SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Bell v. Bell, 2013 NSSC 330

Date: 2013-10-16
Docket: 1201-061879; SFH-D 053801
Registry: Halifax

Between:

Jill Ruth Bell

Petitioner

v.

Thomas James Bell

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: October 9, 2013

Counsel: William M. Leahey for Jill Gale
Colin M. Campbell for Thomas Bell
Megan E. Farquhar for the Director of Maintenance Enforcement (watching brief)

By the Court:

Introduction

[1] At issue in this case is the method by which Jill Gale may vary child support arrears.

[2] Jill Gale and Tom Bell are the divorced parents are four children. Ms. Gale pays child support to Mr. Bell based on section 8 of the *Federal Child Support Guidelines*, SOR/97-175 which addresses split parenting arrangements.

[3] Ms. Gale says the provisional procedure, provided by section 18 of the *Divorce Act*, R.S.C. 1985 (2nd Supp), c. 3 is too time-consuming, so she seeks an alternate process. She says such a process is provided by subsection 15(4) of the *Maintenance Enforcement Act*, S.N.S. 1994 – 95, c. 6.

[4] Mr. Bell argues that the *Maintenance Enforcement Act* does not allow a variation of Ms. Gale's arrears. He says that if Ms. Gale wants to vary the arrears, she must apply using the provisional process because he doesn't live in Nova Scotia, and he doesn't accept this court's jurisdiction.

Procedural history

[5] Ms. Gale began her quest in February 2012 when she applied to vary the parenting and child support provisions of a 2011 consent variation order and the couple's Corollary Relief Judgment. In August 2012 she filed a motion asking for an order directing the Director of the Maintenance Enforcement Program "to cease and desist from enforcement action" with respect to the 2011 consent variation order. This motion was pursuant to subsection 15(4) of the *Maintenance Enforcement Act*.

[6] Later in August 2012 she amended her motion to add reference to Civil Procedure Rule 59.40(4). That rule seeks my permission for Ms. Gale to initiate a motion after an application has been scheduled for hearing. Permission was required because a hearing date had been scheduled.

[7] There have been various adjournments. Settlement conferences in the fall of 2012 and the spring of 2013 were adjourned. The hearing, scheduled for the spring of 2013, was also adjourned when Mr. Bell's counsel became unavailable as a result of an emergency child protection matter.

[8] There was a pre-hearing conference in July 2013. I was uncertain that subsection 15(4) allowed more than a means to challenge the Director of Maintenance Enforcement's calculation of arrears. I asked the parties to address whether the subsection was also a means for determining the appropriate amount of support. A hearing was scheduled for argument about the effect of subsection 15(4). I directed Ms. Gale to provide notice of her claim to the Director. In my conference memorandum, I wrote:

> 5. . . . the parties will argue whether Ms. Gale can bring an application under subsection 15(4) of the *Maintenance Enforcement Act* (which argument shall address the issue of paramountcy and the method by which arrears are to be calculated). Ms. Gale shall serve the Director of Maintenance Enforcement with notice of this motion and a copy of this Conference Memorandum within seven days of the date of this Memorandum.

[9] Two weeks after the Memorandum was sent, Ms. Gale provided the Director with a copy of the Memorandum and her own affidavit. She did not provide copies of her motion or her amended motion to the Director and has not done so to this date. Instead, in September 2013, she filed a new motion and a new affidavit. Her new motion requested an order pursuant to subsection 15(4) "to calculate arrears". This Notice of Motion showed that the motion was made to Mr. Bell and to the Director. She served this new motion and new affidavit on the Director.

[10] Ms. Gale has two motions before me. One motion is for an order that the Director cease and desist enforcement action and the other is for an order calculating child support arrears. Each motion is pursuant to subsection 15(4) of the *Maintenance Enforcement Act*.

The prevailing order

[11] The order which contains the relevant child support provision is the 2011 consent variation order. Paragraph 6 states that Ms. Gale will pay Mr. Bell monthly child support of $521.18. Paragraph 7 says:

> Each year [the parties] will exchange Notice of Assessment and tax Returns on or before July 8th. Child support shall be adjusted effective July 8th of each year based on the parties Line 150 Taxable Income provided however that either [party] may apply to Court to review the child support if the Line 150 does not reflect the parties income or having regards to any other legal principle of child support.

The *Maintenance Enforcement Act*

[12] Section 15 of the *Maintenance Enforcement Act* deals with the Director's enforcement of arrears. It details when the Director may enforce arrears and when the Director may refuse to do so. It allows a recipient to enforce arrears when the Director won't and outlines the considerations I'm to have in deciding whether to grant a recipient's application to enforce arrears. Subsection 15(4) of the *Maintenance Enforcement Act* provides that "where the payor or recipient disputes the amount of the arrears, the payor or recipient may apply to the court for an order determining the amount of the arrears."

[13] Subsection 15(4) has been considered by all levels of Nova Scotian courts. In 2009, it was considered by the Court of Appeal in *Riding v. Nova Scotia (Attorney General)*, 2009 NSCA 82. In 2008, Dr. Riding applied for an order to quash the Director of Maintenance Enforcement's garnishment notice, a declaration that his spousal support obligation ceased when he retired and an order prohibiting Maintenance Enforcement Program officials from enforcing the spousal support provisions of his Corollary Relief Judgment. The parties to that application were Dr. Riding and the Attorney-General on behalf of the province. Dr. Riding's application was made as a discrete application between himself and the Attorney-General. It was not part of any other ongoing application and there was no application involving his former wife.

[14] The Corollary Relief Judgment stated that spousal support payments "shall cease" when Dr. Riding's income fell below "$80,000.00 per annum". Dr. Riding argued that upon his retirement, his income dropped below the rate of $80,000.00 per year and his obligation to pay support ended. The Director's position was that, regardless of Dr. Riding's retirement, his income for the year in which he retired exceeded $350,000.00 so his spousal support obligation continued until the end of that year. The parties disagreed about the interpretation of the phrase "$80,000.00 per annum".

[15] When Dr. Riding's application was heard, it was dismissed. At paragraph 17 in *Riding v. Nova Scotia (Attorney General)*, 2008 NSSC 287, these comments were made:

> The mandate of the Maintenance Enforcement Program is to enforce maintenance orders. [Dr. Riding] would not disagree with that. However, the Maintenance Enforcement Program is not a judicial body. It only enforces maintenance orders. It does not vary them and it does not or should not decide on the meaning of an order when that meaning depends on circumstances or variables that do not appear on the face of the maintenance order itself.

Dr. Riding was told he should apply to vary the Corollary Relief Judgment under the *Divorce Act*.

[16] On appeal, at paragraph 9 in *Riding v. Nova Scotia (Attorney General)*, 2009 NSCA 82, Justice Fichaud said that a person "who seeks merely to interpret, not vary, a support provision" doesn't need to apply to vary. His Lordship wrote at paragraph 12 that "an application under s. 15(4) normally would be appropriate, in a case such as this, to seek a judicial interpretation, without a variation, of a corollary relief judgment's support provision that the Director seeks to enforce."

[17] The exact point to be interpreted was whether the words "$80,000.00 per annum" meant "assessed on any three consecutive months of full-time employment" (Dr. Riding's interpretation) or assessed on a calendar year basis (the Attorney-General's interpretation).

[18] Dr. Riding's application wasn't pursuant to the *Maintenance Enforcement Act*. He had applied for prerogative remedies (an order quashing a garnishment notice and prohibiting

enforcement action), and a declaration. Rather than telling Dr. Riding to start a new application under subsection 15(4) of the *Maintenance Enforcement Act*, and creating additional cost for the parties, the Court of Appeal took the practical approach of interpreting the contested phrase.

[19] A decade earlier, Justice Hood considered subsection 15(4) in her decision in *Beaulieu v. Swinimer*, 1998 CanLII 1196 (NS SC). When the child support agreement was being registered at the Maintenance Enforcement Program, Ms. Beaulieu completed the registration package and said there were arrears of $11,250.00 owing. Mr. Swinimer disputed the arrears and applied to set aside the registration. Subsection 3(b) of the *Maintenance Enforcement Act* provides that registration may be set aside if the order was obtained by fraud or error, or if it wasn't final. Justice Hood dismissed Mr. Swinimer's claim because there was no suggestion the agreement was the result of fraud or an error and it was a final agreement. She said that where Mr. Swinimer was challenging the arrears, he could make an application under subsection 15(4) of the *Act*.

[20] From the Family Court, there is Chief Judge Comeau's decision in *K.M.H. v. M.R.N.*, 2001 NSFC 10. There, Mr. N challenged the calculation of child maintenance arrears. Mr. N said he gave cheques directly to Ms. H and her mother cashed the cheques for her. Mr. N produced copies of two cancelled cheques and said that he made the remainder of his child maintenance payments to Ms. H in cash. Mr. N's application was pursuant to section 37 of the *Family Maintenance Act* (now known as the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160) which says that where there's been a change in circumstances since the last order or variation order, the court may vary a maintenance order. Chief Judge Comeau identified subsection 15(4) of the *Maintenance Enforcement Act* and said that Mr. N's application should have been brought pursuant to it.

[21] In the latter two decisions, it's clear that subsection 15(4) is the statutory basis for challenging the amount of arrears the Director is collecting. The challenges don't argue about the amount of support stated in the order, but whether that amount has been paid. Justice Fichaud's decision makes clear that subsection 15(4) provides a statutory context for a person to dispute the calculation of arrears based on his or her interpretation of the order: Dr. Riding interpreted the Corollary Relief Judgment's words to mean that his spousal support obligation had ended and he owed no arrears. The Corollary Relief Order stated what was to happen (his support would end) and when it would happen (when his income fell below $80,000.00 per annum). Dr. Riding and the Attorney-General disagreed about the meaning of the phrase "per annum", but not what was to happen when Dr. Riding's income fell below $80,000.00 per annum.

[22] Taken together, the decisions show that applications under subsection 15(4) do not involve changing the order in any way. No words are added to or subtracted from the support order. As well, the parties to an application under subsection 15(4) are the person who disputes the arrears and, in some form, the Director of Maintenance Enforcement. The application is a discrete one, between these parties, though the other party to the support order has an interest in the outcome and may be required to give evidence. The application to challenge arrears doesn't come in the context of a larger proceeding.

Ms. Gale's position

[23] Ms. Gale says she's seeking to interpret the 2011 consent variation order, not to vary it.

[24] Ms. Gale doesn't point to any words or phrases in the order which require interpretation. She doesn't suggest that paragraph 7 is unclear in any way. She says the order provides "a specific formula in which the amount due and owing by way of the setoff formula is to be calculated for each calendar year." She says that with nothing more than each party's tax returns, child support can be calculated. These comments suggest the order is easily interpreted, not in need of interpretation.

[25] The result that Ms. Gale pursues is one which does re-write the order. If arrears are calculated, the amount of support stated in paragraph 6 changes.

[26] Ms. Gale asks that I apply the formula contained in paragraph 7 of the order. Because this formula has been specified and she's not asking that the formula be changed, I accept that paragraph 7 isn't being "varied". The clarity of paragraph 7 means it isn't being interpreted. What Ms. Gale is asking me to do is to apply paragraph 7 so as to calculate the amount of a new child support obligation.

[27] In response to my comment that the calculation will result in a variation of the amount of child support ordered in paragraph 6, Ms. Gale said that I am taking "an extremely strict and narrow view of variation". The formula in paragraph 7, referring to each parent's income shown at line 150 of his or her income tax return and adjusting the amount of child support, is the most basic formula for varying child support. That this formula is recited in an order does not mean that child support isn't being varied.

[28] In *Riding v. Nova Scotia (Attorney General)*, 2009 NSCA 82, when Justice Fichaud interpreted "$80,000.00 per annum" he wasn't applying the terms of the Corollary Relief Judgment or changing the Judgment, he was determining what those words meant. Depending on their meaning, Dr. Riding's obligation to pay spousal support would either terminate or continue according to the Judgment.

[29] Ms. Gale's circumstances are different from those of Dr. Riding. If I apply paragraph 7, then her obligation will change: she will no longer pay $521.18 each month to support her children. She will pay a different amount. This is a variation.

[30] Ms. Gale says that, "It is common practice for the Maintenance Enforcement Program to rely on information identified on the face of an Order but not actually contained in the Order for the purpose of determining the amount due and payable under the Order." This assertion is expressly rejected by the Director who says, "The Director does not have authority under the *Maintenance Enforcement Act*, or any other statute or law, to do a calculation of child support under the *Child Support Guidelines*."

[31] Subsection 15(4) says that where a support payor or support recipient disputes the amount of arrears, he or she may apply to have arrears determined. The decisions I've mentioned (*Riding v. Nova Scotia (Attorney General)*, 2009 NSCA 82, *Beaulieu v. Swinimer*, 1998 CanLII 1196 (NS SC) and *K.M.H. v. M.R.N.*, 2001 NSFC 10) provide examples of when this subsection applies. For example, the dispute may arise because a payor says payments have been made and not credited. The dispute may arise because arrears were misstated when the order was registered. The dispute may arise because of a difference in interpreting the order. None of these situations are Ms. Gale's.

[32] My analysis is supported by subsection 39(1) of the *Act* which states that orders enforced by the Director under the *Maintenance Enforcement Act* are varied under the *Maintenance and Custody Act* or the *Divorce Act*, whichever is applicable. A variation application does not stay the Director's enforcement proceedings or prevent further enforcement proceedings. Of course, if an order is varied, the Director will give effect to the variation. Subsections 39(5) to (7) specifically address variations of a Supreme Court order in the Family Court pursuant to the referee process in Civil Procedure Rule 35 of the *Nova Scotia Civil Procedure Rules (1972)*.

Conclusion

[33] Ms. Gale has two motions before me. They arise from her August 2012 amended motion and her September 2013 motion. I dismiss both.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia