07-FA-014624 FIS

Ontario Superior Court of Justice

Tom Baker v. Monica Francis

Counsel:
L.Pawlitza for applicant father
J.Piafsky for respondent mother

Motion heard June 23, 2009

Endorsement of Backhouse, J. released June 24, 2009

[1] The father seeks an order bifurcating the issue of whether the children are "children of the marriage" from the other issues. The mother opposes this on the basis that the children of the marriage and child support issues are inextricably intertwined and she cannot afford to have 2 trials. The father also seeks to amend his application to claim the termination of child support. The motion to amend is not opposed other than on the issue of costs. Accordingly, leave to amend is granted.

[2] On February 23, 2007, the father brought an application that he pay the child support directly to the children, for disclosure with respect to the children's education performance and plans and for the children to have a vocational assessment. On October 2, 2007, the mother filed an Answer seeking full financial disclosure retroactive to 2000 and retroactive child support.

Background

[3] The parties were married in 1979 and separated in July, 1985. There are two children, Lauren Baker, born November 8, 1983 (now age 25)and Lesley Baker born July 7, 1985 (now age 23). In May, 1997, Benotto, J. ordered the husband to pay child support of $10,034/month pursuant to which the father continues to pay. The order has not been amended.

[4] At the time the mother commenced her application for disclosure and retroactive support in October, 2007, Lauren, then age 23, had commenced first year law school at Buckingham University in London, England. Her first term marks were 76, 59, 56 and 50. She is scheduled to have completed law school at this time. No further marks have been disclosed notwithstanding the order of Justice Archibald that required this. She wishes to do what is necessary to get called to the Bar in Ontario. At October, 2007, Lesley, then age 22, had commenced a General Arts program at George Brown College and was on the Dean's Honour Roll after her first term. She did not complete this program. She has just completed her first year of a Bachelor of Arts program at Guelph Humber in Applied Psychology. She is said to be interested in obtaining a Masters in Psychology.

[5] In the year 2000 and 2001 both children were still in high school. Lauren commenced an engineering degree at Ryerson in January, 2002 and graduated in the summer of 2006. Until July, 2007 when she started law school, she completed 1 course at York University, having

dropped some courses and failed one. After Leslie graduated from high school in June, 2003, she started and dropped courses. She completed 3 OAC courses between the fall of 2003 and late 2004. She passed one course at York University in 2005/2006 and a second course in the 2006/2007 term.

Law

[6] Rule 12(5) of the *Family Law Rules*, O.Reg.144/99 provides:

> 12(5) If it would be more convenient to hear two or more cases, claims or issues together or to split a case into two or more separate cases, claims or issues, the court may, on motion, order accordingly.

[7] In *Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills*, [1986] O.J.No.578 (Ont.C.A.), Morden, J.A. held at paragraph 11:

> ... since it is a basic right of a litigant to have all issues in dispute resolved in one trial, it [splitting a trial] must be regarded as a narrowly circumscribed power. This approach is supported by the familiar statutory admonition which is continued in s.148 of the Court of Justice Act, 1984 (Ont.),c.11:
>
> > 148. As far as possible, multiplicity of legal proceedings shall be avoided.
>
> There is also the judicial admonition of Meredith C.J.C.P. in *Waller v. Independent Order of Foresters* (1905), 5 O.W.R. 421 at 422: "Experience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon..." The power should be exercised, in the interest of justice, only in the clearest cases. We would think that a court would give substantial weight to the fact that both parties consent to the splitting of a trial, if this be the case. On the other hand, a court should be slow to exercise the power if one of the parties, particularly, as in this case, the defendant (see *Emma Silver Mining Co. v. Grant* (1878), 11 Ch.D.918 at p.928), objects to its exercise."

[8] The moving party has the onus of showing that there is a clear benefit to be gained in terms of time and expense from severing an issue from the trial. Fairness and justice are always the dominant considerations. Himel J. in *General Refractories Co. of Canada* v. *Venturedyne Ltd.* [2001] O.J.No.746 at para.16 sets out a list of issues the court should consider in deciding whether severance of a trial is just and expeditious:

(1) Whether the issues for the first trial are relatively straightforward;
(2) The extent to which the issues proposed for the first trial are interwoven with those remaining for the second;
(3) Whether a decision at the first trial is likely to put an end to the action altogether; significantly narrow the issues for the second trial or significantly increase the likelihood of a settlement;

(4) The extent to which the parties have already devoted resources to all of the issues;
(5) The timing of the motion and the possibility of delay;
(6) Any advantage or prejudice the parties are likely to experience; and
(7) Whether the motion is brought on consent or over the objection of one or more of the parties.

Analysis and Findings

[9] I have concluded that the father failed to satisfy the onus of showing that it is in the interests of justice that the trial be bifurcated. In reaching this conclusion, I have considered the following factors:

1. The father waited until the trial management conference when the mother was seeking the setting of a trial date to raise the issue of bifurcation. As a result of his almost two year delay in bringing this motion, considerable resources have been expended in litigating all of the issues raised by both parties.

2. Based on the litigation history of these parties, it is likely that an order in a bifurcated trial will be appealed, leaving the balance of the issues in limbo pending the appeal. There may be further appeals. It is likely to be less costly and more expedient, to deal with all issues in one trial.

3. The issues of support and the father's income are inextricably intertwined with the issue of whether the children are "children of the marriage" for purposes of child support. It is far from clear that the father will prevail in his contention that the children were not "children of the marriage" at the date of the mother's application. The evidence of dependence is substantial. A decision at the first trial is unlikely to put an end to the action altogether.

4. The father's *bona fides* in bringing this motion is doubtful. I find that he is motivated more by desire to avoid financial disclosure than to meet the policy objectives of a bifurcated trial.

5. A single trial is burdensome for any litigant, both financially and emotionally. The father can afford many trials. The mother cannot. One trial is sufficient. If the mother succeeds in her claim that the children are dependent, then she is entitled to an award at the same time.

[10] The mother may make brief written submissions on costs within 14 days of the release of this endorsement. The father may have 14 days thereafter to respond.

Released June 24, 2009

Backhouse, J.