SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Austin (Burke) v. Casey, 2018 NSSC 49

Date: 20180309
Docket: SFHISOS 094527
Registry: Halifax

Between:

Kelly Dawn Austin (Burke)

Applicant

and

Clint Irwin Casey

Respondent

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Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Hearing: February 8, 2018, in Halifax, Nova Scotia

Issues: Is the subject child still dependent? May the Nova Scotia Court decide the matter? Has there been undue delay by the payee in asserting the claim?

Summary: The father resides in Nova Scotia. The mother resides in the Yukon and the child lives with her romantic partner in British Columbia. The parties agreed to have the Nova Scotia Court decide the matter. The Court held the subject child was not dependent and no child support obligation existed. The Court also held the payee had delayed asserting a claim and was therefore at fault and no retroactive adjustment of child support should occur.

Keywords: Dependent child; blameworthy conduct; jurisdiction.

Legislation: *Interjurisdictional Support Orders Act,* S.N.S. 2002 c.9

Cases Considered: *Waterman v. Waterman,* 2014 NSCA 110
D.B.S. v. S.R.G., (2006 SCC 37)

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Counsel: Kelly Austin (Burke), Self-Represented
Kenzie MacKinnon QC, Counsel for Clint Casey

By the Court:

Introduction/Overview

[1] This proceeding is governed by the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 9 known commonly as the *'ISO' Act* and the companion legislation in the Yukon. The interprovincial legislative regime was reviewed in *Waterman v. Waterman*, 2014 NSCA 110 by our Court of Appeal. The subject Payee (mother) currently lives in the Yukon and the Payor (father) lives in Nova Scotia. The subject child, D.O.B. April 17, 1994, almost 24 years of age, now resides in British Columbia and has resided in that Province for seven years.

[2] This Court received the mother's support variation application on June 12, 2017. It is in the form provided for by the 'ISO' legislation. She seeks to have child support increased from $171.00 per month to $594. Mr. Casey says he voluntarily increased his child support payment to the table amount from 2006 to 2011.

[3] Mr. Casey was made subject to a British Columbia child support order to pay child support of $171.00 each month for his child Dakota beginning April 1, 2000. Earlier, on October 6, 1999 he was made subject to a parenting order for Dakotah. Note the 1999 order does not identify the payment as child support nor does it identify the child. However, the parties agree the amount was for support of the child Dakotah Craig Casey, D.O.B. April 17, 1994 (see birth certificate being part of ISO Form A).

[4] The matter was to be before me on September 21, 2017 for a first appearance but was adjourned upon request to November 15, 2017 to permit both parties to participate. Ms. Burke did participate by telephone on November 15, 2017. Mr. Casey was represented by counsel, Mr. Kenzie MacKinnon, QC.

[5] After discussions with the Court, the parties agreed to adjourn the matter to explore a consent resolution. No agreement was reached and the matter returned to me on February 8, 2018 for further consideration.

[6] The following is not in dispute:

1. The parties were never married.
2. Dakotah will soon be twenty-four (24) years of age.
3. Dakotah has not resided with her mother since 2011 when she left Yellowknife where she was living her mother.
4. Dakotah has been in the workforce for uninterrupted periods since 2011.
5. Dakotah has lived in a common-law relationship for the past three (3) years in Victoria.
6. Dakotah is not a full-time student at university.
7. Mr. Casey has paid $171 per month and continues to do so.

Issues

[7] The issues are as follows:

1. Whether the Court has jurisdiction to consider an application to vary the child support obligation on a retroactive basis? If so, how?
2. Whether the Court has jurisdiction to order ongoing child support payable by Mr. Casey?
3. Would a child support order represent an undue hardship for Mr. Casey?

4. Is the claim really for a special expense for the child while at university? If so, was it perfected? Does the Court have jurisdiction to order the expense regardless?

[8] On February 8, 2018, Mr. Casey appeared with his counsel, Mr. Kenzie MacKinnon, QC. Ms. Burke participated by telephone. Both parties were given the opportunity to make submissions on what the Court should order.

Conclusion

[9] I am satisfied the child Dakotah is not a dependent of either party and has not been for several years or longer. The Court does not have jurisdiction to order either ongoing or retroactive child support in response to the application of her mother, Ms. Burke.

[10] The child has resided full-time in British Columbia since 2011. The mother has resided in the Northwest Territories and then the Yukon since then.

[11] The Court is told Dakotah has cohabited with her current partner for three years or more.

[12] The Court does not have any evidence from Dakotah as to her circumstances including information about her income, her household income and expenses. All the Court is told is offered by Ms. Burke.

[13] To illustrate the unreliably of what the court is told, I observe that on February 8, 2018 Ms. Burke advised Dakotah is now in receipt of education support available to her as an aboriginal person. She explained the support is effective for the period beginning September 1, 2017.

[14] Ms. Burke asks that the child support be paid to her and says she will forward the support to her daughter. Ms. Burke is not and has not been entitled to child support since 2011 even if the Court had jurisdiction to order it. The child did not live with her and I am not satisfied she incurred any household expenses attributable to the child.

[15] If any claim could be theoretically claimed on this evidence, it would be for a sharing of the special expenses related to the child attending college/university.

However, on the evidence, such a claim would not be sustained. In any case, special expenses were not claimed by Ms. Burke.

[16] The retroactive claim of Ms. Burke suffers from the additional weakness that it comes after years of delay, on her part, in asserting it. Payors and Payees both have obligations when a child support order is in effect. I rely on the discussion of the law in *D.B.S. v. S.R.G.* (2006 SCC 37). Her conduct in not pursuing this claim years ago is blameworthy and in my view, defeats the claim if considered.

[17] The Payors are often required to disclose their income annually to the payee and to adjust their child support payments. Payees are under an obligation to act should the Payor not do so. Payees risk losing an otherwise valid claim for retroactive child support if the payee fails to prosecute such a claim. Payees may rest on their rights but risk adverse consequences should they do so.

[18] I need not consider Mr. Casey's claim for undue hardship.

[19] I find Mr. Casey's child support obligation ended years ago and he has overpaid child support for the years since. His obligation is now terminated.

ACJ