3 Did the application judge err in determining Mr. Westhaver had not established undue hardship?

[37] The application judge found that Mr. Westhaver had not shown that he was suffering from undue hardship under Section 10 of the *Guidelines*, which provides:

> **Undue hardship**
>
> 10 (1) On the application of a parent, a court may award an amount of child maintenance that is different from the amount determined under any of Sections 3 to 5, 8 or 9 if the court finds that the parent making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.
>
> **Circumstances that may cause undue hardship**
>
> **(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 to maintain the parents and their children prior to the separation, where the parents cohabited, or to earn a living;
>
> (b) the parent has unusually high expenses in relation to exercising access to a child;
>
> (c) the parent has a legal duty under a judgment, order or written separation agreement to maintain any person;
>
> (d) the parent has a legal duty to maintain a child, other than a child to whom the order relates, who is
>
> (i) under the age of majority, or
>
> (ii) the age of majority or over but is a dependent child within the meaning of clause 2(c) of the Act; and
>
> (e) the parent has a legal duty to maintain any person who is unable to obtain the necessaries of life due to an illness or disability, including a dependent parent within the meaning of clause 2(d) of the Act.

[38] It appears that Mr. Westhaver was relying on s. 10(2)(a) and (b) in making his application. His argument, which he made in writing to the trial judge, is as follows:

> I am claiming undue hardship for the reason being that Dawn broke up with me and kicked me out and I had all kinds of debt which she knew about. I ended up paying her 1000 a month for child support and daycare expenses, so I fell behind in all my other bills leaving me with debt that kept piling up and no way to get pay this (sic).

[39] Mr. Westhaver also argued that he was suffering hardship as a result of his parenting-related expenses. He wrote:

> In the meanwhile, I have all the travelling expenses to and from to get my daughter on top of the child support and daycare expenses. This does not include the expenses while she is in my care. The expenses I have on top of all this is food, milk, plus the cost of any activities that I would be doing with Payton. For example, taking her to visit family, bowling, eating out for a treat, beaches, clothing, going to the park and the list goes on.

[40] Finally, Mr. Westhaver argued that his failed business ventures related to the debt which Ms. Swinemar put him in, saying:

> This led me to getting into business with a silent partner to help me get out of this exceptional debt that Ms. Swinemar put me in, then everything went out of control and downhill with my silent partner, so I lost it all and this is why I cannot afford my own lawyer.

[41] The application judge soundly rejected Mr. Westhaver's claim for undue hardship for a number of reasons which I will summarize:

1. Most, if not all, of the arguments being made by Mr. Westerhaver for undue hardship were in play at the time of the March, 2014 Consent Order. At the time of the Consent Order, Mr. Westhaver was represented by a solicitor and there were no representations to the Court that his finances were precarious;
2. Although he broadly asserted that his parenting related expenses were approximately $100 per month, he provided no evidence to support this;
3. Mr. Westerhaver's assertions that Ms. Swinemar was somehow responsible for some, if not most of his debt, was not supported by any reliable evidence nor were any of the debts connected to child support or to help Ms. Swinemar earn a living;
4. Mr. Westhaver continues to smoke cigarettes at a monthly expense of approximately $400.

5. His claim for undue hardship was a "feeble attempt to shift blame and to rationalize his own poor lifestyle and business decisions".

[42] Mr. Westhaver makes the same arguments before us as he made to Judge Dyer with respect to his undue hardship claim. In addition, he wishes us to take into account his daughter's diabetes in considering this aspect of his appeal. As I explained earlier, that evidence is not properly admissible at this level and we cannot consider it.

[43] What I can do, and what I have done, is to consider the evidence and submissions that were before Judge Dyer to determine whether his decision that Mr. Westhaver did not suffer undue hardship illustrated a material error. I am satisfied that it does not.

[44] There is no basis for this Court to interfere with the application judge's decision that Mr. Westhaver had not established undue hardship.

Conclusion

[45] I would dismiss the appeal with costs to Ms. Swinemar in the amount of $2,000 (including disbursements) payable directly to Nova Scotia Legal Aid.

Farrar, J.A.

Concurred in:
Hamilton, J.A.
Van den Eynden, J.A.