COURT OF APPEAL FOR ONTARIO

CITATION: Murphy v. Murphy, 2015 ONCA 69
DATE: 20150130
DOCKET: C59040

MacFarland, Hourigan, Benotto JJ.A.

BETWEEN

Shelley Leigh Murphy

Appellant

and

Timothy Laurent Murphy

Respondent

Edwin A. Flak and Amit S. Dror, for the appellant

Gary S. Joseph and Ryan M. Kniznik, for the respondent

Heard and released orally: January 26, 2015

On appeal from the order of Justice Paul Perell of the Superior Court of Justice, dated November 12, 2013.

ENDORSEMENT

[1] The parties to this appeal have been involved in expensive, acrimonious and protracted family law litigation. To their credit, they agreed to refer all matters to mediation-arbitration with Malcolm Kronby Q.C.

[2] After a 23 day hearing Mr. Kronby released an award which divided the success. Consequently, there was an appeal and a cross-appeal to the Superior Court of Justice.

[3] The appeal judge dealt with all the issues. Again success was divided. Predictably, both parties sought leave to appeal to this court. Leave was granted to the appellant on one issue only: the arbitrator's award of retroactive child support which had been overturned by the appeal judge.

[4] At the conclusion of the appellant's argument, her counsel submitted that the court should not permit the respondent to make submissions on the appeal. Mr. Flak said that the costs that this court had awarded against the respondent when his application for leave to appeal was dismissed remained unpaid; he had not disclosed his income tax returns from 2009 to the present; and he had paid no child support since January 2014. At the conclusion of the appellant's submissions, the court retired for the luncheon recess. On resuming, the court asked counsel for the respondent why, in the circumstances, his client should be granted an audience.

[5] Mr. Joseph reported that his client had "paid" the outstanding costs order by presenting a cheque to the appellant just before court resumed. He had no reasonable explanation to offer as to why his client had unilaterally stopped paying child support. As for his client's failure to produce his income tax returns,

Mr. Joseph argued that his client's income was "complicated", composed as it was in some years of proceeds from the cashing in of shares, options and so on. Complicated as the calculation of the respondent's income may have been, it is no excuse whatsoever for his failure to produce copies of the income tax returns he had filed for each of those years. The very fact that he had filed these returns was only revealed in court in response to questions from the panel. It was the first that the appellant's counsel was aware of their existence.

[6] In these circumstances, the court determined that to hear the respondent's submissions would be to reward his deliberate and wilful misconduct. The court refused to entertain submissions from the respondent.

[7] With respect to the merits of the appeal, there was ample and compelling evidence before the arbitrator that the respondent had misrepresented his income while paying child support. The arbitrator made findings as to the actual income of each parent and then established what amount of child support should have been paid. He said:

> Considering the objectives as set out in section 1 of the *Guidelines,* the mandate is "to establish a fair standard of support for [the child] that ensures that [she] benefit from the financial means of the parents."

[8] Applying these principles, the arbitrator determined that the respondent ought to have been paying $8,000 per month for child support, a figure below the Guideline amount. He then calculated that the difference between what the

respondent did pay and what he ought to have paid was $274,420.00. He ordered this amount and used the term “retroactive child support” to describe it.

[9] The appeal judge concluded that the arbitrator erred in law because he did not conduct an analysis of the retroactive support issue in accordance with the criteria established in *D.B. S v. S.R.G*. [2006] S.C.C. 37. This case holds that, in determining retroactive child support, the factors to be considered are:

- the reason that support was not sought earlier;
- the conduct of the payor; the circumstances of the child; and
- the hardship to the payor.

[10] It is not clear that, in the circumstances of this case, a *DBS* analysis is required. Nor is it clear to what extent its application was argued before the arbitrator. It was not expanded upon in the arbitrator’s reasons, which the appeal judge determined were insufficient.

[11] In our view, the appeal judge erred in law in two ways. First, he applied the wrong test to the sufficiency of the arbitrator’s reasons. He cited criminal cases without regard to the goals of efficiency and expediency in the arbitration context. These goals have particular significance in a family law matter where finality is important –especially when a child is involved. Moreover *Hickey v. Hickey* [1999] 2 S.C.R. 518 provides that significant deference must be given in relation to the determination of support orders. This principle recognizes that the

discretion in making the order is best exercised by the person who heard the parties directly. This is of particular significance when the parties select an arbitrator well known and respected for his expertise and experience in the area of family law. In any event, in our view, the reasons although brief, do explain how he calculated the award and why he made it.

[12] The second error of the appeal judge was to determine as a matter of law that *DBS* applied to the circumstances here, and having made that determination, to disallow the award without performing the analysis himself or referring the matter back to the arbitrator for the analysis.

[13] In our view, the retroactive child support award should be referred back to the arbitrator. He will determine whether the criteria of *DBS* apply and if so, he is in the best position to determine whether or not his award requires adjustment and if so by how much.

[14] The appeal is allowed. The issue of retroactive child support is referred back to the arbitrator for reconsideration. He is to determine whether or not in the circumstances of this case, the *DBS* factors apply and if so, whether any adjustment to his award is required. Pending that determination the arbitrator's award of $274,420.00 is restored.

[15] Costs of the application for leave to appeal are fixed in the sum of $7,500 and costs of the appeal are fixed in the sum of $25,000. The appellant's full

indemnity costs of the proceedings before the appeal judge were approximately $98,000. The judge below ordered no costs in view of the divided success in the Superior court. In view of the appellant's success in this court, she should have some portion, although not all of her costs below. We award the sum of $10,000 for these costs. The total costs awarded to the appellant are therefore fixed in the amount of $42,500 inclusive of disbursements and HST. The costs may be enforced by the Family Responsibility Office as an incidence of child support.

"J. MacFarland J.A."
"C.W. Hourigan J.A."
"M.L. Benotto J.A."