

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Kermack v. Kermack, 2005NSSC51

Date: 20050308
Docket: S.AT. 018732
Registry: Antigonish

Between:

Donald Robert Kermack

Applicant (Petitioner)

v.

Lynn Marie Walker Kermack

Respondent (Respondent)

Judge: The Honourable Justice Glen G. McDougall

Heard: November 9, 2004 in Antigonish, Nova Scotia

**Final Written
Submissions:** January 14, 2005

Counsel: Maurice Smith, Q.C., counsel for the respondent

By the Court:

[1] This is an application under section 19 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supplement), as amended, to confirm a provisional order of the Superior Court of Justice of Ontario.

[2] On the 27th day of May, 2003, the Honourable Mr. Justice Belch heard an application brought on behalf of Donald Robert Kermack in which he sought:

1. An Order varying Paragraph 6 of the Divorce Judgement of the Honourable Mr. Justice O'Connell, dated April 30th, 1997 by terminating the amount of child support payable by the Applicant to the Respondent for Lincoln Kermack born June 25th, 1984.
2. An Order varying Paragraph 5 of the Provisional Order of the Honourable Madam Justice Benotto dated April 18th, 2000 (and confirmed by the Supreme Court of Nova Scotia) by directing the Director of the Family Responsibility Office to return any and all funds in the Director's possession to the Applicant Donald Kermack.
3. An Order rescinding the Support Order and related Support Deduction Order with respect to this matter as specified in Paragraphs 1 and 2 above.
4. An Order rescinding all child support arrears accrued to date pursuant to the Divorce Judgment of the Honourable Mr. Justice O'Connell, dated April 30th, 1997 and or the Provisional Order of the Honourable Madam Justice Benotto dated April 18th, 2000 (and confirmed by the Supreme Court of Nova Scotia).

5. An Order requiring the Director of the Family Responsibility Office to cease enforcement of the Support Order of the Honourable Mr. Justice O'Connell, dated April 30th, 1997 and or the Honourable Madam Justice Benotto dated April 18th, 2000 (and confirmed by the Supreme Court of Nova Scotia) and related Support Deduction Orders.
6. Any and such further relief as this Honourable Court may deem just; and
7. An Order for costs on a solicitor and client basis.

[3] Justice Belch rendered an oral decision based on the affidavits filed in support of the application and after hearing from counsel for the applicant along with counsel for the Director of the Family Responsibility Office, a division of the Ministry of the Attorney General.

[4] Justice Belch's order, which was not issued until the 4th day of December, 2003, provided for the following:

1. **THIS COURT ORDERS THAT** Paragraphs [sic] Paragraph 6 of the Divorce Judgment dated April 30th, 1997 of the Honourable

Mr. Justice O'Connell and Paragraph 5 of the Provisional Order of the Honourable Madam Justice Benotto dated Tuesday April 18th, 2000 are varied such that the Applicant's obligation to pay child support to the Respondent for the child Lincoln Kermack born June 25th, 1984 is terminated effective April 18th, 2003. This court finds that as early as August, 1999 Lincoln Kermack was no longer a child of the marriage for support purposes.

2. **THIS COURT ORDERS THAT** all child support arrears accrued pursuant to the original Divorce Judgment and Provisional Order are rescinded and arrears shall be fixed at \$0 as of April 18th, 2000.
3. **THIS COURT ORDERS THAT** the Respondent shall repay to the Applicant the sum of \$21,346.26 upon confirmation of this Provisional Order, together with interest from the date this Order is confirmed.
4. **THIS COURT ORDERS THAT** the respondent shall pay to the Applicant costs fixed in the amount of \$1,500.00 including disbursements and GST.

5. **THIS COURT ORDERS THAT** the Respondent's approval as to form and content with respect to a draft of this Provisional Order is dispensed with.
6. **THIS COURT ORDERS THAT** on a non-provisional basis, there shall be a stay of the Support Order and that enforcement of arrears shall be stayed pending the confirmation of this Provisional Order by the Supreme Court of Nova Scotia, or failing confirmation, until this Provisional Order has been dealt with.

THIS ORDER bears interest at the rate of 4.0 per cent per year on any payments or payments in respect of which there is a default from the date of default.

THIS ORDER is Provisional only and shall have no force and effect until confirmed by a Court of competent jurisdiction wherein the Respondent, Lynn Marie Walker Kermack, is residing.

[5] This order, along with a transcript of the proceeding and all documentation pertaining to it, were forwarded by the Family Law office in Toronto to the

Interjurisdictional Support Orders Unit in Downsview, Ontario on the 11th day of December, 2003.

[6] This office then forwarded the entire package to the Maintenance Enforcement Program office (MEP) in Halifax. It is not readily apparent from a review of the file on what date it was sent, however, from the date stamp on the transmittal or cover sheet attached to the package it was not received at MEP until June 9, 2004, more than a year after Justice Belch's oral decision.

[7] From Halifax it was forwarded to the Prothonotary's office in Pictou on June 11, 2004, arriving there on June 18, 2004.

[8] The Prothonotary in Pictou in turn forwarded it to the Prothonotary's office in Antigonish on June 21, 2004. It was received in Antigonish on the 23rd day of June, 2004. The matter was set down for hearing on September 20, 2004. Notice of the confirmation hearing was prepared on the 13th day of July, 2004 and personally served on Ms. Kermack on the 26th day of July, 2004.

[9] Ms. Kermack appeared in Nova Scotia Supreme Court on the initial date set for the hearing. The Honourable Justice Douglas MacLellan agreed to set the matter over until November 9, 2004 in order to give Ms. Kermack a chance to retain legal counsel.

[10] Ms. Kermack retained the services of Nova Scotia Legal Aid. Along with her counsel, Mr. Maurice Smith, Q.C., she appeared before me on November 9, 2004. In addition to hearing from Ms. Kermack, the court also heard from Ms. Kermack's 22 year old daughter, Lyndon Kermack and Mr. Greg Smith, a probation officer.

[11] The evidence of Ms. Kermack, which was corroborated by the other two witnesses, is that her youngest child, Lincoln, remained living with her until sometime in August, 2000. This is contrary to the affidavit of Lincoln Kermack sworn on the 13th day of March, 2003 and filed in support of his father's application to terminate child support. In his affidavit, Lincoln Kermack stated that he left his mother's residence sometime in July or August, 1999, a full year prior to when he actually left. To further support Ms. Kermack's contention that the actual departure date was in 2000 she produced a copy of a photograph taken from The Casket newspaper published on Wednesday, March 8, 2000. It shows the St. Mary's Junior

High School basketball team that won the Nova Scotia Provincial J.A.G.A.S. title in 2000. Lincoln Kermack appears in this photograph. He was a member of the school team during the 1999/2000 season.

[12] I am satisfied based on the evidence presented before me that the affidavit of Lincoln Kermack inaccurately stated the year in which he had departed his mother's residence. I find that he did not depart his mother's care until sometime in August, 2000 and not 1999 as was indicated to the Ontario Court at the time of the provisional hearing. Justice Belch would have therefore made his decision based partly on incorrect information.

[13] This has had an unfortunate result for Ms. Kermack both in regards to the overpayment that she has been ordered to repay (\$21,346.26) and the award of costs (\$1,500.00) made against her.

[14] In order to truly appreciate the predicament that Ms. Kermack now faces, one must go back to the first provisional order of the Honourable Madam Justice Benotto of the Ontario Court of Justice. After a provisional hearing on April 18, 2000 in which Ms. Kermack was neither present nor represented, Madam Justice Benotto

allowed Mr. Kermack's application to reduce child support from the \$1,591.00 per month ordered in the Corollary Relief Judgment to \$550.00 for the one remaining child still living with Ms. Kermack - the couple's youngest child, Lincoln. Madam Justice Benotto also ordered Ms. Kermack to pay \$750.00 in costs.

[15] Unfortunately the order reflecting Madam Justice Benotto's decision did not get issued until February 28, 2002 - a delay of nearly two years. The provisional order eventually found its way to Nova Scotia whereupon the matter was set down for a confirmation hearing scheduled for September 26, 2002. Ms. Kermack was personally served with Notice of the Confirmation Hearing along with a copy of the Provisional Order of Madam Justice Benotto on August 26, 2002. She was aware prior to this that her support payments had been reduced as she had already begun receiving a lower monthly amount. She accepted the reduction knowing that Mr. Kermack's obligation to support the two older children had ceased when they left her care to strike out on their own. What she did not realize was that Madam Justice Benotto had also set arrears at \$0. The earliest she could have known this was on August 26, 2002 at the time of being serviced with the Notice of the Confirmation Hearing.

[16] She indicated that she had been receiving payments of varying amounts after April, 2000 which she thought reflected the change from three to one dependent child as well as payment of arrears. She testified that Mr. Kermack was always in arrears of payment. Indeed, she thought the payments that she had received after Lincoln left in August, 2000 were towards arrears. Although I accept her testimony in this regard, I believe it was incumbent upon her to inquire in order to verify this and also to provide notice to Mr. Kermack that Lincoln had by then left her care. This is especially so after Lincoln left the Antigonish area altogether to go to Toronto. This happened on or about the 15th day of November, 2000.

[17] Mr. Kermack too must also share some of the blame for failing to maintain sufficient contact with his former spouse and the children. I am not certain of the circumstances of Mr. Kermack's estrangement from his ex-wife and children but as father to these three children it would appear that he could have done more to keep himself informed of their whereabouts. Having said this, the onus was still on Ms. Kermack to notify him of the changes that had taken place.

[18] Ms. Kermack further testified that she had ceased receiving any payments by July, 2002. Because of this she decided not to attend the first confirmation hearing before Justice MacLellan on September 26, 2002.

[19] Ms. Kermack's evidence on when support payments ended is not consistent with the evidence presented to Justice Belch at the time of the second provisional hearing on May 27, 2003. Based on the record of payments attached as Schedule "A" to the affidavit of the agent of the Director of the Family Responsibility Office and sworn the 25th day of March, 2003, Mr. Kermack was in arrears by \$33,641.31. The affidavit also indicates that the calculation of arrears was based on a court order / agreement dated the 22nd day of February, 1993.

[20] Apparently neither the Corollary Relief Judgment (which ordered child support of \$1,522.00/month – ie. \$507.33 per child – and which also rescinded all arrears accrued under any prior order to that date - the date being April 30, 1997) nor the provisional order of Madam Justice Benotto, which had been confirmed by our court on September 26, 2002, were taken into consideration in calculating arrears.

[21] It will be recalled that Madam Justice Benotto had also fixed arrears at \$0 as of April 18, 2000.

[22] What Justice Belch had been told by Mr. Kermack's counsel and which was not challenged by counsel for the Family Responsibility Office, is that Mr. Kermack was not in arrears but rather that he had over-paid child support. Indeed, it was indicated that Ms. Kermack was not entitled to any of the payments she had received after August, 1999, however, Mr. Kermack would be content if the court decided only to order repayment of any amounts paid to Ms. Kermack after April 18, 2000. This was determined to be \$21,346.26.

[23] The provisional order granted by Justice Belch orders the repayment of \$21,346.26 together with interest at the rate of 4% per year on any payments or payments in respect of which there is a default from the date of default. This amount was arrived at by adding all the payments made after Madam Justice Benotto's provisional order in April, 2000.

[24] I am satisfied that Ms. Kermack cannot be faulted for accepting support payments up to August 26, 2002, which is the date when she was served with Notice

of the first confirmation hearing along with a copy of Madam Justice Benotto's provisional order reducing child support to \$550.00 per month and the elimination of all arrears. Any amount received beyond this date however should be repaid. Throughout the period from April, 2000 until August, 2002 Ms. Kermack relied on welfare and a small amount of income earned picking blueberries. She had to provide for herself and for approximately five months of that period she still had the responsibility of providing for her son. Fairness and equity would not allow for the repayment of \$21,346.26 under such circumstances.

[25] No one is challenging the validity of Madam Justice Benotto's provisional order. It had been confirmed by the Nova Scotia Supreme Court and it is what it is. With respect to the provisional order of Justice Belch, I believe certain changes are warranted. I want to make it perfectly clear that I do not question the wisdom of Justice Belch's decision. Any changes made by me simply reflect the additional and more accurate information presented to me at the confirmation hearing on November 9th, 2004.

[26] Madam Justice Benotto varied Mr. Kermack's obligation to pay child support to \$550.00 per month effective April 30, 2000. Since, as I have earlier found, Lincoln

Kermack continued to remain in his mothers care until sometime in August, 2000, she was entitled to receive child support for him for five months based on the first provisional order.

[27] Any payments received after that, unless for the payment of arrears which had been set by Madam Justice Benotto at \$0 as of April 18th, 2000, should not have been kept by Ms. Kermack.

[28] She certainly knew when her son removed himself from her care. She does not suggest that she continued to support him financially after his departure. She was, however, unjustly accused of knowing this fact when the first provisional hearing had taken place before Madam Justice Benotto in April, 2000. This was the main reason why Justice Belch ordered her to pay costs of \$1,500.00 for the second application. As previously indicated, the information presented to Justice Belch regarding Lincoln's departure from home was not correct. He was still residing in Isaac's Harbour and attending school when the first provisional hearing took place. It is clear, however, that Justice Belch's decision to order costs of \$1,500.00 was based primarily on the incorrect belief that Ms. Kermack withheld information that if disclosed at the time of the first provisional hearing could have avoided the second

application. In April, 2000, Ms. Kermack still had the care of her youngest son who was attending school at that time and was dependent on her for his welfare. She cannot be held responsible for the need to make the second application. I am prepared to stay the enforcement of collection of the award of costs and pursuant to section 19(8) of the *Divorce Act* refer this portion of the provisional order back to Justice Belch for his further consideration. Costs are always at the discretion of the Court and as such I do not wish to interfere with the exercise of another judge's discretion. In light of the new information provided by Ms. Kermack I am certain that the Honourable Justice Belch might wish to re-visit this part of his decision.

[29] The amount ordered by Madam Justice Benotto for costs - \$750.00 - is not affected by my decision. If Ms. Kermack has not yet paid this amount then she is still responsible for its payment.

[30] I will order that she be responsible for the repayment of \$4,764.55, which represents the sum total of all payments forwarded to her by the Family Responsibility Office in Ontario after August 31, 2002. Although she stated during testimony that she had not read the clause in Madam Justice Benotto's provisional

order that had set arrears at zero dollars, it is not a valid reason for allowing her to keep payments that she was not entitled to. She must therefore repay this amount.

[31] In all other respects I confirm the provisional order of the Ontario court subject to the issue of costs which I have referred back to Justice Belch for further consideration.

J.