IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***P.A.H. v. J.H.***
2004 BCSC 306

Date: 20040517
Docket: E006744
Registry: New Westminster

Between:

P.A.H.

Plaintiff

And

J.H.

Defendant

Before: The Honourable Mr. Justice Fraser

Oral Reasons for Judgment (In Chambers)

May 17, 2004

Counsel for the Plaintiff — Maureen Wesley

Counsel for the Defendant — Angela Thiele

[1] **THE COURT:** In this case, the parties applied to Court for a consent order for child support. This order was made in October 2001 and, as it happened, I was the Judge who pronounced the order. But, typical of consent order applications, it was one in which the merits of the order sought were not thrashed out and in which it was the agreement

of the parties as to spousal maintenance and child support which was before me.

[2] In some situations, as I have held before, the Court must examine a proposed consent order, and not merely rubberstamp it. In cases involving child support, where the parties have agreed on child support, my view is that the Court can act upon the wishes of the parties so long as the ***Guidelines*** are satisfied. That is what I did here. In the result, the order was made, based upon a stipulated ***Guidelines*** income of the defendant of $81,000 per year.

[3] In June of last year, Ms. Wesley, on behalf of the plaintiff, applied for an order varying the amount of child support and sought an order that the variation be made retroactive. The basis for the application was evidence that had been acquired since the order was made, showing that the defendant's income in the year 2000 was $129,000, his income in 2001 was $155,000, and his income in 2002 was $165,000. It was on that basis that I made an order increasing child support, which I made retroactive to the pronouncement of the consent order.

[4] Mr. J.H., the defendant, appeared at that June hearing, without counsel. After I made the order, he sought the assistance of Ms. Thiele, who, since then has appeared on his

behalf before me in this matter. Mr. J.H. could not have been better represented than he was by Ms. Thiele.

[5] The long and the short of it, however, is that there is no persuasive evidence, in fact almost no evidence at all, from Mr. J.H. which explains the discrepancy between his income in the year 2000 and his income to the date of the consent order in the year 2001 which would have justified him in allowing the Court to be presented with a misleading figure in October 2001.

[6] The result is that I confirm the order I made on the 11th of June, 2003 concerning the payment of child support and the fact that it is retroactive to the date of the consent order, based on his income from year to year since then.

[7] I appreciate the consequences for him. One is that because of the arrears of child support that I "created" by my order of June 11, 2003, he no longer can deduct spousal maintenance payments when declaring his income for tax purposes. That is because the child support arrears take precedence. Of course, this is a somewhat academic concern, since Mr. J.H. has not paid any spousal maintenance since December 2002.

[8] I note that he has yet, despite demands, to produce his income tax returns and information about his income for the year 2003.

[9] The cases on retroactivity, including ***Marinangeli v. Marinangeli***, (2003), 66 O.R. (3d) 40 (C.A.); the decision of the Court of Appeal of Ontario in ***Walsh v. Walsh***, (2004), 46 R.F.L. (5th) 455; 183 O.A.C. 179 – varied on other grounds, [2004] O.J. No. 1433 (C.A.); the decision of our own Court of Appeal in ***L.S. v. E.P.***, 1999 BCCA 393; the decision of our Court of Appeal in ***E.T. v. K.H.T.***, [1996] B.C.J. No. 2208; and the decision of Madam Justice Boyd of this Court in ***Erickson v. Erickson***, 2001 BCSC 73, do not address directly the issue with which I am concerned here. Collectively, the cases show caution on the part of the courts, for various practical and good reasons, about making retroactive awards. However, those cases are also unanimous, so far as they discuss it, in holding that non-disclosure of income by a person whose child support obligations are being fixed is a ground for making an order retroactive.

[10] In this case, it is appropriate to order the child support to increase retroactively because the statement of income for Mr. J.H. was misleading in the first place. The fact that he has not ordered his affairs to his better

advantage between the time of the order in 2001 and today, with an understanding of the consequences of his higher income, fades, in my view, against the fact of the non-disclosure.

[11] In the context of matrimonial property disputes, I held, in ***Cunha v. Cunha*** (1994), 99 B.C.L.R. (2d) 93 (S.C.), that non-disclosure was the cancer of matrimonial property litigation. It seems to me that in the context of child support, the evil is even more exaggerated. Thus, the concerns expressed by my colleague Mr. Justice Harvey in ***Campbell v. McRudden***, [2001] B.C.J. No. 676, are supervened.

[12] This matter has been before me four times, including today, since June 2003. It has given me the opportunity to think about the situation and to think about situations generally involving the welfare of children and the connection between that and the payment of proper and adequate child support. So far as I and counsel are aware, there has been no case in which the concept of an obligation to disclose on a periodic basis has been looked at, except in the context of agreements or orders which have within them effective disclosure provisions, such as in ***Marinangeli***, *supra*.

[13] No Judge of this Court and no lawyer who works regularly in family law can be unaware that children are on the losing

end when there is a paying parent who is not paying them the amount of child support that the ***Guidelines*** say they are entitled to. The same applies, in some circumstances, to the recipient parent, for example, where there are things like extraordinary expenses which must be shared.

[14] During submissions, I suggested that if the plaintiff in this case had taken a student into her home as a boarder to help supplement her income and had not told the insurance company which provides her with fire insurance that she had done so, chances are that if her home burned down, the insurance company would refuse to pay her, on the ground that she had a legal obligation under the doctrine known as utmost good faith to volunteer that information to the insurance company.

[15] It seems to me inconceivable that the law could attach smaller importance to the right of children to have proper child support.

[16] I therefore say that as from today in British Columbia, the law is that parents whose incomes are relevant to the financial support of their children have an obligation to disclose changes in their income from time to time. This is based on the concept of utmost good faith. It does seem to me

that the law should not hesitate to require that parents act with the utmost good faith toward their children.

[17] I think it necessary to say that I do have one qualm about the declaration I have just made and that is this. Discretion in the matter of child support has been taken away from judges by the ***Guidelines***. The ***Guidelines*** were the product of prolonged discussion and, presumably, compromise. I do understand that I have introduced a new factor into the law concerning child support, as to which the ***Guidelines*** are silent, that is, the ***Guidelines*** do not require a parent whose income is relevant to the financial support of a child to volunteer information about changes in income.

[18] I also see the potential that a regime in which disclosure is compulsory could lead formerly battling parents into new battles. However, to me that does not seem to me a good enough policy reason to allow the frustration of proper financial support to children.

[19] That is my order.

[20] Ms. P.A.H. will recover the costs of these applications.

"G.P. Fraser, J."
The Honourable Mr. Justice G.P. Fraser