COURT OF APPEAL FOR ONTARIO

CITATION: Trembley v. Daley, 2012 ONCA 780
DATE: 20121115
DOCKET: C53662

Laskin, Juriansz and Tulloch JJ.A.

BETWEEN

Michele Elizabeth Trembley

Applicant (Appellant)

and

James Stephen Daley

Respondent (Respondent)

D. Smith, for the applicant (appellant)

Malcolm Bennett, for the respondent

Heard: September 20, 2012

On appeal from the final order of Justice L. Templeton of the Superior Court of Justice, dated March 16, 2011.

Juriansz J.A.:

[1] This is an appeal from an order dated March 16, 2011, granted on a motion to change the respondent's child support obligations under an earlier order dated July 10, 2007. The appellant also seeks leave to appeal the costs awarded on the motion to change.

[2] The parties started living together in 1986 and separated in 2004. There are two children of the relationship born in May 1994 and December 1991.

[3] There was a trial on the issue of child support in June 2007. The trial judge remarked that the respondent was not represented at trial, had failed to satisfy undertakings given at examinations, and had failed to provide his income tax returns or proper documentation supporting his income, bank accounts, expenses or any other documents to properly assess his child support obligations. The trial judge inferred that the respondent's failure to make proper disclosure was for the purpose of hiding his source of funds or income. The trial judge also remarked that since the respondent was employed by his new common-law partner, the court faced "a most impossible task differentiating her income from the business and that of [the] boyfriend's employment earnings". The "guesswork" and "speculation" in determining his income was "directly as a result of [the respondent's] failure to provide the court with this information."

[4] The trial judge ordered the respondent to pay $29,640 for child support arrears and $1,208 per month in ongoing child support commencing August 1, 2007, on the basis of an imputed income of $84,000. The trial judge also ordered the respondent to pay the appellant a property judgment of $49,939.75. The appellant's costs, fixed in the amount of $33,114.19, and three previous cost awards totalling $3,000 were ordered enforced as child support.

[5] The respondent brought a motion to change on March 3, 2008. The appellant brought a cross-motion dated April 21, 2008, requesting that the respondent's motion be dismissed.

[6] On February 10, 2010, the respondent suffered a serious injury, losing several fingers on his right hand. The motions were heard in April 2010.

[7] The motions judge found that the "catastrophic injury" that the respondent suffered constituted a material change in circumstances. Prior to the injury, he had worked in snow removal, grass cutting, wheat whipping, machinery preparation and counter work. He had never done any kind of work that had not involved working with his hands.

[8] The more difficult question, in the mind of the motions judge, was whether she should exercise her jurisdiction to change the quantum of child support payable prior to the respondent's injury and even prior to the decision of the trial judge. In considering that question, she observed that the respondent "was neither credible nor reliable as a witness regarding his employment and income in the hearing before me." Echoing the findings of the trial judge, she stated her opinion that "the dearth of evidence regarding [the respondent's] efforts to improve his earning capacity in 2007 reflects the extent of his willingness or lack thereof to explore options to meet his support obligations." She concluded that "on all the evidence before me that [the respondent] deliberately chose to

withhold the evidence from the trial judge and now, faced with the impact of an assessment of his income throughout the relevant time which he views as inflated, he seeks to redress his own foolishness." She added that "the frustration of [the appellant] who has had to face yet another court proceeding after the conclusion of a trial and prior to that, substantial and exhaustive efforts to ascertain an accurate financial picture with respect to [the respondent] is entirely understandable."

[9] Nevertheless, the motions judge considered that she ought to render a fair decision on the basis of all the evidence before her. She found that the arrears in child support for the year 2004 were $6,438, as calculated by the trial judge, his income for 2005 was $76,824, his income in the years 2006 and 2007 was imputed at $36,000, his income for 2008 was $23,001, and his income for 2009 was $26,002. She then stated, at para. 53:

> Both the Guideline amount for child support for two children and s. 7 expenses will be recalculated to accord with these findings regarding [the respondent's] income for the years 2005, 2006, 2007, 2008 and 2009. Credit will be given for the $10,878 paid by [the respondent] on account of child support in that timeframe.

[10] The motions judge ordered ongoing child support in the amount of $316 per month based on 2010 income of $20,574. The motions judge also ordered that the costs ordered by the trial judge were to be added to the arrears of child support.

[11] In fixing costs, the motions judge took into account the respondent's offer to settle and the fact that "solely by virtue of his own conduct [he] has only just achieved an order similar to that which, on a balance of probabilities, he would have obtained at the conclusion of the trial if he had provided complete, accurate and reliable disclosure of his property and income throughout the course of the litigation." Therefore, the motions judge denied the respondent his costs and ordered that he reimburse the appellant for her disbursements of $12,413.34.

[12] The appellant concedes that the respondent's diminished earning capacity due to his injury constitutes a change in circumstances and does not contest the order of the motions judge insofar as it relates to the level of ongoing child support ordered from the date of that injury. The appellant submits that the motions judge lacked jurisdiction to make the order that she did respecting the child support prior to the date of that injury.

[13] The appellant submits that the motions judge did not engage in a proper analysis. The appellant submits that a motions judge, on a motion to change, should consider how the changed circumstances affect the payor's prospective ability to pay the arrears out of future income. For example, the appellant says in this case the motions judge could have reasoned that the respondent's injury was a change in circumstances that so diminished his future earning capacity that he would be unable to pay the accumulated arrears of child support, and on that basis could have forgiven all or any part of the arrears.

[14] Instead of doing this, the appellant submits that the motions judge went back in time and revisited the findings made by the trial judge and recalculated the child support payments as of the date of the original order. That is, rather than making an order dealing with the payor's past debt because of his future inability to pay, the motions judge made an order that retroactively recalculated what the payor's debt was in the first place.

[15] Appellant's counsel did not support her submissions with any case law interpreting s. 37(2.1) of the *Family Law Act*, R.S.O. 1990, c. F.3, the section under which the motions judge's order was made. Instead, she referred to the factors set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, which addresses the scenario of a requested retroactive increase in support. The decision is of limited assistance because the court explicitly stated, at para. 98, that "these factors are not meant to apply to circumstances where arrears have accumulated."

[16] Section 37(2.1), which adopts the meaning of "a change in circumstances" set out in s. 14 of the *Federal Child Support Guidelines*, S.O.R./97-175 (the "Guidelines"), establishes the court's jurisdiction on a motion to vary a child support order. It provides:

> Powers of court: child support
>
> 37. (2.1) In the case of an order for support of a child, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines or that evidence not

> available on the previous hearing has become available, the court may,
>
> > (a) discharge, vary or suspend a term of the order, prospectively or retroactively;
> >
> > (b) relieve the respondent from the payment of part or all of the arrears or any interest due on them; and
> >
> > (c) make any other order for the support of a child that the court could make on an application under section 33.

[17] As can be seen, the court's power is set out in three different paragraphs. Paragraph 37(2.1)(b) empowers the court to make an order relieving the respondent from the payment of part or all of the arrears that exist under the original order while leaving the original order intact. That is exactly the type of order that appellant's counsel submits the court should have made in a case like this.

[18] Paragraph 37(2.1)(a) must mean something else. Paragraph 37(2.1)(a), on an ordinary and grammatical reading, gives the court the power to vary the original order retroactively wherever there has been a change in circumstances. In interpreting a statute, a court may depart from an ordinary and grammatical reading of the text where such an interpretation results in absurdity, or if another meaning that the text can reasonably bear is more consonant with the purpose of the legislation. Counsel for the appellant offered no alternative meaning of the words of paragraph 37(2.1)(a) other than their plain meaning. Moreover, the plain

meaning of the text is consonant with the evident intention of the provision to give the court a broad discretion on a motion to change.

[19] Given that the motions judge's finding that there was a change in circumstances is uncontested, she had jurisdiction under paragraph 37(2.1)(a) to make the order that she did.

[20] There is in this case no basis for interfering with the motion judge's discretion in exercising that jurisdiction. After finding a change in circumstances, she carefully addressed the question whether she should vary the original order and did so on the basis that it had been based on inaccurate information.

[21] The appellant next argues that the reasoning of the motions judge is fundamentally flawed in that she found that the respondent was not credible and then accepted his evidence as to what his income was. I accept that the motions judge could have provided a better explanation of her reasoning. The motions judge heard eight days of evidence and this court is obliged to defer to her findings of fact. It is worth repeating the direction of the Supreme Court of Canada in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12:

> There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the

> relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced factors differently.

[22] This ground of appeal fails.

[23] Finally, I would not grant leave to appeal the costs decision of the motions judge. She denied the successful respondent his costs and ordered him to pay costs to the appellant in the amount of her disbursements. The appellant cannot argue that the motions judge erred in principle by not awarding the unsuccessful appellant her costs after she rejected an offer to settle based on a readjusted monthly quantum of support that flowed from the annual income that was ultimately the basis of the order.

A. CONCLUSION

[24] For these reasons, I would dismiss the appeal and refuse leave to appeal costs. I would fix costs in favour of the respondent in the amount of $7,500 all inclusive.

"R.G. Juriansz J.A."
"I agree John Laskin J.A."
"I agree M.H. Tulloch J.A."

Released: November 15, 2012