
CANADA / JUDGMENT

Besha v. Lisanework

2010 BCCA 580

COURT

British Columbia Court of Appeal

DECIDED

17 December 2010

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2010 BCCA 580 Besha v. Lisanework

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Besha v. Lisanework,

2010 BCCA 580

Date: 20101217

Docket: CA037756

Between:

Zufan Abebe Besha also known as Zufan Besha

Respondent

(Petitioner)

And

Mandefro Lisanework

Appellant

(Respondent)

Before:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, November 19, 2009,

(Besha v. Lisanework, New Westminster Docket No. E28165)

Appearing on his own behalf:

M. Lisanework

By telephone on her own behalf:

Z.A. Besha

Place and Date of Hearing:

Vancouver, British Columbia

November 5, 2010

Place and Date of Judgment:

Vancouver, British Columbia

December 17, 2010

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

- [1] This appeal, from a decision of Mr. Justice Pearlman of the British Columbia Supreme Court, concerns the application of a British Columbia resident, (the appellant/father) to vary a Washington State Superior Court order on the grounds that the child, for whom support is payable under the Washington order, lives with the father in British Columbia and has done so for some time.

Background

- [2] Both the appellant (father) and respondent (mother) were born in Ethiopia. They were married in 1988 in a refugee camp in Somalia. They moved to British Columbia in 1989 as refugees, and became Canadian citizens in or about 1992. Their child was born in 1993. The parties separated in 1996 and entered into a separation agreement in March of 1997.

- [3] It appears that in 1997 the parties moved, together with the child, to Washington State, separated again in 2004, but continued to live in the same residence in Washington State until 2005.
- [4] The father returned to Canada in 2006 and brought the child with him.
- [5] The mother initiated proceedings in the Superior Court of Washington which resulted in an order made on December 8, 2006. The order granted a divorce and a restraining order against the father. The court also made various orders dealing with division of property, custody, access and child support. The December 8, 2006 Washington order awarded custody to the mother and included provisions respecting custody and child support. The pertinent terms of the Washington order were summarized by the chambers judge in his reasons for judgment at para. 5 as follows:

...

- (a) The Superior Court of Washington has jurisdiction over the child, Micheyas Yohannes, born December 4, 1993 (the "Child");
 - (b) the Child shall reside with the [mother in Washington State];
 - (c) the [father] shall immediately return the Child to the [mother] in Seattle, Washington, U.S.A.;
 - (d) the [father] shall have access to the Child for four hours every second Saturday, supervised by a professional agency, the cost of which is to be paid by the [father]; and
 - (e) the [mother] is designated custodian of the Child and is granted sole decision making authority for the Child,
- [6] On October 16, 2007, Mr. Justice Sigurdson made an order in New Westminster action EO28165, commenced by the mother. The order "recognized" the custody aspects of the Washington Order pursuant to s. 48 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] and ordered the return of the child to Washington State.
- [7] In accordance with Sigurdson J.'s order, the child was returned to Washington in October 2007 and resided with the mother until August 2008, at which time he returned to Canada to live with his father.
- [8] On March 5, 2009, on the application of the father, Mr. Justice Truscott made an order varying Sigurdson J.'s order so as to award joint custody and guardianship to the father and mother. In this order, Truscott J. acknowledged that the order of Sigurdson J. made the Washington order "in its entirety, an order of this Court pursuant to s. 48(2) of the Family Relations Act".
- [9] The issue of child support was raised before Truscott J. but adjourned after the mother argued that the British Columbia Supreme Court did not have jurisdiction.

- [10] Parenthetically, it may be of interest to note that in February, 2008, the mother petitioned the British Columbia Supreme Court in New Westminster action S111468, pursuant to s. 29 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78, and pursuant to the Foreign Money Claims Act, R.S.B.C. 1996, c. 155, for an order registering the Washington judgment in the amount of \$79,548.79. This Washington judgment is a judgment in the Washington divorce proceedings ordering a division of the parties' matrimonial property. The petition came on for hearing before Madam Justice Fisher on May 28, 2008. She declined to register the Washington judgment in British Columbia because of her concerns about questions of jurisdiction over the father at the time of the original Washington hearing. There is no information before us as to any further proceedings in S111468. I will have more to say below about the lack of jurisdiction to "recognize" the monetary aspects of the Washington orders.
- [11] On October 5, 2009, the father applied to vary the order of Sigurdson J. He sought relief cancelling all arrears of child support that had accumulated under the order; or alternatively, that the arrears be reduced; an order that the petitioner pay retroactive and ongoing child support; and, for an order that any child support arrears of the father be offset against the amount of child support payable, under the varied order, to the father. The father seems to have misunderstood that Sigurdson J.'s order, as varied by Truscott J., registered only the custodial (not monetary) aspects of the Washington order in British Columbia.
- [12] In reasons for judgment pronounced on November 19, 2009, the chambers judge dismissed the father's application to vary child support under the FRA on the basis that the British Columbia Supreme Court did not have jurisdiction to hear it. It is this order which is the subject of this appeal.
- [13] I agree with the chambers judge that a British Columbia court has no jurisdiction under the FRA, to vary a foreign support order. The appropriate procedure, as noted by the chambers judge, is that which has been adopted by the reciprocating jurisdictions of British Columbia and Washington and which is set out in Part 4 of the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 [ISOA]. The jurisdiction of Justices Sigurdson and Truscott to recognize the Washington order pursuant to s. 48 of the FRA extended only to the custody and access provisions of that order. Accordingly, I would for the reasons that follow, dismiss the appeal.

Relevant Provisions of the FRA and the ISOA:

- [14] Part 3 of the FRA governs the recognition and enforcement of extraprovincial custody and access orders. Section 48(1) provides that "On application by any person in whose favour an order for the custody of or access to a child has been made by an extraprovincial tribunal, a court must recognize the order ..." (emphasis added).

- [15] Section 48(2) of the FRA provides that "An order that is made by an extraprovincial tribunal and that is recognized by a court is deemed to be an order of the court and enforceable as such".
- [16] Under the FRA, maintenance and support obligations are dealt with separately, under Part 7. "Any person may apply for an order under this Part on behalf of a child" pursuant to s. 91(3). "A spouse or parent affected by an order under this Part ... may apply for an order altering, varying or rescinding the order or cancelling or reducing arrears under it" pursuant to s. 91(4) of the FRA (emphasis added). Section 93 empowers the court to make an order for support and maintenance and s. 96 sets out the procedure by which a court may vary or rescind a maintenance order made under ss. 88 to 96. At all times relevant to this proceeding, the FRA has been silent regarding recognition and enforcement of extraprovincial support and maintenance orders. The Part of the FRA which previously dealt with this matter was repealed and replaced by the ISOA on January 31, 2003.
- [17] At all times relevant to this appeal, Part 3 of the ISOA has governed the registration of support orders made outside of British Columbia. Section 16(a) defines a "foreign order" as "a support order that is made in a reciprocating jurisdiction outside Canada ...". Sections 17 through 20 provide a mechanism for registration and recognition of foreign orders in British Columbia.
- [18] The terms governing variation of a foreign support order are set out in Part 4 of the ISOA. Division 1 deals with instances where the applicant ordinarily resides in BC.
- [19] As part of the USA, Washington State is designated as a reciprocating jurisdiction under s. 6 of the ISOA regulations pursuant to ss. 1(1) and 44(3) of the ISOA.
- [20] There are at least two important differences between the reciprocal enforcement schemes under the FRA and ISOA which are relevant to the present appeal.
- [21] First, the provisions of the FRA which oblige the court to recognize extraprovincial orders relate only to orders for custody or access (FRA s. 48 and Part 3 generally). The provisions of the FRA which, until 2002, provided for reciprocal enforcement of maintenance orders were repealed and replaced by the ISOA in 2003.
- [22] Second, the scheme created under the ISOA requires that all necessary documents must pass through the designated authority in British Columbia and "the appropriate authority in the reciprocating jurisdiction" (*Mathers v. Bruce*, 2005 BCCA 410, 51 B.C.L.R. (4th) 54 at para. 23). In British Columbia, the designated authority is the Reciprocals Office, an agency operating under the aegis of the Ministry of Attorney General.
- [23] The chambers judge accepted Madam Justice Southin's conclusion in *L.R.V. v. A.A.V.*, 2006 BCCA 63, 52 B.C.L.R. (4th) 112 at para. 62, supplemental reasons: *Virani v. Virani*, 2006 BCCA 341, 54 B.C.L.R. (4th) 273 at paras. 7-9, that the ISOA is a complete code for the reciprocal enforcement of foreign support orders (Reasons for Judgment at paras. 27-29). It was on that basis the chambers judge concluded "if the respondent intends to pursue his application to

vary child support, he will have to do so pursuant to the administrative process as established by the [ISOA]" (Reasons for Judgment at para. 42). In my view he was correct in that conclusion.

- [24] These British Columbia authorities demonstrate that this Court has consistently regarded the ISOA as the proper avenue for recognition and enforcement of foreign support orders.
- [25] Indeed, the ISOA provides the only procedure available in British Columbia to recognize, enforce, or vary a foreign support order.
- [26] Because the ISOA is a complete code for the recognition and enforcement of foreign support orders, the registration in British Columbia of the foreign support order in this case could only have been effected by compliance with the mandatory procedure set out in ss. 17-19 of the ISOA.
- [27] The chambers judge was aware of this because in his reasons, he said:
- [24] In my view, and with respect, the inclusion in the formal order of the Court of the words "in its entirety" cannot and does not expand the jurisdiction conferred on the Court conferred by s. 48 of the Family Relations Act. Furthermore, I note that the order of Mr. Justice Truscott dealt only with issues of custody and access. In other words, the substantive terms of his order were confined to matters clearly within the jurisdiction of the Court under s. 48(2) of the Family Relations Act.
- [28] There is as well, the fact that the mother opposed the father's variance application on the basis that the British Columbia court did not have jurisdiction regarding child support (Reasons for Judgment at para. 18). The chambers judge did not address the issue of whether the British Columbia Supreme Court had jurisdiction over child support generally, his judgment and order related only to the narrower issue of the court's jurisdiction to consider the father's application to vary child support in the Washington order under the FRA.

CONCLUSION

- [29] Justices Sigurdson and Truscott did not have, and did not purport to exercise, jurisdiction under the FRA to recognize those parts of the foreign order which pertained to the father's support obligations. Thus, the monetary provisions of the order could not have been recognized by the British Columbia Supreme Court under that statute.
- [30] The only avenue available for variance of a foreign support order in British Columbia is the ISOA. From my review of the British Columbia Supreme Court file, it appears that the December 8, 2006, Washington child support order was registered in British Columbia with the designated authority for enforcement purposes pursuant to the ISOA. The Family Maintenance Enforcement Program is enforcing this order. The arrears total, as at September 30, 2009, \$29,791.70 and include accrual of arrears since August 2008 when the child returned to Canada to live with his father.

[31] If in fact the order has been registered, the father may wish to apply to vary the foreign support order pursuant to Part 4, Division 1 of the ISOA. That avenue remains open to him.

[32] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Frankel"

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Prepared on 27 October 2026 · Esheria