CITATION: Jason Vivian v. Nicole Courtney, 2013 ONSC 5090
DIVISIONAL COURT FILE NO.: 599/12
DATE: 2013/08/16

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Jason Vivian, Applicant (Appellant in Appeal)

AND:

Nicole Courtney, Respondent (Respondent in Appeal)

AND:

Jason Courtney, An Added Party

AND:

Family Alliance of Ontario, Intervener

BEFORE: Herman J.

COUNSEL: *Robert Shawyer*, for the Respondent (Respondent in Appeal)

Martha McCarthy, for the Family Alliance of Ontario

Daniel Guttman, for the Attorney General of Ontario

HEARD: June 25, 2013

ENDORSEMENT

[1] This matter came before me for directions as to whether the matter should be heard by the Divisional Court or be transferred to the Court of Appeal. It involves an appeal and a cross-appeal from the decision of Penny J. of the Superior Court of Justice, dated November 21, 2012, which, in turn, was an appeal from the decision of Curtis J. of the Ontario Court of Justice, dated November 17, 2010.

[2] The respondent mother, Ms. Nicole Courtney, and the intervener, the Family Alliance of Ontario, take the position that this matter should be transferred to the Court of Appeal. The Attorney General's position is that it must be heard by the Divisional Court.

[3] The appellant father, Mr. Jason Vivian, did not appear.

[4] At the hearing of the motion, I requested further written submissions from the parties as to whether I had the authority to transfer the case to the Court of Appeal.

Background

[5] The case involves the issue of child support for an adult child. The father initiated an application in June 2009 to terminate child support in the Ontario Court of Justice on the basis that the child had turned 18 years of age and was not in full-time attendance at school. The mother filed a claim for retroactive child support.

[6] The judge at the Ontario Court of Justice found that the child was enrolled in a full-time educational program, within the meaning of s. 31 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") and was therefore entitled to support. She further found that the father had engaged in blameworthy conduct by failing to disclose changes in his income. Accordingly, she ordered retroactive child support effective January 1, 2006.

[7] The father appealed the decision to the Superior Court of Justice.

[8] The Family Alliance of Ontario was given standing in the appeal as an intervener and the child, Jamie Courtney, was added as a party.

[9] The central issue on the appeal before the Superior Court was whether the child satisfied the criterion for entitlement to child support under s. 31 of the *FLA*, that is, full-time enrolment in school. The second issue was whether the disability payments received by the child should be taken into account. A third issue was the retroactivity of the child support award. The final issue was whether the provision was contrary to the *Canadian Charter of Rights and Freedoms*, on the basis of the differential treatment afforded to adult disabled children of married and unmarried parents under the federal (*Divorce Act*) and the provincial (*FLA*) regimes.

[10] The judge dismissed the father's appeal with respect to the issues of the child's qualification under s. 31 and retroactivity. He referred the matter back to the Ontario Court of Justice to determine: whether there was a shortfall between the child's means, that is, her receipt of disability payments, and her conditions, needs and other circumstances; if there was, how much the shortfall was; and how the shortfall should be apportioned between the father and the mother.

[11] The appeal judge declined to consider the *Charter* issue because, in his opinion, it was unnecessary to do so in view of his disposition of the case.

The appeal and the cross-appeal

[12] The father appealed on the basis that the judge had erred in fact and law in determining that the child was enrolled in a full-time educational program, and he had misapplied the onus.

[13] The mother cross-appealed on the basis that the judge erred in remitting the matter back to the Ontario Court of Justice to determine quantum. Further, she seeks a finding/declaration that s. 31 of the *FLA* violates s. 15 of the *Charter* and a remedy under s. 24(1).

[14] The Attorney General was served with a Notice of Constitutional Question.

[15] The appeal and cross-appeal were filed with the Divisional Court because they involve a final order for payments of not more than $50,000.

[16] On February 21, 2013, the father's appeal was dismissed because he had failed to perfect it.

The parties' positions

The mother's position

[17] The mother's position is that the appropriate jurisdiction for the support issues is the Divisional Court, in view of the amount of payments at issue. However, the proper venue for the *Charter* issue is the Court of Appeal, in view of s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The mother further submits that this Court has the authority to transfer the matter to the Court of Appeal pursuant to s. 134 (1)(c) of the *Courts of Justice Act*.

The Family Alliance of Ontario's position

[18] The position of the Family Alliance of Ontario is that the mother's cross-appeal is not caught by the exception in s. 19(1)(a), which provides that appeals from final orders for payments of not more than $50,000 must be heard by the Divisional Court. The remedy sought by the respondent, that is, a finding that s. 31 of the *FLA* contravenes the *Charter* engages issues that are not only monetary in nature.

[19] Rule 61.07(1) of the *Rules of Civil Procedure* makes it clear that a cross-appeal may proceed regardless of whether the appeal is successful. That applies here, in view of the dismissal of the father's appeal.

[20] Requiring the mother to first argue her case before the Divisional Court will increase the costs of litigation of an important issue.

The Attorney General's position

[21] The Attorney General's position is that the appeal must be heard by the Divisional Court. Constitutional issues are only to be heard in the proceeding and level of court in which they are raised. The case came about as a motion to vary child support, not as an originating application challenging s. 31 of the *FLA* under the *Charter*.

[22] The Attorney General argues further that the respondent mother is trying to raise a constitutional challenge on a point that is moot. Since the father's appeal has been dismissed, the only decision that the mother may challenge is the decision to send the matter back to the Ontario Court of Justice to determine the amount of support. That is a non-constitutional issue.

Statutory Framework

[23] In general, appeals from final orders of a judge of the Superior Court are to the Court of Appeal. However, there is an exception for appeals from final orders for a single payment of not more than $50,000 or for periodic payments of not more than $50,000 over a period of 12 months after the first payment is due, in which case the appeal is to the Divisional Court.

[24] This results from a combination of ss. 6(1)(b), 19(1)(a) and 19(1.2) of the *Courts of Justice Act*.

[25] Section 6(1)(b) of the *Courts of Justice Act* provides:

> 6(1) An appeal lies to the Court of Appeal from,
>
> …
>
> (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act;

[26] Section 19(1)(a), in turn, provides:

> 19(1) An appeal lies to the Divisional Court from,
>
> (a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2).

[27] The applicable subsection in this case is s. 19(1.2):

> 19(1.2) If the notice of appeal is filed on or after October 1, 2007, clause (1)(a) applies in respect of a final order,
>
> (a) for a single payment of not more than $50,000, exclusive of costs;
>
> (b) for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

> (c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or
>
> (d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

[28] Section 6(2) of the *Courts of Justice Act* deals with the situation where there is an appeal to the Court of Appeal as well as an appeal to the Divisional Court or the Superior Court of Justice:

> 6(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

[29] Rule 61.07(1) of the *Rules of Civil Procedure* deals with cross-appeals. It provides that a cross-appeal may be commenced either to set aside or vary the order appealed from or, if the appeal is allowed in whole or in part, to seek other relief or a different disposition than the order appealed from.

Analysis

[30] The parties agree that the amount of child support that is the subject of the order under appeal falls within the exception in s. 19(1)(a) of the *Courts of Justice Act*. As a result, the appeal in this case would ordinarily lie to the Divisional Court.

[31] Does the court to which the appeal lies change because the mother has raised a challenge under the *Charter*, or because the father's appeal has been dismissed? In my opinion, it does not.

[32] The *Courts of Justice Act*, in ss. 6(1)(b) and 19(1)(a), provides that appeals of final orders for not more than $50,000 lie to the Divisional Court. The matter before me involves such an appeal, regardless of whether a *Charter* issue has been raised.

[33] This is not an originating application challenging s. 31 of the *FLA* under the *Charter*. Rather, it is a *Charter* issue that arises within the context of a claim for a variation of child support. The mother's cross-appeal, even in the absence of the father's appeal, is still a cross-appeal of an order for not more than $50,000.

[34] Remedies under s. 24(1) of the *Charter* will ordinarily be sought in the court in which the issues arose. The appeal of the court's order will follow the normal, established procedure (*R. v. Mills*, [1986] 1 S.C.R. 863, at paras. 267, 271).

[35] The fact that a *Charter* issue has been raised does not take the appeal out of the normal appeal route. Appeals are creatures of statute. As such, they are governed by provincial

legislation, in this case, the *Courts of Justice Act* (*Canadian Broadcasting Corp. v. Ontario*, 2011 ONCA 624, 107 O.R. (3d) 161 (C.A.) at para. 16).

[36] The mother submits that the Divisional Court has the legislative authority to transfer this matter to the Court of Appeal by virtue of s. 134(1)(c). Section 134(1) provides:

> 134(1) Unless otherwise provided, a court to which an appeal is taken may,
>
> (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
>
> (b) order a new trial;
>
> (c) make any other decision that is considered just.

[37] However, s. 134(1) speaks to the kinds of orders the appeal court may make, that is, the disposition of the appeal. It does not deal with the court to which the appeal should be taken.

[38] The Attorney General also maintains that the *Charter* issue is moot. In its submission, if the appeal itself has been abandoned, the only decision the mother may challenge is the decision to send the matter back to the Ontario Court of Justice for a determination of the amount of support, which is a non-constitutional issue. I decline to address the question of whether the *Charter* issue is moot, since I have determined that the appeal lies to the Divisional Court, regardless of the *Charter* issue. It is a matter that is best decided by the court hearing the appeal.

[39] While I have sympathy with the argument that requiring the mother to first argue her appeal before the Divisional Court has the potential to increase the costs of litigation, it is my opinion that the appeal properly lies to the Divisional Court and I do not have the authority to transfer it to the Court of Appeal.

Herman J.

Date: August 16, 2013