
CANADA / JUDGMENT

Walberg v. Walberg

2020 BCSC 1720

COURT

Supreme Court of British Columbia

DECIDED

28 September 2020

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2020 BCSC 1720 Walberg v. Walberg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walberg v. Walberg,

2020 BCSC 1720

Date: 20200928

Docket: E56946

Registry: New Westminster

Between:

Tracy Walberg

Claimant

And

Garry Walberg

Respondent

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

The Claimant:

No Appearance

The Respondent:

No Appearance

Amicus Curiae:

P.J. Reimer

Place and Date of Hearing:

New Westminster, B.C.

September 28, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 28, 2020

Introduction

- [1] This is an application for variation of a child support order. The claimant's name on the style of cause is Ms. Walberg but it appears that she now uses the name Eckerman, so that is how I will refer to her in these reasons. Ms. Eckerman seeks variation of a support order made against Mr. Walberg, with respect to the support of three children.
- [2] The original support order which is sought to be varied was made in the Ontario Superior Court of Justice, in Guelph, Ontario, on 26 January 2016. Ms. Eckerman applied to vary the order, relying on Ontario's Interjurisdictional Support Orders Act, 2002, S.O. 2002, c. 13 [Ontario ISOA], which in turn invokes the provisions of British Columbia's Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 [BC ISOA]. Ms. Eckerman's application was received by the Ontario Superior Court of Justice, in Guelph, where a Justice of that court issued a provisional order, which was then sent to this Court for confirmation, and that is the matter before me today. Regrettably, based upon the able and helpful submissions of Mr. Reimer appearing as amicus curiae in this matter, I find myself unable to deal with the merits of the application, because the application is procedurally flawed.
- [3] It is indeed regrettable that I cannot deal with this application on its merits today, because it has been before the courts, in Ontario and in British Columbia, since 11 February 2019. I am recording my reasons, with the expectation that they will be transcribed and make their way back to the originating jurisdiction, where the process can be rectified.

Procedural History

- [4] The first order in place between the parties, Ms. Eckerman and Mr. Walberg, appears to be an order dated 22 February 2011. That was an interim order. It dealt with child support, requiring Mr. Walberg to pay support of \$765 per month based on a guideline income of \$61,000. The order is silent as to whether the support terms were made under Ontario's Family Law Act, R.S.O. 1990, c. F. 3 or the federal Divorce Act, R.S.C. 1985 c. 3 (2nd Supp.).

- [5] The next order in place between Ms. Eckerman and Mr. Walberg would appear to be an order dated 17 October 2011, in the Ontario Superior Court of Justice in Guelph. The order was made following a settlement conference. It dealt with custody, primary residence, parenting time, and child support in respect of the three children of the marriage between Ms. Eckerman and Mr. Walberg. The order does not specify whether those matters were dealt with under Ontario's Family Law Act, or as corollary relief under the federal Divorce Act. However, there are other terms in the order that make it clear that there was a Divorce Act proceeding and that certain relief was contemplated under the Divorce Act.
- [6] The next order in place, which I believe is the order now sought to be varied, is an order dated 26 January 2016. At one part of the order a box is checked indicating that it is a final order, but the heading above the order itself states that it is an interim order. Under this 26 January 2016 order, Mr. Walberg is required to pay support of \$647 per month each and every month, for support of two of two children, based upon Mr. Walberg's income of \$44,000. Again, the order is silent as to whether the support was made under provincial or federal legislation.
- [7] That brings us to Ms. Eckerman's variation application. The application was first filed on the Ontario Superior Court at Guelph on 7 May 2018. In it, Ms. Eckerman sought to vary the support order in a number of respects, principally by increasing the support to cover all three children, to increase the amount based on the 2017 Guidelines, to obtain an order for arrears of support, and to obtain an order for arrears of s. 7 expenses. When Ms. Eckerman brought this application, she believed Mr. Walberg was still resident in Ontario. However, when she tried to serve him she learned that he had moved to British Columbia.
- [8] After learning of Mr. Walberg's move to British Columbia, Ms. Eckerman continued with her application to vary the existing support order under the Ontario ISOA. That is clear from the supporting affidavit, sworn by Ms. Eckerman on 11 February 2019. It is also clear from the transcript of proceedings before the Ontario Superior Court of Justice, at Guelph, on 12 February 2019, where the presiding Justice gave an endorsement, stating at p. 4, line 20, that the applicant was seeking enforcement of a support order under the Ontario ISOA.
- [9] What happened on that date, 12 February 2019, is that the presiding Justice issued a provisional order, granting Ms. Eckerman's application to vary the original support order, varying it in a number of respects as mentioned above, basically increasing the support based on three children, and the based on the updated Guidelines, and requiring payment of retroactive support and s. 7 expenses.
- [10] The matter then made its way to British Columbia, for a hearing under this province's ISOA. The matter was originally set for hearing in on 27 March 2020, and the respondent Mr. Walberg was duly served with a notice of hearing. However, that hearing did not proceed because of the shutdown of court operations due to the pandemic.

- [11] The matter was then re-set for hearing for today's date, 28 September 2020. It appears that a notice of hearing was issued and arrangements were made for it to be sent to the respondent Mr. Walberg, although there is no affidavit of service confirming that the new notice of hearing was served on him. I will also note that Mr. Walberg, though he was duly served with the first notice for the hearing to take place on 27 March 2020, has never filed any materials in response to the application.
- [12] That brings me to today's date. The matter was called by telephone and Mr. Reimer appeared as *amicus curiae*. Mr. Walberg did not attend. Efforts were made to reach him at his phone number but he did not answer. As noted it is not clear that Mr. Walberg was given formal notice of today's hearing. There is no affidavit of service to that effect.

Analysis

- [13] Having heard the submissions of *amicus curiae*, I am satisfied that the application is fatally flawed because the procedures contemplated in the relevant statutes have not been followed. There are two concerns.
- [14] The first is that it is not clear whether this variation application was properly brought under the interjurisdictional support order legislation the first place. I say that because it is not clear whether the current support order that Ms. Eckerman seeks to vary, the order dated 26 January 2016, ordered support under provincial or federal legislation. The order itself is silent on the point. A previous order refers to specific forms of relief under the Divorce Act, but even that order is silent as to whether the support terms were made under the Ontario Family Law Act or the federal Divorce Act. This is a central concern because an application can only be brought under provincial ISO legislation in relation to a support order made under provincial legislation. Where the support order in issue was made under the federal Divorce Act, the provisions and procedures in that Act govern interjurisdictional support applications: Divorce Act, ss. 19-19; *R.D.O. v. C.J.O.*, 2003 BCSC 804 at para. 47.
- [15] The second concern is that, assuming the existing support order dated 26 January 2016 was actually made under provincial legislation, such that the provincial ISO legislation could be invoked to vary it, the statutory process was not followed. The presiding Judge of the Ontario Superior Court of Justice who dealt with this matter on 12 February 2019 made a "provisional order", but that is not the correct process to follow under the ISO legislation.
- [16] Here, I will refer to two cases, *Herriman v. Beresford*, 2012 BCCA 437 [Herriman], and *Wysocki v. Wysocki*, 2019 BCSC 1274 [Wysocki].
- [17] *Herriman* involved an appeal from a chambers judge's decision dismissing support application brought by an Ontario applicant which came before the British Columbia courts under the ISOA, because the applicant did not appear on the application, and because there was no "provisional order" from the Ontario court. The Court of Appeal found that the chambers judge was in error, because all of the steps necessary to confer jurisdiction on the British Columbia Superior Court had taken place, and no "provisional order" was

required. In reaching that conclusion, the Court of Appeal described the process as follows:

- [9] The BC ISOA creates a complete code for the recognition, enforcement, and variation of support orders between British Columbia and the reciprocating jurisdictions. It repealed and replaced provisions of the Family Relations Act, in 2003, which provided for a more complex reciprocal enforcement scheme known as "REMO".
- [10] All of the provinces and territories of Canada are declared to be reciprocating jurisdictions. Reciprocating jurisdictions are those declared by regulation, and having laws for the reciprocal enforcement of support orders made in British Columbia on a basis substantially similar to the BC ISOA.
- [11] Under the BC ISOA variation applications originating in certain jurisdictions require a "provisional variation order" to be made by a court in the jurisdiction where the applicant is ordinarily resident before the materials are sent to British Columbia. Other jurisdictions do not involve securing a provisional order before materials are sent to British Columbia and an application is made here.
- [12] The United Kingdom, for example, requires applicants for support variation orders first to obtain provisional variation orders in their own jurisdiction: see, *Mathers v. Bruce*, 2005 BCCA 410 at paras. 24-26. In such a case, an applicant brings a court application in the jurisdiction in which they ordinarily reside, without giving notice to the respondent. If the provisional variation order is made, both it and the support variation application are sent to the court in the reciprocating jurisdiction where the respondent ordinarily resides: see, BC ISOA, s. 27.
- [13] On receiving the provisional variation order and support variation application, the court in the reciprocating jurisdiction must set the matter down for a hearing, giving the respondent an opportunity to respond to the application, before confirming or denying the provisional variation order: see, BC ISOA ss. 28(2)(b) and 29(4).
- [14] A provisional variation order has no effect unless and until it is confirmed by the court in the reciprocating jurisdiction: see BC ISOA s. 1(1) definitions of "provisional variation order".
- [15] By contrast a provisional variation order is not required where an applicant in one province of Canada seeks to vary a support order originally made by a court in another province under provincial legislation: see, *R.D.O. v. C.J.O.*, 2003 BCSC 804 at paras. 44-47, and *Eyamie v. Eyamie*, 2012 BCSC 646.
- [16] If a respondent's jurisdiction does not require a provisional variation order, then only the court in the respondent's jurisdiction is engaged: *Mathers v. Bruce*, at paras. 5, 23, 38, 41. An applicant need only complete a support variation application in the jurisdiction in which he ordinarily resides and submit that application to the designated authority in his home jurisdiction.

- [18] That brings me to Wysocki, a case which bears considerable similarity to the case at bar, in that the applicant, an Ontario resident, was seeking to use the ISOA process to vary what was in effect an Ontario court order. Rather than submitting the ISOA application directly to the competent authority in British Columbia, the applicant applied for and obtained a "provisional order" in the Ontario courts, and then sought to have that provisional order confirmed in British Columbia. Madam Justice Shergill held that this was not the correct procedure.
- [19] This is part of what Shergill J. said in Wysocki, at para. 45 and following:
- [45] I turn next to the Provisional Order that Mr. Wyskocki seeks to have this Court confirm.
- [46] If the respondent's jurisdiction does not require a provisional order, then only the court in the respondent's jurisdiction is engaged: Herriman at para. 16.
- [47] A provisional order is not required in respect of a support variation application where the applicant is a resident of Ontario, and the respondent a resident of British Columbia: Herriman at para. 15.
- [48] Herriman involved an appeal from a chambers judge's decision to dismiss a support variation application because the applicant did not appear on the application, and because the material did not disclose that an Ontario court had made a "provisional order": Herriman at para. 3.
- [49] In finding that the chambers judge erred in refusing to hear the application, the Court in Herriman noted at para. 29 that:
- [29] It is apparent from the record that all steps necessary to confer jurisdiction on the Supreme Court had been taken and, specifically, neither a "provisional order" from Ontario nor an appearance by the applicant were required. Accordingly, the chambers judge ought to have proceeded to deal with the application on its merits in accordance with the requirements of ss. 30-32.
- [50] Here, the circumstances are reversed. The BC ISOA permits a British Columbia court to consider a support variation application on the basis of "the documents from a reciprocating jurisdiction that correspond to a support variation application referred to in section 25 (2)". Those documents do not include a provisional order.
- [51] Rather than applying for and obtaining a provisional variation order from the Ontario Superior Court of Justice, Mr. Wyskocki ought to have submitted his application directly to the designated authority in Ontario pursuant to ss. 27-28 of the Ontario ISOA. This would have resulted in engaging only the BC court. In effect, as pointed out by amicus and discussed by the Court in Mathers at para. 5, Mr. Wyskocki has defeated one of the fundamental purposes of the ISOA scheme: to simplify the interjurisdictional recognition of support orders by reducing the number of hearings required.

[52] Where the BC ISOA does not authorize the application, the appropriate result is for the court to dismiss the application: Mathers at para. 3.

[20] I will refer also to Herriman on this point, where the Court said at para. 15:

a provisional variation order is not required where an applicant in one province of Canada seeks to vary a support order originally made by a court in another province under provincial legislation: see, *R.D.O. v. C.J.O.*, 2003 BCSC 804 at paras. 44-47, and *Eyamie v. Eyamie*, 2012 BCSC 646.

[21] Applying that reasoning, I conclude that a similar procedural flaw is present in the case at bar. Rather than submitting the application to the competent authority in British Columbia, the applicant Ms. Eckerman proceeded with an application for a provisional order in Ontario. From one perspective it is understandable how this happened, since Ms. Eckerman began her variation application in the Ontario Superior Court of Justice, at a time when she still thought that Mr. Walberg was residing in Ontario. It is only when she learned that Mr. Walberg was no longer residing in Ontario that she in effect re-cast or re-framed her application as an application brought under the ISOA. Unfortunately, the procedure that was followed was irregular and has resulted in the involvement of two courts in a process that was intended to be streamlined to require only the involvement of one court.

Conclusion

[22] The bottom line is that the present matter is procedurally flawed for one of two reasons.

[23] First, it is not clear whether the original support order which is sought to be varied was made under provincial or federal legislation. If it was made under federal legislation, then the effort to vary it had to be dealt with under the interjurisdictional variation procedures set out in s. 18-19 of the Divorce Act. If this is the case, the application would have to be dismissed for lack of jurisdiction.

[24] Second, even if the original support order which is sought to be varied was made under the provincial legislation, that is, the Ontario FLA, then the application did not follow the proper procedure under the interjurisdictional support order legislation. Specifically, a provision order was sought and obtained when there was no requirement to do so, and the matter has come to this Court with a provisional order when the legislation contemplates that it should have come before this Court as a hearing of the application itself, per s. 29 and 30 of the British Columbia ISOA. If this is the case, then, as explained in *Wysocki*, the application must be dismissed on that basis that the British Columbia ISOA does not authorize the application to proceed in this fashion.

"Riley J."

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