SUPREME COURT OF NOVA SCOTIA
Citation: Fraser v. Tighe, 2011 NSSC 511

Date: 20120315
Docket: SFPAMCA 066765
Registry: Halifax

Between:

Tabitha Kerry Fraser

Applicant

and

Myles Sheldon Tighe

Respondent

Judge:	Associate Chief Justice Lawrence I. O'Neil
Date of Hearing:	August 12, 2011
Date of Oral Decision:	August 12, 2011
Counsel:	Tracey Sturmy, Counsel for the Applicant Myles Tighe, Self Represented (Absent)

By the Court : **(orally)**

Introduction

[1] The application of Ms. Fraser was filed October 7, 2009, under the provisions of the *Maintenance and Custody Act*. R.S.N.S., c.160. It pertains to the parties' child born July 13, 1999.

[2] Ms. Fraser seeks an order granting her sole custody of the child; limiting Mr. Tighe's access to that of supervised access; ongoing child support and she seeks retroactive child support to 2006.

[3] As a preliminary matter, the Court is required to rule whether it has jurisdiction to entertain the application. That issue arises because Mr. Tighe lives in Alberta. Although the Court's jurisdiction on the issue of custody and access is clear, the Court's jurisdiction on the issue of child support is less clear. The Court notes that, although the running file shows that the matter has proceeded or been forwarded to Alberta, under the provisions of the *Interjurisdictional Support Orders Act*, S.N.S. 2002 c.9, that process was delayed or at least put on hold pending this ruling. For purposes of this application, Ms. Sturmy on behalf of the Applicant, withdraws the application under the *Interjurisdictional Support Orders Act*.

[4] The file contains an affidavit of attempted service filed December 3, 2010, reflecting efforts to serve Mr. Tighe in Fort McMurray, Alberta in November of 2010.

[5] The file also contains two affidavits of Ms. Fraser. Those affidavits give the history of the parties' relationship and are evidence of domestic violence having been typical over the course of the parties' relationship. These affidavits also confirm, and I accept, that in recent years, threats of violence have been directed at Ms. Fraser by Mr. Tighe. In particular, when issues of child support have arisen Mr. Tighe has threatened Ms. Fraser. I am so satisfied on a balance of probabilities.

[6] I am also satisfied, on a balance of probabilities, that Mr. Tighe has decided to avoid dealing with the child support issue. He has communicated to Ms. Fraser that he does not wish to deal with the child support issue and he has concealed from Ms. Fraser his address, his location, his place of employment and the details of his income. I am satisfied that he has engaged in a course of conduct with the objective of not paying child support and he has decided to not take advantage of due process that would be available to him, both in this province and in Alberta to respond to her application.

[7] I am satisfied that he has been in receipt of significant earnings at various times over the last number of years. Ms. Fraser testified earlier this week that she

believed his income to be in excess of $100,000. She also reported that family members, told her that Mr. Tighe recently completed a period of detoxification, due to an alcohol problem. Clearly, he has not been working the full year and has probably been without an income for some of it. In any case, this is not a straightforward situation as far as his earnings go.

[8] Ms. Fraser has been in contact with members of Mr. Tighe's family and she has been in contact with Mr. Tighe himself in recent months. He called as recently as last Saturday, and she spoke with him. He is aware of these proceedings.

[9] In addition, Ms. Fraser sought and obtained an order for substituted service on Mr. Tighe. The motion for that order was made February 22, 2011. That order was issued March 15, 2011. Service was effected April 27, 2011, but the documents served at that time referenced a Court date of April 18, 2011, for a conference. I am not sure if there is any additional service on Mr. Tighe to give him notice of today's proceeding. In his conversation with Ms. Fraser last weekend, she reminded him of this Court date. He was not represented yesterday, or earlier this week, when we appeared.

[10] I am satisfied that he has demonstrated no interest in participating in this proceeding. In fact, he has an interest and has pursued a strategy of avoiding participation in this proceeding.

[11] The *Interjurisdictional Support Orders Act* is legislation that reads in its title, "An Act to facilitate the making, recognition, enforcement and variation of interjurisdictional support orders". Clearly, for Ms. Fraser, that statute does not facilitate the making of an order. The Alberta jurisdiction is required to serve Mr. Tighe, should the support matter be mandated to be dealt with under that legislation. The legislation itself says a person may apply. It does not say a person seeking support from a payor living in another jurisdiction in the country must apply under that legislation. Is Ms. Fraser in the unenviable position of having no recourse if she is required to use the procedures mandated by the *Interjurisdictional Support Orders Act*? Clearly, that was not the objective or desire of the legislature, when passing that legislation.

[12] So the policy basis of the ISO is to facilitate, not limit, the jurisdiction of Courts and the enforceability of support orders. That legislation is very valuable

because it gives potential payors the opportunity to appear in another jurisdiction and to make the case as to why a claim for support should not be made or should not be varied. In that respect, its provisions are analogous to the provisions of the *Divorce Act* dealing with provisional orders and confirmation orders but this is Provincial legislation.

[13] There are tremendous advantages or benefits to the process mandated by the *Interjurisdictional Support Orders Act*, should a party wish to, in good faith, respond to a support application. I make that observation because it reinforces the conclusion that Mr. Tighe has no interest in dealing with the merits of this application by Ms. Fraser. We are approaching the second anniversary of her having filed her application. It was filed October 7, 2009.

[14] I had the opportunity in *Pitts v. Noble* 2009 NSSC 325, to rule in a similar case. The issue in *Pitts v. Noble supra*, was not identical. In that case, Mr. Pitts lived in British Columbia; initiated an application in Nova Scotia under the *Maintenance and Custody Act* to deal with custody and access. Ms. Noble, lived here in Nova Scotia with the children. In response she sought to vary the support obligation at the same time. Mr. Pitts argued that she was mandated or precluded from doing so because she had to follow the procedure mandated by the *Interjurisdictional Support Orders Act* and Nova Scotia therefore lacked jurisdiction. I ruled that the applications could be heard together here in Nova Scotia.

[15] I apply the reasoning of that case here. I will not repeat all of my discussion of the law. I do reserve jurisdiction and in the event a written decision is required, to expand upon the law and the legal principles that I am applying and to further comment on the evidence.

[16] I incorporate by reference my discussion of common law principles, beginning at paragraph 28 of the *Pitts v. Nobel* decision *(supra).* I am satisfied that, quoting from paragraph 31, "Nova Scotia has a real and substantial connection to the parties; the matter being litigated," and there has been service on Mr. Tighe.

[17] I need not consider whether Mr. Tighe has attorned to the Nova Scotia jurisdiction. I am satisfied that he is not physically present. I am satisfied and I apply the analysis that governs when the Court must consider *forum conveniens*, to

determine if this is the appropriate forum. Mr. Tighe's birth family is here. His child is here; he lived here; he had a relationship with Ms. Fraser here; he continues to have extended family in Cape Breton. He has a substantial connection to this jurisdiction in both a personal way and a legal way, and the issue of custody and access is before the Court. That issue must be considered here. It has been a long time since the parties separated and there has been no custody or access order put in place, so this is a first time order.

[18] Ms. Fraser offered in her affidavit, evidence that one of the reasons she did not go to Court earlier, is that she feared Mr. Tighe. I am satisfied that was a genuine belief on her part. This is the *forum conveniens*. As I commented on in *Pitts v. Noble supra*, I believe that the support issue has a strong nexus to the custody and access issue, and this is an important consideration for the Court when determining the *forum conveniens*. The law in this country has evolved to the point where payors are accepting that they will pay child support based on the *Child Support Tables*. There is less and less litigation on the issue of child support because of the *Child Support Guidelines*. They were implemented to limit child support litigation; to provide some certainty for both payees and payors, and to eliminate unnecessary litigation. They have, to a large extent, succeeded in that respect. So there is a significant nexus between the issues of custody, access and child support.

[19] This is an appropriate case for the Court to rely on its *parens patriae* jurisdiction, to the extent that additional authority may be necessary to bring the support issue into this proceeding. I repeat that Ms. Fraser has no other option but to have the issue considered here. She cannot successfully invoke the *Interjurisdictional Support Orders Act*, and Mr. Tighe, clearly, does not want the benefit of that legislation.

[20] Having expressed these conclusions, I am also satisfied the Court must be very reluctant to look for an alternative to the *Interjurisdictional Support Orders Act*. The legislature adopted this legislation and put procedures in place to deal with support orders that affect persons in other jurisdictions. The Court should hesitate before resorting to common law principles and arguments about *forum conveniens* to justify accepting jurisdiction because that in itself, may open up another avenue or reason for litigation.

[21] In this case, the benefits of the *Interjurisdictional Support Orders Act* are not available to Ms. Fraser nor Mr. Tighe. In the case of *Pitts v Noble supra*, there was absolutely no reason the Court could not deal with the two applications at the same time, given that Mr. Pitts was proposing to be in Nova Scotia to deal with the custody and access issue. Mr. Tighe is not here to deal with any of the issues. What is particularly significant here is the history of domestic violence and the unavailability of the benefits of the provisions of the *Interjurisdictional Support Orders Act* to Ms. Fraser, because she cannot locate Mr. Tighe. The clear statement of Mr. Tighe as evidenced by his conduct and other communication is that he has no intention of subjecting himself to a proceeding, whether here or in Alberta; a proceeding which might result in his having to pay child support.

[22] There is not a lot of case law on how the *Interjurisdictional Support Orders Act* should apply. I note that the Alberta Court of Appeal in *A.G. v. L.S.*, 2006 ABCA 311, at paragraph 15, does make reference to the conflict of laws issue that I commented on earlier. The Court also makes reference to other cases; *Kasprzyk v Burks*, 2005 CanLII 2062, and the *Prichici v. Prichici* decision, 2005 CanLII 16626 (ON SC). Those citations are within the text of paragraph 15. I have considered *McLaren v. Brunner*, 2005 Carswell NWT 60, also reported at 2005 6 NWTSC 68.

[23] I am satisfied this Court has jurisdiction to deal with all issues. Mr. Tighe has not been involved with the child to any extent in many years, sole custody of the child should be granted to Ms. Fraser. I am not providing any access to Mr. Tighe, because of the evidence of domestic violence and the long period of time since meaningful contact with the child. I am concerned that to provide him with supervised access may provide him with what he perceives to be a legal weapon to use against Ms. Fraser. Access rights may be a guise that he could use to initiate contact or to visit her home or even to impose himself on the child. The child is 13 and if Mr. Tighe wishes to have parenting time or access with the child, it is open to him to make an appropriate application. The order should say, that his access will be as determined by further order of the Court. Not so much that it is being denied, I want the order to recognize that it will be as per further order of the Court.

[24] Finally, on the issue of child support, the order should say that ongoing child support will be determined on the basis of an imputed income of $65,000 and that Mr. Tighe is required to provide to Ms. Fraser his Income Tax Return for 2010.

He is to do so by October 15, 2011, and by March 30, 2012, he is to provide a copy of his Income Tax Return for 2011.

[25] The order should also say that, in the event that his income is more than $65,000 on an annual basis, he is to pay the appropriate child support based on the Alberta tables, and he is to begin doing so immediately.

[26] On the issue of retroactive child support, that matter is being put over for further consideration of the Court. It is hoped as a result of this order, Mr. Tighe's location and place of employment will be determined, that this order will get his attention and he will decide to deal with the issue of retroactive child support. Right now, we do not have much evidence that permits the Court to do that. I am not prepared to make a retroactive order given the scant evidence I have. That may change.

[27] The order should also say that Mr. Tighe is ordered to appear, personally or through counsel, or a representative, at a future date for the purposes of setting a date for a hearing of the application for retroactive child support, and that date will be in the spring, of 2012.

A.C.J.