COURT OF APPEAL FOR ONTARIO

CITATION: Colucci v. Colucci, 2017 ONCA 892
DATE: 20171122
DOCKET: C63664

Sharpe, Blair and Epstein JJ.A.

BETWEEN

Lina Colucci

Applicant (Respondent)

and

Felice Colucci

Respondent (Appellant)

Richard Gordner, for the appellant

Surinder Multani, for the respondent

Heard: October 5, 2017

On appeal from the order of Justice K.A. Gorman of the Superior Court of Justice, dated April 3, 2017.

Family Law – Divorce – Child Support – Arrears – Variation – Whether there is jurisdiction under s.17 of the Divorce Act to vary or discharge child support arrears once the children are no longer "children of the marriage" as defined in s. 2(1).

Sharpe J.A.:

[1] The issue on this appeal is whether the Superior Court has jurisdiction under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), s. 17(1) to vary or discharge child support arrears where the application is brought after children are no longer "children of the marriage".

[2] That issue turns on how we are to interpret *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37, [2006] 2 S.C.R. 231. *D.B.S.* holds that a court does not have jurisdiction to entertain an original application for child support under s. 15.1(1) of the *Divorce Act* if the children are no longer "children of the marriage". Does that mean that a court has no jurisdiction to vary an existing order for child support under s. 17(1) where the application to vary is made after children are no longer "children of the marriage"?

FACTS

[3] The appellant father and the respondent mother were married in 1983 and divorced in 1996. They have two children born in 1988 and 1989. The appellant father was ordered to pay child support to the respondent mother at the time of the divorce in the amount of $115.00 per week for each child. He made more or less regular payments until April, 1998. Thereafter, payments were irregular and they eventually ceased in June 1999. He accrued more than $175,000 in arrears by the time both children were over eighteen years old and were no longer "children of the marriage".

[4] Since the divorce, the father has lived and worked as an unskilled labourer in Canada, the U.S. and Italy. His income tax returns and other financial disclosure report a declining income since 1997.

[5] The father brought a motion to change the order retroactively and to have his arrears rescinded on the ground that there had been a change in circumstances. The mother brought a cross-motion to dismiss the application for want of jurisdiction. The father brought a motion for summary judgment, asking the court to determine that narrow issue. Specifically, he asked:

Does the court have jurisdiction to retroactively vary child support by discharging child support arrears which have accumulated pursuant to a court order, notwithstanding that the children are no longer entitled to support, i.e. they are no longer "children of the marriage" as defined by the *Divorce Act*, 1985 as of the date of the motion to change?

DECISION OF THE MOTION JUDGE

[6] The motion judge dismissed the father's motion and granted summary judgment dismissing the application to vary on the ground that D.B.S. deprives the court of jurisdiction to rescind or vary support arrears once the children are no longer "children of the marriage".

ISSUE

[7] The only issue on this appeal is whether the motion judge erred by dismissing the father's application solely on the ground that the court did not have jurisdiction to entertain it.

ANALYSIS

[8] The issue of jurisdiction turns on the effect of the Supreme Court's decision in *D.B.S.* That decision dealt with four applications to vary child support orders, two under Alberta legislation and two under the *Divorce Act*. The Supreme Court explained in some detail the principles governing child support and the variation of child support orders.

[9] One of the points considered was whether an application for child support could be made under the *Divorce Act* after the child had ceased to be a "child of the marriage". Writing for the majority of the court, Bastarache J. referred to the language of s. 15.1(1), the provision that authorizes a judge to make a child support order in a divorce application:

> 15.1 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

[10] Relying on the specific language of the section, Bastarache J. held that s. 15.1(1) conferred jurisdiction to make a child support order only where there were children who were still "children of the marriage". Given its importance to this appeal, I will quote the relevant part of the judgment, at paras. 88 and 89, in full:

> Under s. 15.1(1), an order may be made that requires a parent to pay "for the support of any or all children of the marriage". The term "child of the marriage" is defined in s. 2(1) as
>
> a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;
>
> The question then arises when the "material time" is for retroactive child support awards. If the "material time" is the time of the application, a retroactive child support award will only be available so long as the child in question is a "child of the marriage" when the application is made. On the other hand, if the "material time" is the time to which the support order would correspond, a court would be able to make a retroactive award so long as the child in question was a "child of the marriage" when increased support should have been due.
>
> In their analysis of the *Guidelines*, J. D. Payne and M. A. Payne conclude that the "material time" is the time of the application: *Child Support Guidelines in Canada* (2004), at p. 44. I would agree. While the determination of whether persons stand "in the place of . . . parent[s]" is to be examined with regard to a past time, i.e., the time when the family functioned as a unit, this is because a textual and purposive analysis of the *Divorce Act* leads to this conclusion; but the same cannot be said about the "material time" for child support applications: see *Chartier v. Chartier*, 1999 CanLII 707 (SCC), [1999] 1 S.C.R. 242, at paras. 33-37. An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status.

[11] *D.B.S.* did not directly consider the point at issue on this appeal, namely, whether the court has jurisdiction to entertain an application to vary a child support order after the children are no longer "children of the marriage". That issue falls to be determined under s. 17(1) of the *Divorce Act*:

> 17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> > (a) a support order or any provision thereof on application by either or both former spouses;
>
> …
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[12] One of the four cases decided together with *D.B.S.*, *Henry v. Henry*, involved an application for retroactive variation of a child support order. At the time the notice of motion to vary was filed, the eldest child was no longer a child of the marriage. The Supreme Court held, at para. 150, that as the Notice to Disclose/Notice of Motion had been served while that child still was a child of the marriage, there was jurisdiction to entertain the application. That might suggest that there would have been no jurisdiction had the proceedings not been initiated while the child was still a child of the marriage, but the court did not directly consider or decide that point. In some cases, including the case at bar, trial level judges have held that *D.B.S.* governs and declined to vary child support orders after the children are no longer "children of the marriage": see *Giroux v. Mueller*, 2013 ONSC 246, [2013] O.J. No. 90; *Durso v. Mascherin*, 2013 ONSC 6522, [2013] O.J. No. 4803; *Noseworthy v. Noseworthy* (2011), 313 Nfld. & P.E.I.R. 1 (N.L.S.C.); *Boomhour v. Huskinson* (2008), 2008 CanLII 26261 (ON SC), 54 R.F.L. (6th) 297 (Ont. Sup. Ct.); *Krivanek v. Krivanek* (2008), 2008 CanLII 44732 (ON SC), 56 R.F.L. (6th) 390 (Ont. Sup. Ct.); *Haavisto v. Haavisto*, 2008 SKQB 446, 325 Sask. R. 82; *Millar v. Millar*, 2007 SKQB 25, 292 Sask. R. 316.

[13] There is, however, a strong line of conflicting authority supporting the view that given the different wording and purpose of s. 17(1), the test for jurisdiction to vary differs from the test for jurisdiction to make an original order under s. 15.1(1).

[14] I am more persuaded by this line of authority. The leading and most carefully reasoned decision is *Buckingham v. Buckingham*, 2013 ABQB 155, 554 A.R. 256, where Strekaf J. concluded that both the wording of the statute and the principles of child support favoured distinguishing *D.B.S.* and interpreting s. 17(1) to allow a court to vary a child support order even though the children are no longer children of the marriage. The reasoning in *Buckingham* has been followed in a number of Ontario trial level decisions under the *Divorce Act*: *Timmers v. Timmers*, 2016 ONSC 306; *Charron v. Dumais*, 2016 ONSC 7491, [2016] O.J. No. 6235; *Lemay c. Longpré*, 2014 ONCS 5107 (CanLII), 2014 ONSC 5107, 68 R.F.L. (7th) 365. Courts have also retained jurisdiction on the basis that the payor parent's deliberate absence or deception prevented the recipient from applying for a variation while the child was still a "child of the marriage": *George v. Gayed*, 2014 ONSC 5360, [2014] O.J. No. 4383; *Simone v. Herres*, 2011 ONSC 1788, [2011] O.J. No. 1626.

[15] I note as well that Ontario cases decided under the *Family Law Act,* R.S.O. 1990, c. F.3 hold that the court has jurisdiction to vary child support orders after retroactively after the children cease to be dependants, frequently citing *Buckingham* in support: see *Surighina v. Surighin*, 2017 ONCJ 384, [2017] O.J. No. 3022; *Smith v. McQuinn*, 2016 ONSC 7997, [2016] O.J. No. 6600; *Meyer v. Content*, 2014 ONSC 6001, [2014] O.J. No. 4992; *Catena v. Catena,* 2015 ONSC 3186, 61 R.F.L. (7th) 463. While not determinative of the point at issue on this appeal, there would be an additional unfairness if parents in precisely the same situation were permitted to vary *Family Law Act* orders, but not orders under the *Divorce Act*.

[16] To date, where retroactive variation is sought when the children are no longer entitled to support, the courts have seen fit to entertain the request in the following situations, summarized in *Smith v. McQuinn*, at para. 59:

> In summary, the case law has created exceptions to the DBS analysis in the following circumstances:
>
> > a) In variation proceedings where there is an existing order and an established support obligation under the Divorce Act, 1985, c. 3 (2nd Supp.) ("Divorce Act");
> >
> > b) In motion to change proceedings where there is an existing order and an established support obligation under the FLA; and
> >
> > c) When there has been blameworthy conduct on behalf of a support payor that has contributed to the support recipient's failure to bring the retroactive support claim within the requisite time.

[17] Other cases have avoided applying *D.B.S.* by framing the motion as a matter of enforcement rather than variation. For example, in *Lalande v. Pitre*, 2017 ONSC 208, [2017] O.J. No. 101, an existing child support order required annual disclosure and contemplated adjustments based on income fluctuations. Relying on the decision in *Meyer,* at paras. 65-67 and 83, the court found that because the right to variation was clearly established in the order, the mother was entitled to enforce it, by seeking a retroactive variation for the child who was no longer a "child of the marriage".

[18] Ontario courts have also avoided *D.B.S.* by framing the motion as a "variation" even if there is no existing court order. In *P.M.B. v. A.R.C.A.*, 2015 ONCJ 720, 71 R.F.L. (7th) 474, at paras. 92-94, the court distinguished from *D.B.S.* on the basis that the mother, who had brought an originating application for child support, was in reality seeking to adjust the terms of a "well-established" oral child support agreement retroactively.

[19] As Strekaf J. observed in *Buckingham*, the interpretation of s. 15.1(1) in *D.B.S.* turned on the precise wording of that provision, which confers jurisdiction to make a child support order for any who were, "at the material time", "children of the marriage". The jurisdiction to vary a child support order under s. 17(1) is at large and is not limited by those words. I agree that we should look first to the words of the statute and that given this crucial difference between the words of s. 15.1(1) and 17(1), we are not bound to import the interpretation accorded to s.

15.1(1) by the Supreme Court in *D.B.S.* when interpreting s. 17(1). Section 17(1) does not, by its language, limit the jurisdiction of the court to vary a child support order to the time period when the children are still "children of the marriage" and the decision in D.B.S. does not compel us to interpret the jurisdiction conferred by s. 17(1) as being precisely the same as that conferred by s. 15.1(1).

[20] Section 17(1) puts parties who are subject to a s. 15.1(1) order on notice that the order may be changed. That puts them in a different position than parties for whom no s. 15.1(1) order has been made.

[21] I also agree with Strekaf J. that allowing a court to vary an existing order after the children cease to be "children of the marriage" is consistent with the principles of child support. The principles at play here are first, that the amount of child support depends upon the income of the parents; second, that as the parents' income changes, so too does the obligation to pay support. The third relevant principle must be balanced with the second, namely, that child support orders should, as far as possible, foster certainty, predictability and finality.

[22] As *D.B.S.* explains, it is a basic principle of child support and the *Federal Child Support Guidelines* that the amount of support is essentially determined by the income of the payor parent. If an order imposes a child support obligation that does not correspond to the payor parent's income, the order is not consistent with that principle. It is for that reason that *D.B.S.* permits retroactive orders in appropriate circumstances. Section 17(1) allows a court to vary an order where there has been a material change in circumstances to ensure that the child receives an amount of support commensurate with the income of the payor parent.

[23] Certainty, consistency and finality are important considerations in relation to child support orders but they must be balanced with the concerns of flexibility and fairness.

[24] As the Supreme Court explained in *D.B.S.*, at para. 64, "parents should not have the impression that child support orders are set in stone…[T]here is always the possibility that orders may be varied when these underlying circumstances change: see s. 17 of the *Divorce Act*". The court added: "The certainty offered by a court order does not absolve parents of their responsibility to continually ensure that their children receive the appropriate amount of support." A payor parent is not entitled to assume that his or her obligation is fixed for all time. If the payor's income goes up, the support obligation may be increased. Similarly, the recipient parent cannot safely assume that he or she will always continue to receive the same amount to help support the children. If the payor parent's income goes down, the amount of support may be decreased. As *D.B.S.* explains at para. 74: "As the circumstances underlying the original award change, the value of that award in defining parents' obligations necessarily diminishes."

[25] How should these principles apply to the variation of child support orders after the children are no longer "children of the marriage"?

[26] The first two principles favour giving a court the jurisdiction to vary the order, particularly in the case of increased support. I can see no reason why the court should be deprived of jurisdiction to consider the request of a recipient parent who struggled to support the children

and to shift part of that burden to the payor parent if there was a change in circumstance that would have justified a variation while the children were still children of the marriage. The court faced with a variation application would, of course, have to be mindful of the principle that child support is the right of the child, not the parent and that once the children are no longer children of the marriage, they will not directly benefit from increased support. However, a regime that gave payor parents immunity after the children ceased to be children of the marriage would create a perverse incentive. If the payor parent is to be absolved from responsibility once the children cease to be "children of the marriage", the payor whose income increases might be encouraged not to respond to his or her increased obligations in the hope that the reciprocal spouse will delay making an application for a variation increasing support until the children lose their status to avoid opening the door to an increased obligation: see *Simone v. Herres*, at para. 27.

[27] While the argument for allowing post-"child of the marriage" applications to decrease support is perhaps less compelling, if there is to be jurisdiction to entertain applications to increase, I agree with *Buckingham* that the law should adopt an even-handed approach and, from a jurisdictional perspective, treat payor and recipient parents the same way. If a court has jurisdiction to consider a recipient parent's request for a retroactive increase in child support where the payor's income increased, there should also be jurisdiction to consider a payor parent's request for a reduction where his or her income declined. Moreover, as I will point out, while the question of jurisdiction is one thing, the question of whether such applications should be allowed is quite another.

[28] This brings me to the considerations of certainty, predictability and finality. I recognize that these are important values in the family law regime. The law should strive to be as certain and predictable as possible. The law should also discourage disturbing settled arrangements so that parties are encouraged to resolve their disputes and get on with their lives following family break-down, ideally without ever resorting to litigation for the sake of the children: see *Louie v. Lastman* (2001), 2001 CanLII 28065 (ON SC), 54 O.R. (3d) 286 at paras. 33-34 (S.C.), aff'd (2002), 2002 CanLII 45060 (ON CA), 61 O.R. (3d) 449 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 465.

[29] But as I have already mentioned, the interests of fairness and the need to ensure that children get the support they deserve precludes a rigid approach that forbids changing support orders when there has been a change in circumstances. The very existence of s. 17(1) demonstrates that finality has its limits and that neither children nor parents can safely assume that support orders will never change. The interest of certainty and finality does not, in my view, justify erecting a rigid jurisdictional bar on variation applications simply because the children are no longer "children of the marriage".

[30] For these reasons, I conclude that neither the language of s. 17(1) nor the principles of child support require us to deny a court jurisdiction to vary an existing child support order or well established written or oral argument after the children cease to be "children of the marriage".

[31] As I have noted, the issue before us on this appeal is a narrow one. The parties brought cross motions for summary judgment on the single issue of whether the court had jurisdiction to consider the father's application to vary the child support order. The motion judge was not asked to decide the merits of the father's application. In these circumstances, it would not be appropriate for us to go beyond the narrow issue of jurisdiction on the facts of this case. However, it is appropriate to point out that having the jurisdiction to vary an order is one thing and deciding whether to vary it is quite another. *D.B.S.* offers some guidance on when it will be appropriate to vary a child support order retroactively. The factors the court will consider include whether there has been unreasonable delay in seeking the variation, any misconduct of the payor parent, the circumstances of the child, and hardship to the payor. The issue of arrears calls for special consideration: see *D.B.S.* at para. 98, stating that the factors are not meant to apply when arrears have accumulated. "[T]he payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction."

DISPOSITION

[32] I would allow the appeal, grant summary judgment declaring that the court has jurisdiction to entertain the application, and remit the matter to the Superior Court for a determination on the merits. I would fix the costs of this appeal at $4500 but order that liability of those costs and the costs of the motion for summary judgment be reserved to the judge hearing this matter on the merits.

Released: November 22, 2017

"Robert J. Sharpe J.A."
"I agree R.A. Blair J.A."
"I agree Gloria Epstein J.A."