

CANADA / JUDGMENT

A.S. v. L.H.S.

2004 BCSC 166

COURT

Supreme Court of British Columbia

DECIDED

5 February 2004

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

A.S. v. L.H.S.,

2004 BCSC 166

Date: 20040205

Docket: D020525

Registry: New Westminster

Between:

A.S.

Petitioner

And

L.H.S.

Respondent

Before: The Honourable Mr. Justice Cole

Reasons for Judgment

Counsel for Petitioner

D.H. Goodwin

Counsel for Respondent

S. Van der Flier

Date and Place of Trial/Hearing:

November 20, 2003

New Westminster, B.C.

- [1] The respondent applies to set aside the interim order of the Honourable Judge McMorran made July 10, 1988 or, in the alternative, that the arrears, interest and penalties that have accumulated under the order be cancelled or buried.
- [2] The parties were married January 14, 1984, and have two children: A.1, born [], 1984, and A.2, born [], 1987.
- [3] The parties separated on February 20, 1987 and the petitioner, the mother of the infant children, filed for divorce on September 26, 1987 alleging physical and mental cruelty as grounds for divorce. The petitioner alleged that the respondent was an alcoholic and was physically abusive.
- [4] On June 10, 1988, the same day that the notice of motion was filed, Judge McMorran granted interim custody of the infant children to the petitioner with supervised access to the respondent, and ordered that the respondent pay child support of \$150 per month per child and \$700 per month spousal support. There is an order that the respondent provide financial disclosure within seven days. The respondent was not present when the order was made, his solicitor being unable to receive instructions. The order for support could be set aside on two clear days notice. I will refer to this order as the interim order.
- [5] On June 3, 1988, the respondent filed a statement of income and expenses showing a net income of \$900 per month and \$900 in monthly expenses. In a statement of property filed at same time, he discloses debts in the amount of \$81,509 and no assets. Although the respondent filed documents to support an application to set aside the interim order, no application was ever made.
- [6] On February 3, 1989, the uncontested trial of this matter was heard by Judge Fisher. In addition to a divorce, there was an order that the petitioner have custody of the infant children and there was an order that there was no access to the children by the respondent. The orders for custody and no access were by consent. There was also a declaration and judgment in the amount of \$8,800 representing accumulated arrears under the interim order of Judge McMorran. I will refer to this order as the final order.
- [7] The respondent's evidence was that he negotiated with the petitioner directly and sometimes through the lawyers, and that those negotiations resulted in an agreement that he would have no access to the children, that the outstanding amount of arrears would be turned into a judgment as he was unable to make any payments, and that there would be no further maintenance paid for either the petitioner or the children. He says that based on his discussions with his lawyer, the final order was the appropriate order to bring into effect the agreement. He was aware that in the future the petitioner could bring an application for

child maintenance regardless of what the Court order said.

- [8] The respondent's lawyer at the time, J.F. Chester Bridal, swore an affidavit that he advised the respondent in respect to the final order and deposed, "[T]he advice I gave, at the time, to the respondent, Mr. L.H.S. was that the interim order ceased to have effect once the final order was pronounced and that his obligation in spousal and child support was limited to the amount set out in the final order."
- [9] Based on the agreement, the respondent states that he has not seen his children since the final order was made.
- [10] The petitioner states in her affidavit:

There is absolutely no truth to the respondent's statement that there were negotiations wherein he would have no access in consideration of their being no obligation to pay further spousal and child support. The respondent has not provided any evidence from his then counsel to support these statements as there is no evidence because these negotiations did not occur. My understanding has always been that the order respecting child support continued as the respondent never successfully applied to vary the order.

- [11] On April 30, 1997, the petitioner obtained an order for substitutional service of an application to change her name and the name of the children, to her maiden name. The substitutional service was on the respondent's parents. The application was heard on May 7, 1997, and the order was granted changing the children's name to D.. In her application, the petitioner states that because of the respondent's previous criminal record, she did not want to carry his name and that the children have been known as D. since the children commenced going to school.
- [12] The petitioner filed the final order with Family Maintenance Enforcement on June 15, 1999. According to the respondent, it was not until October 23, 2002 that he was served with documents from Family Maintenance Enforcement Program in respect to the outstanding arrears. The matter proceeded to Provincial Court in May of 2003 where the respondent obtained an adjournment of a show cause hearing on payment of \$1,000.
- [13] The current amount of arrears for spousal and child maintenance as of November 24, 2003, is \$192,550 with interest in the amount of \$42,385, plus \$2,000 in default fees for a total of \$236,935.
- [14] After the separation, the petitioner stayed home and looked after the children without any support from the respondent, except for the \$1,000 payment in May 2003. In 1991, she commenced a nursing program at Douglas College which she completed in 1994, running up in excess of \$20,000 in student loans. In addition, she has had extraordinary expenses for the children for daycare, tuition, orthodontic work and now tuition for the oldest child, who is attending college, totalling over \$30,000. She has medical problems, but those problems do not prevent her from pursuing her career as a nurse where she earns some \$37,570 net per year or \$66,500 gross per year.

- [15] The respondent's evidence is that he earns approximately \$6,000 per year and since his divorce, has never earned more than his personal exemption under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), and consequently, has not filed income tax returns pursuant to section 150(1.1)(b) of the Income Tax Act. He makes extra money picking mushrooms and doing odd jobs, but he only has a Grade Nine education, no trade qualifications, and no driver's licence or credit cards. He says he is not capable of employment because he has psoriasis. His doctor since 1989 states, "Mr. L.H.S. suffers from extensive psoriasis with accompanying psoriatic arthritis. He has been unable to have gainful employment due to disability of his hands and chronic severe sleep disturbances caused by his skin condition." The respondent is presently living on property owned by his parents and receives social assistance.

ANALYSIS

- [16] The issue to be decided is whether or not the interim order survives the final order and if so what, if any, arrears should be cancelled.
- [17] There is no real issue that the practice at the time of final order was that interim orders did not survive the final decree for divorce (*De Grandis v. De Grandis* (1990), 28 R.F. L. (3d) 45, 48 B.C.L.R. (2d) 53 (S.C.) and *Gumplinger v. Gumplinger*, [1996] B.C.J. No. 1122 (Q.L.)(S.C.)).
- [18] In 1993, Huddart J. as she then was in *Boznik v. Boznik* (1993), 76 B.C.L.R. (2d) 202, [1993] B.C.J. No. 472 (Q.L.)(S.C.), interpreted the changes that were made in the amendments to the Divorce Act in 1985, R.S.C. 1985, c. 3 (2nd Supp.), and stated at ¶ 19:

The general rule that an interim order remains in effect until a final order is made is good law. However, what constitutes a final order in relation to an interim order for maintenance has changed with the coming into force under the 1985 Divorce Act. Under the old Divorce Act, the general rule was applied so that a decree nisi extinguished all interim orders made in the proceeding. Under the new Divorce Act, only a final determination regarding the corollary relief can extinguish the interim order.

- [19] After the *Boznik* case, interim orders became final orders if the final order was silent in respect to maintenance. The real issue in this case however is what is the effect of the interim order in respect to spousal and child support in this case.
- [20] The respondent argues that to allow the interim order to continue, when it was made at a time when the dominant interpretation of the Divorce Act was that interim orders did not survive a final order, would be tantamount to enabling a retroactive effect of the law. As I see it, there is no issue of retroactivity in the sense that it is used in the respondent's cited authorities, including *Galiano Conservancy Assn. v. British Columbia (Ministry of Transportation and Highways)*, [1996] B.C.J. No. 103 (Q.L.) (S.C.). In that case, where a Court declares a statute unconstitutional, a live issue is the status of those persons to whom the statute had applied before being found unconstitutional. The same issue does not arise where a validly enacted statute receives judicial interpretation. It is a cardinal principle that

Courts, in interpreting statutes, do not make the law. The law was in existence, per Parliamentary decree, since its coming into force in 1986. The fact that this Court did not interpret section 15 of the Divorce Act until 1993 does not affect its application from 1986.

- [21] The respondent cites the old case of *Yewens v. Noakes* (1880), 6 Q.B.D. 530 at 535, 50 L.J.Q.B. 132 at 135, for the principle that,

While it is true that we have no right to construe the Act itself by the practice which has taken place under that Act, it is equally true that we are entitled to construe that Act, not only upon the actual words used, but with reference to the practice which had grown up and was existing at the time when that Act was passed.

However, that case sought to impute to the legislature knowledge of the practice of a public department in respect of inhabited house duty. It addresses a presumption about legislative knowledge of practical affairs when drafting a statute: see *Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at 154-155. It is inapplicable where a Court interprets the plain meaning of a statute.

- [22] Nor, as the respondent suggests, is this a case of altering a series of decisions that put a certain construction on a statute. Madam Justice Huddart in *Boznik*, *supra*, was not reversing a long line of case law, but rather elucidating how a statute had reversed that case law. Retroactivity is not a problem in such a case.
- [23] In my opinion, therefore, an interim order made before *Boznik*, *supra*, survives a final order even though it was made under a misapprehension of the import of section 15 of the Divorce Act. Any misunderstanding of the state of the law may be relevant where it impacts the parties' intent to enter into a separation agreement or consent order. In the case at bar, that intent is relevant with respect to spousal support, but irrelevant with respect to child support.
- [24] In respect to spousal support, I am satisfied that the interim spousal support order did not survive the final order because of the agreement that was made between the parties. The spousal support issues were clearly intended to be resolved as at the date of the final order. It was the understanding of the respondent and his solicitor at the time that the interim order did not survive the final order and the wording of the final order reflected that fact. The petitioner's answer to the allegation that there was an agreement only refers to her understanding that the child support would continue but she does not indicate where she got that understanding from and it is interesting that she did not refer to spousal support continuing. Considering the respondent's income at the time of the divorce, it is obvious that he could not afford to pay any support, either spousal or for the children. The agreement that he would not see the children in exchange for not paying child support is the type of arrangement that under the circumstances would seem to be reasonable from the point of view of the petitioner, not only because of the respondent's impecuniosity, but because of the fact that she did not want these children involved with the respondent. Her subsequent conduct in changing their name is consistent with that position. The fact that the

respondent has never seen the children and that she made no efforts to enforce support payments for over ten years from the final decree leads me to conclude that their conduct is consistent with the agreement that the respondent says they entered into. Therefore, there will be a declaration that the spousal support terminated upon the granting of the final order and because the petitioner took no action to enforce payment of the judgment in the final order in respect to spousal support, for a period of ten years after the order was made, that portion of the judgment is statute barred under section 3(3) of the Limitation Act, R.S.B.C. 1996, c. 266. The judgment as it pertains to child support, is not subject to the Limitation Act, *supra*, at this time because of the age of the children: *Duke v. Duke*, [1998] B.C.J. No. 1624 (Q.L.)(S.C.); *Schmitke v. Schmitke*, [1993] B.C.J. No. 2401 (Q.L.)(S.C.); and *Semnet v. Sawkins*, [1998] B.C.J. No. 683 (Q.L.)(S.C.).

[25] Although the petitioner can bargain away her rights to support, she cannot bargain away the rights of the children to receive support from their father: *Daniels v. Lakes* (1987), 22 B.C.L.R. (2d) 208, 11 R.F.L. (3d) 159 (C.A.); *Willick v. Willick*, [1994] 3 S.C.R. 670, 6 R.F.L. (4th) 161. Therefore, I am satisfied that the interim order for child support did survive the final decree for divorce, but I would cancel all arrears that accumulated under that order since the granting of the final order. I have referred to the principles set out in subsections 96(2) and (3) of the Family Relations Act, R.S.B.C. 1996, c. 128:

- (2) If an application is made to reduce or cancel arrears under a maintenance order, the court may reduce or cancel the arrears but only if it is satisfied that it would be grossly unfair not to do so.
- (3) For the purpose of subsection (2), the court may take into consideration
 - (a) the efforts the applicant has made to comply with the maintenance order,
 - (b) the applicant's explanation for any delay in applying for variation of the maintenance order, and
 - (c) any special circumstances that the court considers relevant.

[26] In considering whether it would be "grossly unfair" not to cancel arrears, I have considered the following factors:

- (a) I am satisfied that it was the intention of the parties that the respondent would not be required to pay child support and that he gave up his rights to see the children. He has complied with that term of the agreement but because the rights of the children are independent of any agreement between the parties, I give that factor of the intention of the parties very little weight.
- (b) The interim order made by McMorran J. was in fact an *ex parte* order based solely on the information provided by the petitioner and therefore was a true interim order until full financial disclosure had been made.

- (c) Although I am cognizant of the principle that child support is a joint obligation of the parents, and that Ms. A.S. has borne the sacrifices and financial burden of the raising of the children for many years, the fact is that the respondent lacks the ability to pay. This is the dominant "special circumstance" of this case. The respondent has satisfied me that he has not been gainfully employed and has not made more than \$6,000 per year since the granting of the divorce, and that his failure to be gainfully employed is caused by his medical condition.
- (d) The respondent, in fact, was insolvent at the time of the final order. He had debts in excess of \$80,000 that had accumulated as a result of his investments in the stock market. He had at that time - and still has - no assets of any significance.
- (e) I am satisfied that he has made full and frank financial disclosure although the disclosure is limited in part because of his lack of employment, lack of a credit card and not filing income tax returns, coupled with his understanding that he had no obligation to pay support and therefore no need to keep any financial records.
- [27] Therefore, since the making of the original interim order, there has been a significant and long lasting change in the respondent's financial circumstances. The change was not one of choice, but arose out of his medical condition, and he has made reasonable efforts to earn money. I therefore conclude that all arrears arising since the final order should be cancelled as I am satisfied it would be grossly unfair not to do so.
- [28] Further, I find that, based on his annual income and the Federal Child Support Guidelines, S.O.R. /97-175, the respondent is not required to pay child support at this time.

CONCLUSION

[29] In sum, I make the following orders:

- That the interim spousal support order did not survive the final order because of the agreement that was made between the parties;
- That the interim child support order did survive the final order;
- That all arrears accumulated under the child support order since the granting of the final order shall be cancelled; and
- That the respondent is not required to pay child support at this time. However, on May 1 annually, he must provide the applicant with a copy of his income tax return and a statement of all annual income. This obligation will commence on May 1, 2004 and continue until the children are no longer children as defined by the Divorce Act.

[30] In respect to costs, justice and fairness requires that each party bear their own costs because it is the petitioner that has shouldered the burden of looking after these children and in my view, it would be most unfair to require her to pay costs even though the respondent has been successful in this application.

"F.W. Cole, J."

The Honourable Mr. Justice F.W. Cole

May 4, 2004 - Revised Judgment

On page 5, paragraph 12, the sentence reading:

"The matter proceeded to Provincial Court in May of 1993 "

should read:

"The matter proceeded to Provincial Court in May of 2003 "

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Prepared on 29 October 2026 · Esheria