Park v. Thompson
[Indexed as: Park v. Thompson]

77 O.R. (3d) 601

[2005] O.J. No. 1695

2005 CanLII 14132

Docket: C42585

Court of Appeal for Ontario,

Catzman, Rosenberg and Goudge JJ.A.

May 2, 2005

Family law -- Support -- Child support -- Application judge failing to take appropriate considerations into account in ordering retroactive child support -- Application judge failing to consider whether table amount was inappropriate within meaning of s. 3(2)(b) of Guidelines where child had turned 18 and was attending university in another city -- Application judge erring in ordering father to pay certain expenses under s. 7 of Guidelines in absence of adequate evidence -- Father's appeal allowed and trial of those issues ordered -- Child Support Guidelines, O. Reg. 391/97, ss. 3(2), 7.

The parties separated in 1999 and entered into a separation agreement. They agreed to a child support arrangement that involved contribution to a joint bank account for the benefit of their child. They expressly opted out of the Child Support Guidelines, O. Reg. 391/97, but the agreement provided that if either party failed to pay the amounts required by the agreement, the other party might refer the issue of child support for determination by a court pursuant to the Family Law Act, R.S.O. 1990, c. F.3 and the Guidelines. The child, who turned 18 in August 2004, had refused to communicate with the father since April 2001. As of November 2002, the father refused to pay anything further towards the child's expenses until she agreed to attend counselling. The child refused. The mother brought an application for child support in December 2003. Although she had retained counsel, she had not made any demand of the father between November 2002 and December 2003 that he comply with his contractu al obligation to make payments into the account. The application judge ordered the father to pay the table amount of child support in accordance with the Guidelines retroactive to November 2002. The application judge also found that all the extraordinary expenses claimed by the mother were reasonable. In particular, he found that a school trip to Japan, a trip to England to consider university education, club fees and fees for a cell phone were not inappropriate at the income level enjoyed by the parties. At the time of the application, the child was enrolled in university and was living in another city. The application judge ordered the father to pay ongoing support in the full table amounts in accordance with the Guidelines and his pro- rated share of the tuition fees. The father appealed.

Held, the appeal should be allowed.

The jurisdiction to award retroactive child support is to be exercised sparingly. The factors favouring the making of a retroactive order are: the need on the part of the child and corresponding ability to pay on the part of the non-custodial parent; some blameworthy conduct on the part of the non- custodial parent, such as incomplete or misleading financial disclosure; need on the part of the custodial parent to encroach on capital or incur debt; an excuse for the delay in bringing the application; and notice to the payor parent of an intention to pursue support. Those factors mitigating against a retroactive order are: the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and a significant, unexplained delay in bringing the application. In this case, the record did no t support the application judge's finding that the delay was not unreasonable because the father knew that a claim for child support would be pursued. Moreover, although the facts that the child was attending a private school and the father's pre- existing contractual agreement to pay child support were important factors relating to the question of need, the application judge did not consider any of the other relevant factors such as whether the mother had been required to encroach on capital or incur debt. Most importantly, he did not consider the father's present ability to pay given the responsibilities of his new family and whether, in all of the circumstances, an order for retroactive child support would cause an unfair burden on the father. In those circumstances, the order for retroactive child support could not stand.

There was insufficient evidence on the record to support the application judge's conclusions with respect to the extraordinary expenses claimed by the mother. Moreover, the application judge did not take into account that the father had not been consulted about any of the expenses before they were incurred, the possible contribution of the child to the expenses, and any available tax credits. Section 7 of the Guidelines required the judge to take these matters into account in determining the amount of the expenses.

Before ordering the father to pay the full table amounts for child support notwithstanding that the child was now 18 years of age and attending university in another city, the application judge should have considered the provisions of s. 3(2) of the Guidelines. He erred in failing to consider whether the table amount was inappropriate within the meaning of s. 3(2)(b).

The appropriate order was to direct a trial of the outstanding issues.

APPEAL by a father from the order of Paisley J. of the Superior Court of Justice, dated September 29, 2004, for child support.

Marinangeli v. Marinangeli (2003), 2003 CanLII 27673 (ON CA), 66 O.R. (3d) 40, [2003] O.J. No. 2819, 228 D.L.R. (4th) 376, 174 O.A.C. 76, 38 R.F.L. (5th) 307 (C.A.); Walsh v. Walsh (2004), 2004 CanLII 36110 (ON CA), 69 O.R. (3d) 577, [2004] O.J. No. 254, 46 R.F.L. (5th) 455 (C.A.), supp. reasons 2004 CanLII 24259 (ON CA), [2004] O.J. No. 1443, 6 R.F.L. (6th) 432 (C.A.), apld Other cases referred to Henry v. Henry, [2005] A.J. No. 4, 249 D.L.R. (4th) 141, 334 W.A.C. 388, 357 A.R. 388, 2005 ABCA 5, 38 Alta. L.R. (4th) 1, 7 R.F.L. (6th) 275

(C.A.); Luftspring v. Luftspring, [2004] O.J. No. 1538 (C.A.); McLaughlin v. McLaughlin, 1998 CanLII 5558 (BC CA), [1998] B.C.J. No. 2514, 167 D.L.R. (4th) 39, [1999] 7 W.W.R. 415, 44 R.F.L. (4th) 148, 57 B.C.L.R. (3d) 186 (C.A.), supp. reasons 1999 BCCA 135 (CanLII), [1999] B.C.J. No. 485, 172 D.L.R. (4th) 70, 44 R.F.L. (4th) 176 (C.A.); Merritt v. Merritt, [1999] O.J. No. 1732, 98 O.T.C. 321 (S.C.J.); S. (D.B.) v. G. (S.R.), [2005] A.J. No. 1633, 249 D.L.R. (4th) 72, [2005] 5 W.W.R. 229, 2005 ABCA 2, 38 Alta. L.R. (4th) 199, 7 R.F.L. (6th) 373 (C.A.); S. (L.) v. P. (E.), [1999] B.C.J. No. 1451, 1999 BCCA 393, 175 D.L.R. (4th) 423, 50 R.F.L. (4th) 302, 67 B.C.L.R. (3d) 254 (C.A.) Leave to appeal to S.C.C. refused (1999), 252 N.R. 194n; W. (L.J.) v. R. (T.A.), [2005] A.J. No. 3, 249 D.L.R. (4th) 136, 2005 ABCA 3, 9 R.F.L. (6th) 232 (C.A.) Statutes referred to Family Law Act, R.S.O. 1990, c. F.3 Rules and regulations referred to Child Support Guidelines, O. Reg. 391/97, ss., 3(2), 7 [as am.]

Philip M. Epstein, Q.C., for appellant.

W. Douglas R. Beamish, for respondent.

The judgment of the court was delivered by

[1] ROSENBERG J.A.: -- The appellant father appeals from the order of Paisley J. granting an application by the respondent mother for child support. The appellant attacks three aspects of the order:

(1) making the order for child support retroactive to November 1, 2002;

(2) ordering the father to pay certain expenses under s. 7 of the Child Support Guidelines, O. Reg. 391/97; and

(3) ordering the father to pay the Table amounts for child support and s. 7 expenses for the period after the child turned 18 years of age.

[2] For the following reasons, I would allow the appeal, set aside the order and order a trial of the issues respecting retroactivity, the s. 7 expenses and the level of prospective child support.

The Facts

(a) The separation and the breakdown of the relationship with Vanessa

[3] The appellant and the respondent began cohabiting in 1984 and separated in February 1999. They have one child, Vanessa, born August 9, 1986. Vanessa turned 18 years of age in August 2004 (shortly before the application was heard in September 2004). Since April 2001, Vanessa has refused to spend time or communicate with her father. He has made many attempts to communicate with her and has been rebuffed. The father believes that the mother has done nothing to facilitate his relationship with Vanessa.

[4] There were three minor acts of violence by the father that contributed to the breakdown of the relationship. The first act occurred when, in effect, the father forced the mother out of the house.

On two subsequent occasions, the father attempted to establish contact with Vanessa. On April 2, 2001, the father confronted Vanessa outside her school and when she refused to go with him, he grabbed her computer and refused to return it. The father returned the computer after the police became involved. The following day, Vanessa wrote a letter to her father telling him that she did not want to see him again. Over the next few months, the father's lawyer wrote to the mother asking for therapeutic intervention for Vanessa to try and re-establish the relationship. The father also wrote to the mother directly asking her to intercede with their daughter. The mother did not respond.

[5] On April 3, 2002, the father happened to see Vanessa on the street. The father insisted on talking to her and held on to her. The police were called and the father was arrested. He was charged with a criminal offence, but the charge was withdrawn when the father entered into a peace bond. A term of the peace bond was that the father was not to contact Vanessa for six months except pursuant to a Family Court Order. Since that time there has been no further communication between Vanessa and her father. Further, the mother has provided virtually no information to the father about their daughter, including her progress in school and her extra-curricular activities.

(b) The separation agreement

[6] The parties entered into a separation agreement on September 17, 1999. Under the agreement they would share joint custody of Vanessa. They agreed to a child support arrangement that involved contribution to a joint bank account for Vanessa's benefit. The parties expressly opted out of the Child Support Guidelines, O. Reg. 391/97. The payments out of the account would be applied to school fees, trip expenses, other expenses invoiced by Vanessa's private school and various other activities such as music lessons and post- secondary expenses. They also agreed that none of the expenses relating to their respective households would be paid from the account and that they would equally share Vanessa's post-secondary education expenses. The parties agreed to each make an initial deposit of $5,000 and thereafter deposit $1,000 per month into the account. The mother had sole signing authority over the account. The parties were to be provided with bank statements.

[7] From the beginning, there were disputes over the account. The father did not always make payments on schedule and the mother did not always provide monthly statements for the account or receipts or invoices for expenses. The father also claims that the mother did not make her payments to the account as required by the agreement. As of November 2002, the father refused to pay anything further towards Vanessa's expenses until she agreed to attend counselling with a counsellor that the father had chosen. Vanessa has refused to do so.

[8] The separation agreement provided that in the event that either party fails to pay the amounts required by the agreement, the other party may refer the issue of child support for determination by a court pursuant to the Family Law Act, R.S.O. 1990, c. F.3, and the Child Support Guidelines. The mother launched her application for child support in December 2003. Although she had retained counsel, she had not made any demand of the father between November 2002 and December 2003 that the father make his payments into the account. The correspondence between counsel related to the father's requests that Vanessa agree to counselling.

(c) The financial circumstances of the parties

[9] The father has now married and has two young children. His financial statement shows a net worth of approximately $18,000. The mother has a net worth of approximately $450,000. The application judge found that the father's income was $139,103 in 2002, $228,294 in 2003 and $157,773 in 2004. The application judge made no finding concerning the mother's income. The mother's income tax returns show a taxable income of $139,239.89 for the 2000 taxation year, $110,569.94 for the 2001 taxation year, and $91,923.88 for the 2002 taxation year.

The Reasons of the Application Judge

[10] Prior to the attendance before the application judge, another judge had refused to order a trial of the issue of whether the child voluntarily withdrew from the father's guidance. The application was therefore based on the affidavits of the father and mother and cross-examinations on those affidavits. The parties did not renew the request for a trial of an issue before the application judge. The father argued that he should not be required to pay any child support since the child had withdrawn from his parental guidance. The application judge found against the father on that issue and the appellant did not pursue that issue on the appeal.

(a) Retroactive child support

[11] With respect to the claim for retroactive child support, the application judge held that the delay was not unreasonable and that it was clear to the father that the claim for child support would be pursued if not resolved. He found that there "is and has been need for child support--the child was, during the parental relationship, a student at Bishop Strachan School, which is an expensive private school in Toronto". He also found that there was no unfair burden imposed on the father requiring him to pay retroactive child support. The application judge ordered the father to pay the table amounts in accordance with the Guidelines retroactive to November 2002. This totalled $35,584, less a credit of $13,478.78 [See Note 1 at the end of the document].

(b) The s. 7 expenses

[12] The application judge held that the extraordinary expenses were all reasonable. In particular, he found that a school trip to Japan, a trip to England to consider university education, club fees and fees for a cell phone were not inappropriate at the income level enjoyed by the parties. The application judge ordered the father to pay $37,737.61 as his pro-rated share of all the s. 7 expenses claimed retroactive to November 2002.

(c) Ongoing support

[13] At the time of the application, Vanessa was enrolled in McGill University. The application judge ordered the father to pay the full table amounts in accordance with the Guidelines and his pro-rated share of the tuition fees.

Analysis

(a) Retroactive child support

[14] As Weiler J.A. observed in Marinangeli v. Marinangeli (2003), 2003 CanLII 27673 (ON CA), 66 O.R. (3d) 40, [2003] O.J. No. 2819 (C.A.), at para. 72, the term "retroactive" may be somewhat of a misnomer in relation to child support given that the obligation to support a child arises immediately upon her birth. Nevertheless, this court has held that there is no presumption in favour of ordering child support to some date prior to the date of the application. In Marinangeli, Weiler J.A. at para. 72 said the jurisdiction to award retroactive support is to be "exercised sparingly". In Marinangeli and in Walsh v. Walsh (2004), 2004 CanLII 36110 (ON CA), 69 O.R. (3d) 577, [2004] O.J. No. 254 (C.A.), this court adopted the list of factors set out by Rowles J.A. in S. (L.) v. P. (E.), 1999 BCCA 393 (CanLII), [1999] B.C.J. No. 1451, 50 R.F.L. (4th) 302 (C.A.), at pp. 320-21 R.F.L. Those favouring the making of a retroactive order are:

> (1) the need on the part of the child and corresponding ability to pay on the part of the non-custodial parent;
>
> (2) some blameworthy conduct on the part of the non- custodial parent, such as incomplete or misleading financial disclosure;
>
> (3) need on the part of the custodial parent to encroach on capital or incur debt;
>
> (4) an excuse for the delay in bringing the application; and
>
> (5) notice to the payor parent of an intention to pursue support.

[15] Those factors mitigating against a retroactive order are:

> (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations;
>
> (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and
>
> (3) a significant, unexplained delay in bringing the application.

[16] In his submissions, Mr. Beamish on behalf of the mother asks this court to adopt a different approach in line with the so-called Alberta trilogy: S. (D.B.) v. G. (S.R.), 2005 ABCA 2 (CanLII), [2005] A.J. No. 1633, 7 R.F.L. (6th) 373 (C.A.); W. (L.J.) v. R. (T.A.), 2005 ABCA 3 (CanLII), [2005] A.J. No. 3, 9 R.F.L. (6th) 232 (C.A.); and Henry v. Henry, 2005 ABCA 5 (CanLII), [2005] A.J. No. 4, 7 R.F.L. (6th) 275 (C.A.). In the trilogy, the Alberta Court of Appeal has taken a very different approach to retroactive child support and, for example, has presumed need and an ability to pay on the part of the payor and has not required any

demonstration of blameworthy conduct on the part of the payor or encroachment on capital by the custodial parent. Given the recent extended discussion of retroactive support in Walsh and Marinangeli, I have not been persuaded that this is an appropriate time to reconsider the issue, notwithstanding the thoughtful discussion in the Alberta trilogy.

[17] In my view, the application judge erred in his application of the factors adopted in Walsh. First, he found that the delay was not unreasonable because the father knew that a claim for child support would be pursued. The record does not support this finding. Although there was an exchange of correspondence concerning Vanessa's relationship with her father, there is no indication from the mother that she intended to pursue child support. It may well be that the father could reasonably expect an application at some point but, on this record, there is no explanation for the delay by the mother in seeking child support.

[18] Second, although the facts that the child was attending a private school and the father's pre-existing contractual agreement to pay child support were important factors relating to the question of need, the application judge did not consider any of the other relevant Walsh factors such as whether the mother had been required to encroach on capital or incur debt. Most importantly, he did not consider the father's present ability to pay given the responsibilities of his new family and whether, in all of the circumstances, an order for retroactive child support would cause an unfair burden on the father. I should not be taken as holding that the judge must expressly refer to all of the factors mentioned in Walsh. The judge should, however, refer to those factors clearly raised by the circumstances of the case and that are not obviously neutral in their application.

[19] In those circumstances, the order for retroactive child support cannot stand.

(b) The s. 7 expenses

[20] At the application, the mother presented schedules representing the expenses that she claimed fell within s. 7 of the Guidelines. The schedules were supported by invoices and receipts but there was little explanation for them in the mother's material. The father had not been consulted with respect to the expenses before they were incurred although he likely knew that Vanessa was still attending the private school. The father submits that, with the exception of the private school tuition, the mother had not established that any of the expenses fall within s. 7.

[21] Section 7 of the provincial Guidelines provides as follows:

> 7(1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> . . . . .

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extra-curricular activities.

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

(3) In determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense. (Emphasis added)

[22] The trial judge concluded that all the expenses claimed by the mother were reasonable. He did not provide any reasons for that conclusion other than to say that the various expenses were consistent with the activities participated in prior to separation. In my view, this finding cannot stand. It was not sufficient to find that the expenses were reasonable. The judge was also required to find that they were necessary and that they came within one of the paragraphs in s. 7(1). On this record, some of the claimed expenses did not come within s. 7. A few examples will suffice.

[23] The mother claimed, and the application judge allowed, an expense for a trip by the mother and Vanessa to England to investigate whether the child should attend university in that country. The mother did not consult with the father before incurring this expense. There was no evidence to support the necessity for this trip or that it was at all likely, given her parents' incomes, that Vanessa would attend university outside of Canada.

[24] The application judge allowed an expense for a cell phone. There is nothing in the record to support a finding that this was an "extraordinary" expense. As Prowse J.A. said in McLaughlin v. McLaughlin, 1998 CanLII 5558 (BC CA), [1998] B.C.J. No. 2514, 167 D.L.R. (4th) 39 (C.A.), at para. 64, the use of the word "extraordinary" in s. 7 implies that ordinary expenses are intended to be covered by the basic table amounts. Given the incomes of the parents there was nothing to support the conclusion that a cell phone was an extraordinary expense. At least on this record, the same may be said for many of the other expenses such as club fees and music lessons.

[25] Further, some of the expenses do not, on this record, appear to fall within any of the clauses of s. 7(1). For example, the mother claimed close to $1,500 for a ski trip to Whistler Mountain and clothing for the trip. The application judge made no finding that this trip was an extraordinary expense for extra-curricular activities within s. 7(1)(f) and there is no explanation in this record for this trip other than the bald assertion in the mother's affidavit that this was a school trip. There is no other clause of s. 7(1) that would seem to encompass this type of expense.

[26] Finally, the application judge did not take into account that the father had not been consulted about any of these expenses before they were incurred [See Note 2 at the end of the document]; the possible contribution by Vanessa to these expenses; and any available income tax credits, as for the McGill tuition fees. Section 7 requires the judge to take these matters into account in determining the amount of the expenses.

(c) Child support and s. 3 of the Guidelines

[27] The application judge ordered that the father pay the full table amounts for child support notwithstanding that Vanessa was now 18 years of age and attending university in another city. In my view, in these circumstances, before making the order the application judge should have considered the provisions of s. 3(2) of the Guidelines which provide as follows:

> 3(2) Unless otherwise provided under these guidelines, where a child to whom an order for the support of a child relates is the age of majority or over, the amount of an order for the support of a child is,
>
> (a) the amount determined by applying these guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent or spouse to contribute to the support of the child.

[28] At the hearing of the appeal, Mr. Epstein on behalf of the father presented us with a detailed chart showing that generally courts reduce the amount of child support during the academic year where the child is not living at home, in accordance with s. 3(2)(b). Heeney J. explained the rationale for this approach in Merritt v. Merritt, [1999] O.J. No. 1732, 98 O.T.C. 321 (S.C.J.) at para. 73:

> Where, however, a child is residing in another residence for the bulk of the year, it seems inappropriate to apply tables that are not designed with that living arrangement in mind. Furthermore, the table approach assumes that the recipient parent discharges her obligation by being physically in the same household and providing the family home and other amenities for the child. Where a child is at college, this assumption does not hold true. It therefore seems more appropriate to calculate the actual costs of providing for the needs of the child in his other residence, factoring in a contribution toward the cost of maintaining the family home to return to on weekends and school breaks where appropriate, and apportion that between the spouses on a Paras approach after considering the child's own ability to contribute.

(Emphasis added)

[29] The application judge erred in failing to consider whether the table amount was inappropriate within the meaning of s. 3(2)(b). Again, there was very little evidence to assist the

application judge. Because of the lack of communication with the father, all of the relevant information was in the hands of the mother and Vanessa and there is almost no information in the record concerning, for example, Vanessa's expenses at McGill, and whether she has applied for grants or bursaries.

Disposition

[30] The application judge's disposition cannot stand on this record. Mr. Epstein did not, however, suggest that it would be appropriate or fair to, for example, simply allow the appeal and dismiss the mother's application relating to the s. 7 expenses. He suggested, and I agree, that the appropriate order is to direct a trial of the outstanding issues.

[31] Accordingly, I would allow the appeal, set aside that part of the order concerning retroactivity, the s. 7 expenses and ongoing support and direct a trial of those issues.

[32] The father is entitled to his costs of the appeal. If the parties cannot agree on the costs of the appeal, the father shall submit a bill of costs to the Registrar within ten days of release of this order. The mother will have ten days to respond in writing to this bill and the father, if he considers it necessary, will have five days to reply in writing.

Appeal allowed.

Notes

Note 1: In April 2004, Backhouse J. made an interim order for support. The applicant complied with the order; resulting in the credit of $13,478.78.

Note 2: Luftspring v. Luftspring, [2004] O.J. No. 1538 (C.A.).