

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: B. v. F., 2004 NSSF 26

Date: 20040322

Docket: 1201-38086

Registry: Halifax

Between:

B.E.F.

Petitioner/Respondent

v.

D.A.B.

Respondent/Applicant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 29, 2008.

Judge: The Honourable Justice Deborah Gass

Heard: February 24, 2004, in Halifax, Nova Scotia

Counsel: Shelley Hounsell, counsel for D.A.B.

By the Court:

[1]This is an application to terminate D.A.B.' support obligation for two children, K.D.[F.], born [in 1983] and K.E.[F.], born [in 1985]. The application is sought to be retroactive to July 16, 1993 when D.A.B. signed a consent for B.E.F.'s husband to adopt the children.

[2]The parties were married in 1982 and separated in 1985. They were divorced in 1987. The most recent court order is a varied corollary relief judgment dated March 2, 1993 providing that:

"The said D.A.B. shall pay maintenance for the children of the marriage as follows:

(1) \$25.00 per year, per child, while not in receipt of income from employment or unemployment insurance benefits, payable during the week of each child's birthday, directly to the said [B.E.F.].

(2) \$250.00 per month when in receipt of unemployment insurance benefits.

(3) \$400.00 per month when in receipt of income from employment.

The said D.A.B. shall file with Family Court and [B.E.F.], a statement of income from all sources, on or before the 30th day of May each year and shall notify Family Court and [B.E.F.] of any changes in employment status.

[3][In 1992] the respondent married D.F.. On July 16, 1993, D.A.B., the children's father, signed the consent to adoption thereby enabling D.F. to adopt the children. He understood that the adoption would be processed "shortly" and that his rights and obligations ceased upon signing the consent. It was not until several years later that he learned that the adoption was not completed until 1997.

[4]Maintenance Enforcement is collecting maintenance arrears which accumulated from July 1993 to September 1997 when maintenance ceased by virtue of the adoption. D.A.B. is eligible for employment insurance of \$846.00 per month (net) but is receiving \$432.00 per month (net) as the balance is being garnished.

[5]Maintenance enforcement records show arrears of \$3,206.95 as of February 5, 1996 and arrears of \$6,469.00 as of February 2004. Regular due amounts ceased as of September 1997.

[6]On February 3, 1993, judgment was entered for fixed arrears of \$4,000.00.

[7]B.E.F. seeks payment in full of the arrears of \$6,469.00 shown on the Maintenance Enforcement Program enforcement records. She also indicated in her evidence that she was seeking the balance of the arrears which were forgiven in 1993.

[8]B.E.F. and her husband separated on June 18, 2000. D.F. pays support for K.E.F. only. She is 18 and in university. B.E.F. is a school teacher.

[9]There is no dispute that D.A.B. signed the consent to adopt in July 1993, but that the adoption was not completed until 1997.

Old Arrears:

[10]In 1993, arrears were reduced and fixed in the amount of \$4,000.00. Judgment was entered in that amount. B.E.F. seeks enforcement of the balance of the old arrears.

[11]The court has no jurisdiction to revisit this earlier judgment.

[12]In *Smith v. Smith* [2002] N.S.J. No. 294 (N.S.C.A.), the parties were divorced in 1972. In 1976, the appellant obtained judgment for arrears of maintenance of \$12,240.00. In 1998, the appellant applied to have arrears fixed from 1972, to the date of judgment in 1996. The Court of Appeal upheld the decision of Chief Justice Kennedy in dismissing the application on the basis that he was without jurisdiction to revisit the fixing of arrears that had been ordered in 1976.

[13]This matter has already been adjudicated and thus is *res judicata*.

Arrears from July 1993 - September 1997:

[14]D.A.B. argues that he should not be obligated to pay child support after 1993 when he signed the consent to adopt. He relied on that consent, assuming the adoption would go forward. It was not until late 1996 that he learned it had not. He paid no support and he made no application to vary the order because he did not think he had any obligation that required variation. No enforcement proceedings were initiated by B.E.F. to collect maintenance after 1993. Arrears continued to accumulate, but no judgment for those arrears was ever pursued before the adoption.

[15]There is no question that the obligation ends with adoption. Does it also end when a consent to adopt has been signed? *The Children and Family Services Act* S.N.S. 1990 c.5 as amended provides grounds for dispensing with a person's consent to adopt where a person is divorced, is without custody and is not contributing to the support of the child. If this had been the case, it would be incongruous to then turn around and enforce the very support, the lack of which is relied upon to dispense with consent, especially support accumulating after the court dispensed with consent. Here the consent was given; it is equally as incongruous to then seek the continued enforcement of maintenance after the consent is given as it would be where consent is dispensed with. The very act of consenting is the giving up of all rights and obligations with respect to the children. This is consistent with the fact that the mother had remarried and her husband was fully in the parental role. D.A.B.'s relationship with the children had been limited at best, for some time.

[16]The facts in this case are very similar to those in *Wagstaff v. Wagstaff* [1981] N.S.J. No. 502 (N.S. Family Court), a decision of Daley, J. on March 19, 1981.

[17]Mr. Wagstaff was summonsed to show cause for non payment of child support pursuant to the *Divorce Act*. The parties were divorced in 1978. The mother remarried in 1980. Mr. Wagstaff stopped paying child support in September 1980. The child had been adopted by the mother's new husband but she was seeking enforcement of the maintenance up to the date of the adoption. The father argued that his signing of the consent to adopt was the relinquishing of his parental rights and obligations in that the stepfather was assuming those full parental responsibilities.

[18]Daley, J. said at paragraph 11 and 12:

11 The major procedure in the matter before the court, concerns the effect of the voluntary consent to adopt given by Mr. Wagstaff. If a court dispenses with the parent's consent under the *Children's Services Act*, Section 17, it is my view the parent has been denied any parental relationships with the child by court order and consequently, the effect of the order is to cancel any maintenance or other obligations the parent has at that time. It would appear to be against logic that, on one hand, the court could remove all rights of a parent to a child, given the child to another person, then in the absence of specific legislation require the parent to continue supporting the child. The silence of Section 17, on the ability of [*page 470] the court to order maintenance after consent has been dispensed with in my view clearly maintains the policy that, once consent is granted either by court order or voluntarily, the obligation to maintain the child is as a general rule, removed. I believe that this view is supported at least by legislative policy by Section 21(1)(b) *Children's Services Act*, which states:

21(1) If the county court is satisfied

(b) that every person whose consent is necessary and has not been dispensed with has given his consent freely, understanding its nature and effect and, in the case of a parent, understanding that its effect is to deprive him permanently of all parental rights;

the county court shall make an order granting the application to adopt.

12 While this section does not clearly state that the giving of a consent to adoption relieves the parent of all obligations and it could be interpreted to mean that the understanding of the deprivation of parental rights takes effect on the issuing of the adoption order, it is my view that Section 21(1)(b) entitles a parent who consents to the adoption of his child to believe he has given up permanently all parental rights and any obligations as well, by so consenting.

[19]The relevant provision of the current *Children and Family Services Act* is s. 78(1)(b) which sets out one of the pre-requisites to adoption:

(b) that every person whose consent is necessary and has not been dispensed with has given consent freely, understanding its nature and effect and, in the case of a parent, understanding that its effect is to deprive the parent permanently of all parental rights.

[20]It is clear that when D.A.B. signed the consent, he did so understanding the nature and effect of his consent, which was to deprive him permanently of all parental rights. The court in 1997 had to be satisfied that when it was given back in 1993, it was done so with this understanding.

[21]D.A.B. relied on this. Therefore I find his obligation to maintain the children ceased when he signed the consent to adopt. Thus, he has given an explanation for not paying support after July 1993. The obligation of child support is terminated as of July 1993 and any arrears thereafter are hereby cancelled.

Other Grounds:

[22]While it may not be necessary, I will consider whether or not the arrears from 1993 - 1997 should be forgiven on other grounds. While it appears that D.A.B. had income during the relevant time period, and a consequent ability to pay at that time, I must consider whether the arrears can reasonably be collected at this time.

[23]B.E.F. made no effort to collect the arrears during this time period. She remarried in 1992. By 1993 steps were being taken by her husband to adopt both children. The children's father had no role in their lives and he signed the consent. From then until the adoption occurred, there was no pursuit of maintenance and D.A.B. believed his obligation ended. He relied on his consent that was sought by the mother and her husband who intended to pursue adoption. He did not, by his actions, anticipate that arrears would accumulate. Therefore he has a lawful explanation for not paying support from 1993 to 1997.

[24]He is now on employment insurance benefits of \$864.00 per month. That is his sole income.

[25]His income has been under \$15,000.00 since 1998.

[26]Now when one child is an adult, the younger child is in university and receiving support from her adoptive father and the mother is separated from him, the arrears are being pursued.

[27]Therefore, in addition to having a lawful explanation for not paying support during the years 1993 - 1997, I also conclude he is not presently able to pay any

further towards arrears that accumulated and it is not reasonable to expect him to do so.

J.

DG/ng