CITATION: Vivian v. Courtney, 2012 ONSC 397
DATE: 20120127
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jason Vivian, Applicant

AND:

Nicole Courtney, Respondent

BEFORE: Czutrin J.

COUNSEL: *Michael H. Tweyman*, for the Appellant

Robert Shawyer, for the Respondent

Dan Guttman, for the Attorney General of Ontario

HEARD: December 19, 2011

ENDORSEMENT

[1] This is a motion within the Appeal brought by Jason Vivian (Appellant) appealing the November 17, 2010 Order of Justice Carol Curtis of the Ontario Court of Justice ("OCJ") ("the motions judge").

[2] The motions judge found that the mother (Respondent) continued to be entitled to receive child support for the couple's child, Jamie Alexandra Courtney, who was born March 11, 1991. As such, the motions judge dismissed father's request to terminate child support and ordered adjustments to the Appellant father's child support obligations, retroactive to January 1, 2006.

[3] The narrow issue on the motion heard by me on December 19, 2011 is whether the mother can raise a constitutional question for the first time on this Appeal.

Background

[4] Much of the factual background is not disputed and is outlined in the motions judge's Reasons for Judgment released November 17, 2010.

[5] On June 25, 2009, the father started his motion to change the consent support order of Justice Nevins, dated March 23, 2000. He sought to end his child support obligation as of March 11, 2009 based on the child's eighteenth birthday and not being full-time student. He relied on section 31 of the *Family Law Act*, R.S.O. 1990, c. F.3.

[6] The mother asked that the father's motion be dismissed. She also asked for a finding that the child remained dependant due to her health issues and her school attendance to the extent her health allowed. The mother also sought to have the support adjusted as of January 1, 2005.

[7] The parents of the child were not married to each other but lived together from the child's birth until January 1993.

[8] The parties were previously involved in litigation regarding custody, access, and child support, with the last order being that of March 23, 2000. This order required the father to pay child support of $225 per month from April 1, 2000, based on an income of $27,560 (an amount $20 less than the Child Support Guidelines).

[9] The child has severe health problems, but according to the motions judge's reasons, the "father was not accepting the severity of (the child's) illness and he requested additional information about her health." The case was adjourned twice in order to get the child's consent to the disclosure, and to allow the father to meet with the child's primary care doctor to ask questions about his daughter's health. He did not meet with the doctor.

[10] The medical evidence concerning the child was not challenged by the father. According to the motions judge, the father took the position "that it is part of the provincial government's policy that the social safety net, including social services, are intended to be the primary mode of financial support for adult children that are disabled." The motions judge stated: "In other words, his position is that [the child] is the government's responsibility."

[11] The father's position is that "the medical issues are basically irrelevant and that the issue is whether or not Jamie is enrolled full time in accordance with section 31 of the *Family Law Act*."

[12] In arriving at her findings and decision, the motions judge reviewed the child's medical situation, schooling and the law. She devoted several pages comparing married and unmarried parents and the legislative differences with respect to entitlement to child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and the *Family Law Act*.

[13] At para. 33 of her reasons, she specifically raised the *Canadian Charter of Rights and Freedoms* ("the *Charter*") and the possible challenge now raised by the mother.

[14] The mother did not formally raise the *Charter* issue until late in the appeal process. However, she did question the fairness of the potentially different child support entitlement of children born to married and unmarried parents.

[15] The motions judge found that the child was entitled to support under the *Family Law Act*.

The Appeal

[16] The father commenced his appeal within time on November 26, 2010.

[17] A transcript of the August 10, 2010 court attendance was ordered on December 20, 2010 and was made available on March 30, 2011. It is unclear to me why a transcript was necessary, given that the evidence was all by affidavit, and no oral evidence was called.

[18] The father perfected his appeal on May 11, 2011 upon filing his Appeal Record, Factum, and Book of Authorities (approximately six months after the motions judge's judgment).

[19] Pursuant to rule 38(21)3, the mother had 60 days from May 11, 2011 to serve and file her record and factum.

[20] It does not appear that she did so. When the matter came before Justice J. Wilson of this court on August 15, 2011, Her Honour was concerned about proceeding, and she noted: "this is an important matter and it would be appropriate for at least the mother to be represented. The child also should perhaps be represented."

[21] She then referred the appeal to me for September 15, 2011 to consider the issue of service and representation.

[22] On September 15, 2011, counsel for the father appeared and the mother appeared with duty counsel.

[23] The mother was to apply for legal aid and I was to be advised by October 3, 2011 as to the status of her Legal Aid Application.

[24] I adjourned the appeal to be spoken to on October 6, 2011. I was later advised that the mother retained counsel and in a conference call involving counsel, I set December 19, 2011 as the date for the Appeal.

[25] The Attorney General for Ontario ("AG") and the Attorney General for Canada were served.

[26] I indicated that the appeal judge would first decide whether it was too late to raise the *Charter* issue.

[27] I was advised that the AG had yet to decide its position and the Attorney General for Canada was not going to respond.

[28] On December 19, 2011, counsel for the AG appeared to advise that they took no position on whether the issue could be raised at this stage. However, if I decided that it could be raised, they would then decide if they intended to participate in the appeal on the constitutional issue.

[29] It was understood that if I decided that the *Charter* issue could still be considered on the Appeal, then an Appeal date would be fixed to allow the AG to participate if they decided to do so.

The parties' positions on whether the *Charter* Issue can now be raised on Appeal

The Mother's Position

[30] The mother submits that she can raise the *Charter* issue now based on the criteria established by the case law: *R. v. Brown*, [1993] 2 S.C.R. 918, L'Heureux-Dubé J., dissenting; *R. v. Rollocks* (1994), 19 O.R. (3d) 448, [1994] O.J. No. 1458 (C.A.); *A.A.* v. *B.B.*, 2007 ONCA 2 at para. 9.

[31] She submits that the test to raise a *Charter* issue for the first time on appeal is as follows:

> 1. There must be a sufficient evidentiary record to resolve the issue;
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> 2. It must not be an instance, in which the (Respondent, mother) for tactical reasons failed to raise the issue at trial (here on a motion initiated by the Appellant father);
>
> 3. I must be satisfied that no miscarriage of justice will result from the refusal to raise such a new issue on appeal.

[32] The mother submits that there is a strong factual foundational supporting her *Charter* argument that her daughter is being treated unequally as a result of being the child of unmarried parents, compared a child of a marriage.

[33] She submits that all the proper and relevant parties have been given notice and can provide evidence to the court if they choose.

[34] The mother submits that she was unable to raise the *Charter* issue before, as she was unrepresented by counsel. She points to the fact that when asked why she did not have counsel, she informed the court that she was denied legal aid, and that Curtis J. expressed concern.

[35] While not formally raising the *Charter* as the basis of the unfairness of the distinction between the *Family Law Act* and the *Divorce Act*, the mother stated at the motion: "I don't agree that - the fact we were married or not married shouldn't be a factor. The fact that my daughter's disability is going to leave her a dependent of mine for her entire life – just I do not know how to put it in words."

[36] The mother now submitted that the father recognized the issue in his appeal factum and argued:

> [t]he law is clear that, whatever appearance of injustice of the *Divorce Act* and the *Family Law Act* in this area, a child has to be enrolled in a full time programme of education" within the meaning of the section 31 of the *Family Law Act*.

[37] The mother submits that it would be unfair to disallow her from raising the issue at this time. This is because it would limit her ability to seek a declaration that section 31 of the *Family Law Act* is unconstitutional in the event that on appeal, the motions judge is reversed on her findings that the child is entitled to support under section 31.

[38] The mother wants to be able to seek permanent ongoing support, and avail herself of a section 24(1) *Charter* remedy.

[39] To refuse her the opportunity to argue the *Charter* on its merits would continue to deny the child the same opportunity afforded to children under the *Divorce Act*.

The Father's Position

[40] The father submits that he has been subjected to multiple adjournments, delay tactics, and obstructions to get a final determination of what he states is a relatively straightforward motion to change a consent order that he commenced on June 25, 2009.

[41] He submits that there have been many indulgences granted to the mother and she is the only one to benefit by any delays, as he is unlikely to recover the support being enforced by the Family Responsibility Office if he successful on appeal.

[42] His counsel submits that the mother's lawyer, in exchange for a further extension of time to file materials with respect to the substantive issues on appeal, agreed that the matter would be peremptory on her on December 19, 2011.

[43] He claims that on November 10, 2011, without warning, a Notice of Constitutional Question was served.

[44] He submits that this was contrary to the agreement reached by counsel that the Constitutional issue could not be argued on December 19, 2011.

[45] He argues that the constitutional issue may not be raised for the first time on appeal:

> He argues that the adjournments at the OCJ were granted at the mother's request.
>
> He described Wilson J.'s decision on August 15, 2011 when the Appeal was first scheduled to be heard in this court as:
>
> > The presiding justice, on her own accord, took the extraordinary step of adjourning the matter to another judge to discuss the issue of whether the (child) should have counsel and whether (the mother) should have counsel and to deal with other procedural issues.

[46] Much of father's submissions related to the time delay but the delay does not, in my view rest solely with the mother. This court and the Ontario Court of Justice recognized that the mother should be given an opportunity to retain counsel and the significant and critical issue raised.

[47] The father wanted me to hold the mother to an earlier agreement between counsel that the December 19th date was peremptory.

[48] In my conference call with counsel , I endorsed the following relating to the attendance on December 19, 2011:

> a. The first issue to decide will be whether it is too late to raise the constitutional issue.
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> b. If the judge decides that it is not, the constitutional issue will be adjourned to a date to be fixed.
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> c. If the judge decides that it is too late, the appeal will be heard.
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> d. The judge may decide to hear the appeal on the non-constitutional issues or adjourn on all issues.

[49] While largely agreeing as to the test governing whether a constitutional issue can be raised on appeal for the first time, the father submits that "none of the branches of the test are satisfied."

[50] The father argues that there is a very limited paper record and no viva voce evidence. He also argues that the mother underestimates and "misapprehends the level of evidence required to deal properly with an argument of discrimination pursuant to ... (the *Charter*)."

[51] He further submits that no one has had the opportunity to adduce evidence to do a proper analysis and without the opportunity to do so, it would be "unfair to (the father) and Ontario."

[52] He outlines that the evidence might include:

a. social evidence about how Ontario's social safety net provides for adult children with disabilities;

b. internal debates within the Ontario government about how and why its current Ontario Disability Program scheme is administered, how decisions are made on the level of funding, and what level of funding is provided to different applicants;

c. statistical evidence regarding whether disabled adults receive more income benefits through the use of the "social safety net" as compared to a situation where they would be forced to rely on child support alone; and

d. statistical evidence about "adult children" of unmarried parents" as a group including evidence of any historical disadvantage and how that has been ameliorated.

[53] Father submitted the appeal court is not the proper forum to assess competing evidentiary claims.

[54] The father claims that he is prejudiced as he continues to pay support. He submits that the competing interests of the parties have not been properly balanced.

[55] He submits that to suggest that the mother raised the argument on first instance without specific reference to the *Charter* is without merit. He also argues that her inability to raise the issue properly, because she had no counsel, also fails in that she was granted adjournments.

Conclusion

[56] The issue raised is important. Once the mother obtained counsel, he read the rulings of the motions judge and of the first judge who touched this matter on appeal. I find that the mother's counsel then was obliged to raise the *Charter* issue. The issue should not have come as a surprise at all to the father.

[57] There appears to be competing positions as to why the matter was delayed at the OCJ. If mother was denied legal aid to attempt to deal with child support and on first appearance at this court, a judge raised representation issues , the mother cannot be faulted

[58] I am satisfied that the mother has met the test to allow her to raise the *Charter* issues at this time:

1. The challenge should not come as a surprise.
2. There is a factual record, and if either the Attorney General for Ontario (if they choose to participate) or the father wishes to supplement the evidence on the *Charter* issue they will need to now address that issue as part of their defence of the *Charter* Challenge.
3. This case deals with child support and entitlement. I do not see counsel's advancing the issues as tactical to seek to delay.
4. I am not sure what viva voce evidence, if any, is needed concerning the parties, as the father did not attempt to challenge the factual background. Rather, he challenged the motions judge's conclusions on the facts.

[59] This case is about whether the child is entitled to support on the basis approved by the motions judge by applying the *Family Law Act.* It is also about whether if the motions judge was wrong, the *Charter* challenge to the *Family Law Act* should succeed on the basis that children born of marriage under the *Divorce Act* may have different support rights.

[60] This Appeal now needs to be managed.

[61] After the release of this ruling, I would ask counsel, including counsel for the AG to consensually agree to a timetable on the following issues:

1. A date by which the Attorney General will advise whether they will be participating.
2. Timelines for filing any additional material.

[62] If there is no agreement within 14 days of the release of this ruling, all counsel are to attend on a date before me or if I am not available another judge to address these timeline issues and fix a date for the hearing of the Appeal.

[63] I want this matter expedited and will address any further issues arising from this request on either a date arranged as above, or on motion.

Czutrin J.

Released: January 27, 2012