
CANADA / JUDGMENT

Genova v. Knight

2005 BCCA 425

COURT

British Columbia Court of Appeal

DECIDED

22 August 2005

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2005 BCCA 425 Genova v. Knight

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Genova v. Knight,

2005 BCCA 425

Date: 20050822

Docket: CA031199; CA031222

Between:

Donna Genova and Director of Maintenance Enforcement

Appellants

(Plaintiffs)

And

Eric Manors Knight

Respondent

(Defendant)

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Low

J.A. Rose

Counsel for the Appellant,

Donna Genova

P. Hundal

Counsel for the Appellant,

Director of Maintenance Enforcement

S.D. Gill and L. Kim

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

6 June 2005

Place and Date of Judgment:

Vancouver, British Columbia

22 August 2005

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] This is an appeal of a chambers order of Williams J. dated 8 October 2004, as amended, declaring void "as against the public policy of British Columbia" child support provisions in a divorce order made in the Superior Court of New Jersey, Chancery Division on 4 April 1988. The New Jersey order was registered in the Supreme Court of this province on 29 January 2001 under the provisions of part 8 of the Family Relations Act, R.S.B.C. 1996, c. 128, now found in the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 ("the Act") for enforcement against the respondent Eric Knight of a child support provision in the order.
- [2] The New Jersey order incorporated by reference the terms of a matrimonial property settlement agreement (the "agreement") made on 17 February 1988 between the appellant Donna Genova (formerly Donna Knight) and Mr. Knight. In his reasons for judgment [2003 B.C.S.C. 1296] the chambers judge found the agreement (and therefore the New Jersey order) to be void on the basis that the sentence underlined in the following paragraph in the agreement was illegal because it stifled the prosecution of a public offence:

28. Except as otherwise herein expressly provided, the parties shall and do hereby mutually release and forever discharge each other from any and all suits, actions, debts, claims, demands, and obligations whatsoever up to the date of the execution of this Agreement. There is presently a pending action, a Domestic Violence Complaint, which shall be dismissed upon the execution of this Agreement. The parties agree that with the exception of exercising visitation, the HUSBAND is restrained and enjoined from coming to or entering the WIFE's and childrens' residence. The HUSBAND is restrained from harassing the WIFE. The HUSBAND has posted \$250.00 cash bond; upon receiving the refund he shall pay to the WIFE the sum of \$250.00.
- [3] Paragraph 8 of the agreement and, by incorporation, the order required Mr. Knight to pay to Ms. Genova the sum of \$300 (USD) every two weeks for child support with annual increases based upon a specified consumer price index. In addition, para. 13(a) of the agreement required him to provide medical and dental coverage for the children through his employment or at his own cost.
- [4] It is fundamental to our law that non-custodial parents must provide appropriate financial support for their children. In my opinion, in the circumstances of this case, the chambers judge erred in disregarding this important principle in favour of a public policy principle that is not necessarily of general application. At the very least, the child support provision in the agreement is severable and should survive the finding that the impugned provision was contrary to public policy. There is no requirement in the law that the entire agreement be voided. The chambers judge should have given paramountcy to the child support provision in the agreement and the divorce order.
- [5] The history of the parties and of this and related litigation can be stated briefly.
- [6] Ms. Genova and Mr. Knight married in New Jersey on 22 August 1981. They have two children, a daughter born in 1982 and a son born in 1986. It appears they separated in 1987.
- [7] Because of a domestic violence allegation by Ms. Genova against Mr. Knight, the court in New Jersey made a temporary restraining order against him on 29 August 1987 and made the order final on 4 September. Later, Ms. Genova filed a complaint that Mr. Knight had violated the restraining order and was in contempt of it. On 5 January 1988, Mr. Knight failed to appear in court to answer the contempt application. The court found him in contempt and issued a warrant for his arrest. The agreement and the divorce order did not affect the restraining order, only the contempt proceedings. It was a term of the divorce order that the contempt proceedings be withdrawn.
- [8] It is alleged that Mr. Knight made no child support payments since the summer of 1988 when he left New Jersey and moved to his parents' home in Tacoma, Washington. He moved to British Columbia in 1989. He remarried here, was divorced a second time, and is now married for the third time.

- [9] On 3 November 2000, the court in New Jersey made an order fixing the arrears of child support at \$107,828 (USD), including interest and costs. On 13 February 2001, that order was filed in this jurisdiction with the Director of Maintenance Enforcement (the "Director") to initiate an attempt at collection under the Act.
- [10] In January 2001, Mr. Knight initiated the present proceedings by way of petition seeking a provisional variation order cancelling the child support arrears on the grounds that he was coerced into signing the agreement and that he lacked the capacity to consent to its terms due because he was intoxicated when he signed it. On 13 February 2001, Vickers J. made an ex parte provisional order staying execution of the November 2000 New Jersey order. This was to give Mr. Knight the opportunity to apply to the court in New Jersey to set aside the 1988 order on the basis that the underlying agreement was void.
- [11] Mr. Knight did not bring that application. As a consequence, on 22 February 2002, the court in New Jersey refused to confirm the provisional order of Vickers J. and re-calculated the arrears at \$228,545.12 (USD) to include counsel fees.
- [12] In his reasons for judgment in support of the order now under appeal, Williams J. stated what happened next:
- [10] On November 6, 2002, the Director of Family Maintenance Enforcement came before me to set aside this Court's stay order. At that hearing I was advised that [Mr. Knight] had a continuing right to challenge the divorce order in New Jersey. On December 9, 2002, I provided [Mr. Knight] until January 15, 2003, to advance his claim before the Superior Court [in New Jersey] following which the stay of this Court of February 13, 2001, would be rescinded. He professed to have concerns for his safety should he return to New Jersey. This representation was of no consequence as [Mr. Knight] could have attended via videoconference or had counsel attend on his behalf. [Mr. Knight] did not bring an application in New Jersey.
- [11] On April 29, 2003, the parties were before me again. At that hearing I questioned whether paragraph 28 of the agreement might be contrary to public policy in British Columbia. Paragraph 28 of the agreement provides:
28. . . . There is presently a pending action, a Domestic Violence Complaint, which shall be dismissed upon the execution of this Agreement
- [13] Williams J. received written submissions on the public policy issue. He set out four issues at para13 of his reasons:
1. Was there a pending domestic violence complaint?
 2. What was the nature of the complaint?
 3. Is the support provision of the divorce order contrary to the public policy of British Columbia and therefore void?

4. If the support provision is found to be void, what is Eric Knight's obligation to pay child support?

[14] He determined the first three issues in favour of Mr. Knight's position. Having thus decided under s. 19(3)(b)(ii) of the Act that the New Jersey divorce order was "contrary to the public policy of British Columbia", he applied s. 20 of the Act that requires the court to deal with a foreign order set aside under s. 19 as "if it were a document corresponding to a support application under s. 9(1) or a support variation application under s. 29(1)". He said that he was "strongly disposed to make a child support order similar to the one incorporated into the divorce order of April 4, 1998, retroactive to that date". He required the parties to provide written submissions with respect to the appropriate quantum of child support and ordered Mr. Knight to pay interim support of \$600 per month.

[15] Both Ms. Genova and the Director appealed the order. They filed one factum and counsel for the Director adopted the oral argument of counsel for Ms. Genova.

[16] The broad issue on this appeal is whether the chambers judge erred in holding that the child support provisions in the 1988 matrimonial agreement and divorce order were unenforceable in this jurisdiction as being contrary to public policy. Much of the respondent's argument was directed to the issue of coercion. That issue is irrelevant to the public policy issue.

[17] The appellants take issue with the finding of the chambers judge that the contempt complaint amounted to a charge of a public offence. They say he also erred in finding that the child support provisions in the agreement were contrary to public policy in British Columbia even if the impugned sentence in para. 28 of the agreement did refer to a public offence. I find it necessary to consider only the appellants' second argument.

[18] Before analysing the issues he had defined, the chambers judge found the provision in para. 28 of the agreement to be contrary to public policy in this jurisdiction. He said that in a case such as this "it is proper to err on the side of good judgment". With respect, I am unable to find any support for this approach in the authorities cited to us. To the contrary, the law seems to be that caution is required before finding an agreement to be contrary to public policy, particularly when, as here, the provision under consideration is valid in the jurisdiction in which it came into being.

[19] On the public policy issue, the chambers judge quoted the applicable law as follows:

[37] Section 19(3)(b)(ii) of the Act allows this Court to set aside the registration of the Order if it is deemed to be contrary to the public policy of British Columbia. G.H.L. Fridman, Q.C. in *The Law of Contract: Fourth Edition*, 1999, at p. 390 provides:

the courts may declare a contract invalid and illegal on the ground that its very nature, or the purpose which it is designed to achieve, whether directly or indirectly, contravenes the ends of society. Such contracts offend the basis of legal order, which is founded upon justice, legality, and morality. The doctrine of public policy is concerned with the fundamentals of the legal system.

What offends against public policy are acts which support, encourage, permit and foster conduct which is injurious to the very foundations upon which society exists. To recognize and enforce contracts that do this would be to offend the public conscience.

[38] Similarly, at page 399:

if the purpose of an agreement is to interfere with the proper institution or completion of proceedings to prosecute someone accused of a criminal offence, even if the one who agrees not to prosecute, or to refrain from continuation with the proceedings, obtains no financial or other gain, such agreement will be void.

[39] On the authorities, contracts to stifle prosecution are illegal and void: *Legatt, Morgan, Puller v. Stoltze*, [1938] 1 W.W.R. 241 (Sask.C.A.) affirmed [1939] S.C.R. 235.

[20] The chambers judge also found persuasive the judgment of Preston J. in *Hadfield v. Hadfield* (1996), 30 B.C.L.R. (3d) 131 (S.C.). In that case, the parties signed an agreement settling all matrimonial issues between them. The agreement included a provision that the wife would "consent to and support" the husband, against whom charges of harassment of the wife were pending, in an application to relax or cancel bail conditions requiring supervised access by the husband to their children, and request that the charges be disposed of by a peace bond. The agreement also permitted the husband to take the children on a trip without adult supervision despite "the terms of bail" imposed in Provincial Court. The judge found that the provisions in the agreement were illegal and stifled the prosecution of the harassment charges. He said at para. 11 that they amounted to "an agreement to frustrate the bail order of the Provincial Court and to interfere substantially with an ongoing prosecution". The agreement was complex and the provisions were not severable.

[21] In the present case, it is my opinion that the chambers judge took too narrow a scope of the issue of public policy by failing to take into account the matter of comity. The court in New Jersey apparently did not have a concern with the legality of the agreement in 1988 and does not have such concern now. There was an opinion before the chambers judge provided by Robert L. Penza, a lawyer in New Jersey practising matrimonial law and a former family court judge. Although the opinion was mainly directed to the nature of the contempt proceedings in that state and whether Mr. Knight could have challenged the validity of the 1988 divorce order on the ground of coercion, Mr. Penza did comment on the public policy issue thus:

For the foregoing reasons, it is not uncommon, indeed it is the practice in this jurisdiction, for divorce litigants to dispose of domestic violence charges, to the extent that they are pending, contemporaneous with the entry of a Final Judgment of Divorce. Public policy is not compromised where the dismissal of a domestic violence complaint as part of a divorce settlement is in reality the withdrawal of a civil matter. Here, it is apparent that Ms. [Genova's] attorney at the time did nothing more than comport with standard practice which is buttressed by the legal principals [sic] articulated above.

[Emphasis added.]

[22] In my opinion, the chambers judge failed to sufficiently consider the conflict of laws aspect of the broad issue before him. There was evidence that the impugned contract provision was considered routine and not contrary to public policy in the jurisdiction in which it was agreed to. Whether the provision in paras. 28 of the agreement offended public policy in British Columbia had to be considered carefully in that context.

[23] In *Block Bros. Realty. v. Mollard et al* (1981), 122 D.L.R. (3d) 323 (B.C.C.A.), a licensed Alberta realtor sued for commission earned on the sale of property situate in British Columbia. The defendants contended that a section of the real estate legislation in this province prohibited recovery of remuneration for effecting the sale of real property by a person unlicensed in this province. Although the case was concerned mainly with whether the applicable law was that of Alberta or British Columbia, the defendants on appeal argued, in the alternative, that even if Alberta law applied, this court should refuse to recognize the contract on the basis that to do so would be "contrary to public policy in British Columbia". In answering that argument against the appellant's position, Craig J. A. said this:

Defining what is, or what should be, public policy is, generally, a very perplexing task because there are so many variable and subjective factors involved in the decision. Because of this difficulty, a Court should give careful consideration before deciding that something is illegal, or is unenforceable, because of public policy, particularly in the area of the conflict of laws. In referring to the doctrine of public policy, Falconbridge said at p. 387 that "this doctrine must be used with caution". In the case of *National Security Co. v. Larsen*, [1929] 4 D.L.R. 918, [1929] 3 W.W.R. 299, 42 B.C.R. 1, this Court dealt with the problem of public policy with regard to the enforceability of a contract valid in another jurisdiction. At pp. 919-20 D.L.R., p. 300 W.W.R., Macdonald C.J.B.C. said:

. . . there is no reason for disregarding the settled law that a contract good in the foreign country will be enforced here unless prohibited or unless it be contrary to our conceptions of essential justice and morality.

At p. 941 D.L.R., p. 320 W.W.R. Macdonald J.A. said that public policy had been described in various ways including "essential public or moral interests", "founded in moral turpitude", and "inconsistent with the good order and solid interests of society".

[24] In the case at bar, caution dictates against finding that enforcement in this jurisdiction of the child support provisions of the 1988 New Jersey divorce order would be offensive to public policy in this province. In my opinion, enforcement would not offend our concepts of justice and morality and would not be inconsistent with the good order and solid interest of society. I reach this conclusion because the fundamental principles of child support in our law and in our society, in the circumstances of this case at least, overwhelm the relatively minor concern that there might have been an attempt to stifle a public offence completely unrelated to the issue of child support. This case is distinguishable from *Hadfield*, *supra*, because the agreement in that case expressly purported to vary a condition of bail in the

criminal proceeding.

- [25] The importance of sustaining child support obligations is articulated in the following passage from *Richardson v. Richardson*, [1987] 1 S.C.R. 857 at 869-70 per Wilson J. writing for the majority:

This inter-relationship should not, however, lead us to exaggerate its extent or forget the different legal bases of the support rights. The legal basis of child maintenance is the parents' mutual obligation to support their children according to their need. That obligation should be borne by the parents in proportion to their respective incomes and ability to pay: *Paras v. Paras*, [[1971] 1 O.R. 130 (Ont. C.A.)] *supra*. The duration of the obligation of support varies with the provisions of each provincial statute. As a general proposition it can be stated that the obligation of support lasts until a child is between 18 and 21 years of age. It can last longer than that if there are special circumstances such as the presence of physical or mental handicaps in the child or the child is in full time attendance at an educational institution. Child maintenance, like access, is the right of the child: *Re Cartlidge and Cartlidge*, [1973] 3 O.R. 801 (Fam. Ct.). For this reason, a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child: *Malcovitch v. Malcovitch* (1978), 21 O.R. (2d) 449 (H.C.); *Hansford v. Hansford*, [1973] 1 O.R. 116 (H.C.), at pp. 117-18; *Dal Santo v. Dal Santo* (1975), 21 R.F.L. 117 (B.C.S.C.); *Mercer v. Mercer* (1978), 5 R.F.L. (2d) 224 (Ont. H.C.); *Collins v. Collins* (1978), 2 R.F.L. (2d) 385 (Alta. S.C.), at p. 391; *Krueger v. Taubner* (1974), 17 R.F.L. 86 (Man. Q.B.). Further, because it is the child's right, the fact that child support will indirectly benefit the spouse cannot decrease the quantum awarded to the child.

[Emphasis added.]

- [26] This comment and similar comments in other cases dictate that the court should be very cautious about invalidating a contractual provision for the financial support of children on the basis of the public policy principle afoot here. Just as the law is firm that a parent must not be allowed to barter away his or her child's right to financial support, so must the law be slow to invalidate on the basis of public policy a child support provision in a matrimonial agreement. In the present case, the proper result is to find no offence to that principle and leave the 1988 foreign order intact.

- [27] I would allow the appeal, set aside the order and remit the matter back to the trial court for appropriate enforcement under the Act of the child support provisions in the 1988 New Jersey divorce order.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Mr. Justice Mackenzie"

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