FAMLNWS 2020-04
Family Law Newsletters
February 3, 2020

— Franks & Zalev - This Week in Family Law

Aaron Franks and Michael Zalev

Contents

Family Law News - January 27, 2020

J v. B, [2017] EWFC 4 (Eng. & Wales Fam. Ct.)

[This message brought to you primarily by Philip Epstein]

On January 30, 2017, Lord Justice Peter Jackson dismissed the father's application for direct contact with his five children. Readers of the *Newsletter* will remember this controversial case because of what the English Court of Appeal called its "stark, deeply saddening and extremely disturbing" aspects. [See *volume* 2018-14, April 9, 2018.]

The father is transgender and left the family home in June 2015, to live as a transgender person. She now lives as a woman. Because she is transgender, the father was shunned by the North Manchester Charedi Jewish community and the children would face ostracism by the community if they have direct contact with her. Justice Jackson characterized the practices within the community as amounting to:

> . . . unlawful discrimination and victimization of the father and the children because of the father's transgender status.

In the Court of Appeal, Sir James Munby, President of the Family Division, joined with Lady Justice Arden and Lord Justice Singh, and delivered a judgment setting aside the judgment of Justice Jackson and directed a new hearing before Justice Hayden.

The English Court of Appeal wrestled with the question of whether that court should make an order for direct contact between the father and his children that would violate the rights of the community in which the children lived. The Court of Appeal declined to answer the question as they felt that stage had not yet been reached and the matter should be reheard. In the view of the English Court of Appeal, the best interests of the children, seen in the medium to longer term, required more contact with their father, if that can be achieved. This was in spite of the overwhelming evidence that the Charedi community would reject the mother and the children if there was direct contact with the father.

We revisit this case because the father has recently abandoned the family court fight to see her five children. She has not seen the children since leaving the North Manchester Charedi Jewish community in 2015. While she indicated that she wanted to be "sensitively reintroduced" to her children, her estranged wife has not changed her position and said allowing her to see the children could lead to them being ostracized by the community.

The lawyers representing the woman recently appeared before Mr. Justice Hayden and advised that the children did not want to see their father and, accordingly, the father's application was withdrawn.

The report of what was said cannot be reported, but Justice Hayden felt that the public should know that the litigation had ended. The father had decided that pursuing her contact application would be emotionally harmful to the children. Thus, the matter has sadly drawn to a close.

We revisit this only because the original decision of Justice Jackson and the Court of Appeal decision created a great deal of controversy in both England and Canada. There were no easy answers to the problems that this family faced in the Charedi community and it is another lesson, if we needed one, that family law is not designed to solve all human problems.

In the words of the Ontario Court of Appeal in *A.M. v. C.H.*, 2019 CarswellOnt 15391 (Ont. C.A.): "Courts cannot fix every problem."

Disclosure and Variation Proceedings - One Year Late and Many $$$ Short

Janiten v. Moran, 2019 CarswellAlta 2176 (Alta. C.A.) - McDonald, Velduis and Crighton, JJ.A.

This is an interesting case about the impact of disclosure orders on variation proceedings. The parties had one child together, born in 2001. In January 2018, the mother brought an Application for child support, alleging that she had not received appropriate support for the past eight years. On January 22, 2018, the mother obtained an order requiring the father to provide disclosure documents to her by January 25, 2018.

The father did not provide the disclosure.

The mother obtained another order on January 26, 2018, setting the father's income at $200,000 for child support purposes and directing him to pay $1,735 per month as of December 1, 2017. The motions judge directed both parties to appear on February 28, 2018. On February 28, 2018, the mother appeared in court, but the father did not. The mother obtained an order imputing an income to the father of $150,000 per year for the period of January 1, 2014 to November 30, 2017.

Approximately one year later, the father brought his own Variation Application and filed an affidavit in support containing *some* of the information he had been ordered to disclose a year earlier. Why did the husband bring his Variation Application? Because the February 2018 order was then being enforced against him, and he was, finally "feeling it." At the hearing the mother was self-represented and alleged that the father's application to vary was a collateral attack on the previous orders (she was not wrong). The mother did not file any materials, but she did advise the chambers judge of her previous materials.

The chambers judge took the position that there was no evidence before her on behalf of the mother and found in favour of the father's Application. The chambers judge refused to order any retroactive support in 2014 on the basis of the mother's delay and refused any earlier retroactive adjustment because it would occasion hardship on the father. This was in the face of requests for financial information being made in 2010 and 2012.

There are two major problems here.

First, the Alberta Rules specifically contemplate a party relying on previously filed materials: *Cosentino v. Cosentino* (2016), 84 R.F.L. (7th) 17 (Alta. C.A.). [Other jurisdictions allow the court to rely on previously-filed material on notice. See, for example: *Bergquist v. Bergquist* (2014), 39 R.F.L. (7th) 251 (Sask. C.A.); *Alvi v. Misir*, 2004 CarswellOnt 5302 (Ont. S.C.J. [Commercial List]); and *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 CarswellBC 2331 (B.C. C.A.).

Second, to allow a party to ignore their disclosure obligations and then claim a material change by producing them would eviscerate the financial disclosure process: *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.). Remedying one's own default cannot constitute a material change in circumstances and cannot ground a material change in circumstances. Where a party is imputed with income on account of non-disclosure, *Trang v. Trang* (2013), 29 R.F.L. (7th) 364 (Ont. S.C.J.) offers the court

a way to deal with the matter: assume the original order is correct; consider why income was imputed and the basis for the imputed income; and then consider whether *those* circumstances have changed. [See also *Power v. Power* (2015), 67 R.F.L. (7th) 138 (N.S. S.C.); *Ruffolo v. David* (2016), 75 R.F.L. (7th) 16 (Ont. Div. Ct.); *Gray v. Rizzi*, *supra*]

The mother appealed the chambers decision, and the Court of Appeal also took issue with the decision below. The Court of Appeal found that the chambers judge had erred in failing to consider the evidence that the mother had previously adduced. Litigants can rely on previously filed materials. The mother, in this case, had specifically pointed the chambers judge to this material. The chambers judge should have considered it and the failure to do so was an error in principle.

The Court of Appeal also held that it was an error to vary the two previous orders. The only change subsequent to the February 2018 order was that the father had finally complied with his disclosure obligation. The father's application was not based on a proper change in circumstances, rather he was simply remedying his own delinquency. A litigant who ignores court orders for disclosure and/or who fails to attend in court when ordered to do so does so at their own peril. The father's "tardy" disclosure compliance was not a ground for a successful variation application.

The Court of Appeal varied the *ongoing* support, as the father had adduced evidence regarding his 2018 income. However, the orders for the retroactive adjustment prior to 2018 were reinstated.

Jurisdiction, Chicanery and *Forum Non Conveniens*

Fisher v. Oates, 2019 CarswellBC 3679 (B.C. S.C.) Gaul, J.

This case involved a jurisdictional fight between British Columbia and Delaware, and is a useful decision for B.C. counsel to have handy when dealing with a request to stay a family property claim in B.C. on the basis that it would be more convenient to deal with the claim in another jurisdiction.

Ms. Fisher was from Canada, and her wife, Ms. Oates, was from the United States. During the marriage, the parties spent time in both jurisdictions and, when they separated in 2018, they had homes in B.C., New York State, and Delaware.

After they separated, Ms. Fisher commenced a family law proceeding in B.C., but withdrew it when the parties agreed to participate in a collaborative family law process in B.C.

It does not appear that Ms. Oates was sincere about resolving the matter through the collaborative process, because while it was underway she started a proceeding in Delaware, and withdrew from the collaborative process the day after her claim in Delaware had been issued. (Very nice. Very "collaborative".) When Ms. Fisher realized what Ms. Oates had done, she immediately filed a new claim in B.C.

After she was served with Ms. Fisher's claim, Ms. Oates brought a motion in British Columbia to ask the court to stay the proceeding pursuant to s. 106(4) of the *Family Law Act*, which provides that "a court may decline to make an order under this Part [Part 5 - Property Division] if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia."

Somewhat surprisingly (given the factual history of the matter), Ms. Oates tried to argue that the matter should proceed in Delaware because the proceeding there was started first. Justice Gaul quickly disposed of this argument by reminding Ms. Oates that, "when the entire history of the parties' matrimonial breakdown and litigation is considered, it becomes clear that Ms. Fisher was the one who was the first to launch proceedings," and that they "were discontinued for a very understanding reason: the parties mutually chose to engage in a collaborative process that was designed to keep them out of court and as part of that process Ms. Fisher was required to discontinue her action."

Justice Gaul also reviewed the statutory factors that are set out under s. 106(5) of the *Family Law Act*, and dismissed Ms. Oates' motion on the basis that she had not established that Delaware would be the more appropriate jurisdiction. In particular, he found that:

(a) It would have been less of a financial burden for Ms. Oates to travel to British Columbia for the trial than it would have been for Ms. Fisher to travel to Delaware.

(b) The choice of law provisions set out in s. 108 of the *Family Law Act* provided for the parties' matrimonial property rights to be governed by B.C. law.

(c) Staying the property claims in B.C. would result in a multiplicity of proceedings because Ms. Oates spousal support claims would still need to be dealt with in B.C. even if her property claims were stayed as no claim for spousal support had been made in Delaware. He also rejected Ms. Oates' argument that he could stay the claim for spousal support in B.C., and noted that that "having started her action in British Columbia, as Ms. Fisher was entitled to do, there is no ability for this court to decline jurisdiction to decide her claim for spousal support."

(d) It would have been more difficult to enforce a Delaware order in British Columbia than it would be to enforce a British Columbia order in Delaware.

Such chutzpah should not go unrewarded.

Imputation of Income to High-Income Earners

Ferguson v. Ferguson, 2019 CarswellBC 3336 (B.C. S.C.) - Branch, J.

This case involved a very wealthy payor trying to vary a 2017 trial decision after his employment had been terminated. At the initial trial, the husband had been ordered to pay support on the basis of an income of $933,820 for child support purposes and $855,545 for spousal support purposes. (There were some double-dipping issues that caused his income to be lower for spousal support purposes.)

At the time of the trial, the husband was employed as the Managing Director - Western Canada for Scotiawealth. On January 28, 2018, the husband's position was eliminated. The husband commenced a wrongful dismissal proceeding and, on May 23, 2018, he settled the case. He was to receive a salary continuation for 18 months, ending July 30, 2019, and the annual salary used for this continuation was $1,000,681. The husband's motion to change was heard in October 2019.

Justice Branch noted that the first step was to determine whether there had been a material change in the husband's financial circumstances. Absent a material change, the inquiry could go no further: *Litman v. Sherman* (2008), 52 R.F.L. (6th) 239 (Ont. C.A.); *Persaud v. Garcia-Persaud* (2009), 81 R.F.L. (6th) 1 (Ont. C.A.); *Pontius v. Murray*, 2011 CarswellSask 679 (Sask. C.A.). In determining this, the Court properly considered whether the husband's ***income*** would be materially different in 2019 than it was in 2018. The mere fact that the husband had been terminated did not, in and of itself, justify a change in the support order if there was to be no material change in his income. This is an important point to remember - it is a material change in income that matters; not a material change in employment status. The Court considered the husband's income and determined that he would receive income from the following sources:

- $250,000 from RSUs in 2019;

- $560,000 in salary continuation in 2019;

- The Court attributed $171,000 to the husband based on a 3 percent rate of return for his $5.7 million in financial assets. The Court acknowledged that the husband had spent $2.9 million on a home - but that still left him with $2.8 million in financial assets that could generate $84,000 in income per year based on a 3 percent rate of return.

Taking the lesser number for the amount he could generate from his investments, the husband was left with an income of about $894,000. When compared to the incomes used for the determination of support at trial, $855,545 and $933,820, the Court found that there had not been a material change in circumstances to justify a variation of the support order - and, as noted above, without a material change the inquiry could proceed no further. The Court noted that the husband's income in 2020 *might* justify

such a modification, but it was unclear at the time. This decision emphasizes that high-income payors may be able to sustain larger fluctuations in annual earnings before a material change is found than payors of much more modest means.

While the Court did not have to consider whether or not to impute income to the husband, it did embark on that analysis (so these comments are *obiter*, but interesting). The Court considered whether he was intentionally unemployed as a result of the fact that he did not have a job at the time of his motion to change. The Court noted that the husband had received job offers, but that they were not equivalent to his old job in terms of "prestige", position, or compensation, so he had not accepted them. While a person is entitled to a reasonable period of time to try and find work in their field after they have been become unemployed, eventually there comes a time when they must "widen the net." Further, the fact that the husband had rejected a number of offers demonstrated that he was indeed intentionally underemployed. [Several courts have now made it clear that a payor with a support obligation is not entitled to wait for interesting or high-paying work. [For example, see: *Donovan v. Donovan*, 2000 CarswellMan 440 (Man. C.A.); *Jendruck v. Jendruck* (2014), 50 R.F.L. (7th) 23 (B.C. C.A.); *Cotter v. Cotter* (2016), 81 R.F.L. (7th) 43 (B.C. C.A.); *Duffy v. Duffy* (2009), 73 R.F.L. (6th) 233 (N.L. C.A.)]

Consequently, Justice Branch stated that if he was going to impute income to him for 2020 it would have been $325,000 which was based on the mid-point between the two salaries of the employment offers the husband had rejected.

Partition & Sale

Delongte v. Delongte, 2019 CarswellOnt 20274 (Ont. S.C.J.) - L. Shaw, J.

There is nothing new or earth-shattering in *Delongte*. But it does run counter to what seems to be a recent trend (or swinging of the pendulum) of *not* ordering interim partition and sale.

While acknowledging that orders for interim sale should not be made "as a matter of course", Justice Shaw emphasizes that the sale of the home is sometimes the most appropriate catalyst to force a matter forward.

In the decision, Justice Shaw also clarifies that the following factors will ***not*** be a sufficient basis to deny a motion for interim partition and sale:

- The fact that the home is the only home the children have ever known.
- The fact that the children are attached to the home and that the home provides the children with a sense of stability. (If that was a sufficient basis to resist sale, there would rarely be an order for interim sale where children are present.)
- The fact that the home is close to the children's school.
- The fact that the party moving for sale has significant other assets such that s/he can afford another residence.
- A bare claim for unequal division.
- A bare claim for final exclusive possession.
- The fact that the resisting party would like the chance to purchase the home.

As noted regularly in the case law, a joint owner has a *prima facie* right to partition and sale, which can be defeated only by showing that the moving party is acting in an oppressive, vexatious or malicious manner, or by showing that a *legitimate* family law claim would be unfairly prejudiced [*Latcham v. Latcham* (2002), 27 R.F.L. (5th) 358 (Ont. C.A.); *Dulku v. Dulku*, 2016 CarswellOnt 16066 (Ont. S.C.J.)]. *Delongte* offers a reminder of those principles and comments, adversely, on some defences that are regularly raised, but that do not suffice to defend such a claim.