“Successful application on behalf of client’s step-father, to have court dismiss claim against him by biological father who wanted client to contribute to biological father’s child support payments.” [COMMENTS BY RICHARD NEARY]

B v. Br

Between
C B, applicant, and
R Br and K W, respondents

[2003] O.J. No. 5528

[2003] O.T.C. 1164

50 R.F.L. (5th) 263

129 A.C.W.S. (3d) 135

Newmarket Registry No. 15898/03

Ontario Superior Court of Justice
Newmarket, Ontario

Nelson J.

Oral judgment: November 26, 2003.

(32 paras.)

Statutes and Regulations cited: Child Support Guidelines, O. Reg. 391/97, clause 3(1)(a) and sections 5 and 7. Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3. Family Law Act, R.S.O. 1990, c. F-3 [as amended], section 33, subsections 33(5) and 33(7) and clause 33(7)(b). Family Law Rules, O. Reg. 114/99, subrule 16(12).11

Cases Cited: C.(K.) v. B.(S.) (2003), 36 R.F.L. (5th) 22, [2003] O.T.C. 227, [2003] O.J. No. 1124, 2003 CarswellOnt 988 (Ont. S.C.). Mohr v. Baxter, [1999] O.J. No. 1541 (Ont. Prov. Div.). Morrison-Pelletier v. Pelletier and Swayze (1997), 97 O.A.C. 359, 143 D.L.R. (4th) 766, 26 R.F.L. (4th) 1, [1997] O.J. No. 156, 1997 CarswellOnt 114 (Ont. C.A.). Wright v. Zaver (2002), 59 O.R. (3d) 26, 158 O.A.C. 146, 211 D.L.R. (4th) 260, 24 R.F.L. (5th) 207, [2002] O.J. No. 1098, 2002 CarswellOnt 887 (Ont. C.A.); affirming (2000), 49 O.R. (3d) 629, 7 R.F.L. (5th) 212, [2000] O.J. No. 2391, 2000 CarswellOnt 2208 (Ont. S.C.).

Counsel:

Garry J. Wise, for the applicant.
Monty F. Goren, for the respondent.
Richard L. Neary, for the added respondent.

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1 NELSON J. (orally):— By way of background, the applicant, C B, and the added respondent, Ken W, bring motions pursuant to subrule 16(12) of the Family Law Rules, O. Reg. 114/99, which allows the court to decide a question of law before trial. They are the moving parties. The respondent on the motion is R Br. Ms. B and Mr. Br are the birth parents of S E B. They do not reside together. S is 14 years old. She is in the custody of her mother. Ms. B was married to Mr. W. They now live separate and apart. They have two children who live with Ms. B. It is agreed by all parties that Mr. W demonstrated a settled intention to treat S as a member of his family. Mr. Br has had limited contact with S.

2 Ms. B has brought an application for child support naming Mr. Br as the respondent. Apparently, she and Mr. W have entered into financial arrangements that are satisfactory to Ms. B and, therefore, she has not brought an application for child support against Mr. W.

3 As a result, Mr. Br moved to add Mr. W as a party. On 27 June 2003, Justice Claire Marchand made an order adding Mr. W as a party. The endorsement was unclear whether Mr. W was present or made submissions. In any event, the order came to Mr. W's attention some time ago and he has not appealed.

1: THE MOTIONS

4 Mr. W brought a motion dated 9 November 2003 for an order striking Mr. Br' claim against Mr. W as disclosing no cause of action and removing Mr. W as a party. Ms. B has also brought a motion dated 10 November 2003 asking for temporary child support against Mr. Br and for an order that Mr. Br' claim over for child support against Mr. W be struck as disclosing no cause of action.

5 At the hearing of the motion it became readily apparent to all counsel that this court could not remove Mr. W as a party, as it could not sit as an appeal court with respect to Justice Marchand's order. As well, it was agreed by all counsel that the issue to be decided was not really one of striking a claim as

disclosing no cause of action but was one of dealing with an issue of law prior to trial.

6 Subrule 16(12) states:

(12) Motion for summary decision on legal issue. - The court may, on motion,
(a) decide a question of law before trial, if the decision may dispose of all or part of the case, substantially shorten the trial or save substantial costs;
(b) strike out an application, answer or reply because it sets out no reasonable claim or defence in law; or
(c) dismiss or suspend a case because,(i) the court has no jurisdiction over it,
(ii) a party has no legal capacity to carry on the case,
(iii) there is another case going on between the same parties about the same matter, or
(iv) the case is a waste of time, a nuisance or an abuse of the court process.2: THE ISSUE

7 Mr. Br, in his pleadings, is requesting that Mr. W and he share the payment of the table amount ordered.

8 It was agreed by all counsel that the issue should be framed as follows:

Is apportionment allowable between a biological father and a stepfather under the provincial table amounts of the child support guidelines in the circumstances of this case?

9 I will deal with Mr. Br' position first.

10 Mr. Goren takes the position that there is discretion in this court under the Family Law Act, R.S.O. 1990, c. F-3 (as amended), to apportion the table amount of support between a biological parent and a stepparent who has been added as a party to the child support claim.

11 All counsel agree that if Ms. B had sued Mr. W for child support, then section 5 of the provincial Child Support Guidelines, O. Reg. 391/97, which allows the court to order:

... such amount as the court considers appropriate, having regard to these guidelines and any other parent's legal duty to support the child,

would come into play, allowing the court to reduce the table amount otherwise payable. Counsel further agree that section 5 is not available to a biological parent and, therefore, not available to Mr. Br. Nonetheless, Mr. Goren submits that there is still discretion in the court to apportion between the two respondent parents the amount found owing under the guidelines.

12 Clause 3(1)(a) of the guidelines reads as follows:

3. Presumptive rule. - (1) Unless otherwise provided under these guidelines, the amount of an order for the support of a child for children under the age of majority is,

(a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the parent or spouse against whom the order is sought; ...

Mr. Goren concedes that, on the face of it, there is no discretion conferred by clause 3(1)(a). He takes a somewhat historical path to demonstrate that, in spite of the wording of subsection 3(1) of the guidelines, discretion still exists. Mr. Goren points out that the Ontario Court of Appeal case of Morrison-Pelletier v. Pelletier and Swayze (1997), 97 O.A.C. 359, 143 D.L.R. (4th) 766, 26 R.F.L. (4th) 1, [1997] O.J. No. 156, 1997 CarswellOnt 114, in allocating responsibility for child support payments between a "natural" parent and a parent "who is not", recognized that:

[4] ... the court has an overriding discretion to determine what is the proper apportionment to be made of the obligation to support the child.

13 In deciding Morrison-Pelletier v. Pelletier and Swayze, the Court of Appeal was interpreting the provisions of subsection 33(7) of the Family Law Act, which had stated:

(7) Purposes of order for support of child. - An order for the support of a child should,

(a) recognize that each parent has an obligation to provide support for the child;

(b) recognize that the obligation of a natural or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent; and

(c) apportion the obligation according to the capacities of the parents to provide support.

14 Mr. Goren concedes that this case was decided just prior to the coming into force of the new guidelines and the new amendments to the Family Law Act that were made necessary in order to deal with the guidelines.

15 Subsection 33(7), as amended by S.O. 1997, c. 20, now reads as follows:

(7) Purposes of order for support of child. - An order for the support of a child should,

(a) recognize that each parent has an obligation to provide support for the child;

(b) apportion the obligation according to the child support guidelines.

16 Mr. Goren argues that the subsection still makes it very clear that apportionment is alive and well in the province of Ontario because it is specifically set out in the new amendments. He points out that the concept of apportionment is not to be found in the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, and, therefore, that any divorce cases on the subject should be distinguished.

17 He also submits that a plain reading of section 33 of the Family Law Act confers jurisdiction on the court to exercise discretion in apportioning between Mr. Br and Mr. W the table amount under the guidelines. In addition to its continuing use of the word "apportion", subsection 33(5) allows a respondent to:

... add as a party another person who may have an obligation to provide support to the same dependant.

18 Mr. Goren submits that it would be illogical to allow the addition of another party if the court could not allocate or apportion the quantum of support found due under the guidelines. Mr. Goren also submits that, even though subsection 3(1) of the guidelines is silent on the issue of apportionment and the use of discretion, it is clear that the Family Law Act has legislative force and that the provincial guidelines are simply regulations. As a matter of statutory interpretation, he urges the court to follow the Family Law Act and especially his interpretation of subsections 33(5) and 33(7) of the Family Law Act.

19 Mr. Goren submits that it would be somewhat of an absurdity to allow the addition of Mr. W under subsection 33(5) only to be told that there was no discretion in a court to apportion the obligation of the table amount of child support. If the legislature wanted to limit apportionment between a biological parent and a step-parent, it would not have used the word "apportion" in subsection 33(7) of the Family Law Act. After all, argues Mr. Goren, Parliament did not use this term in the Divorce Act.

20 Mr. Goren points out that the Family Law Act is the legislation that deals with liability for child support in this province and, therefore, a parental obligation must be determined under the Act. Apportionment must be given its due under the Family Law Act. Clause 33(7)(b) cannot be overridden by regulation. According to this argument, liability is determined under the Family Law Act and quantum is determined under the guidelines. The scheme to be followed is to first determine liability under the Family Law Act, then to determine quantum under the guidelines and finally to refer to clause 33(7)(b) to allocate or apportion support. In this way, Mr. Goren submits, the court's inherent jurisdiction to use its discretion is preserved. In other words, the law as it existed with respect to discretion when the Court of Appeal decided Morrison-Pelletier v. Pelletier and Swayze is still valid.

21 I now turn to Ms. B's and Mr. W's position.

22 Mr. Neary and Mr. Wise submit that a biological parent must pay the full table amount of support. They argue that the law of Ontario is such that the court cannot use its discretion to relieve a biological father from paying the full table amount. They further submit that there is no right in a court to apportion the table amount of support between two parents in circumstances where a biological parent adds a stepparent. They do concede that section 5 of the guidelines would allow a stepparent to ask the court to exercise its discretion in making an order that is less than the table amount but that is not the case here where a biological parent has been sued by a custodial parent.

23 Mr. Neary and Mr. Wise produced a number of cases for me to review, the more important of them being both the trial judgment and appeal decision in Wright v. Zaver. The trial judgment is reported at (2000), 49 O.R. (3d) 629, 7 R.F.L. (5th) 212, [2000] O.J. No. 2391, 2000 CarswellOnt 2208 (Ont. S.C.); the appeal decision at Wright v. Zaver (2002), 59 O.R. (3d) 26, 158 O.A.C. 146, 211 D.L.R. (4th) 260, 24 R.F.L. (5th) 207, [2002] O.J. No. 1098, 2002 CarswellOnt 887. As well, I was referred to the case of K.C. v. S.B. (2003), 36 R.F.L. (5th) 22, [2003] O.T.C. 227, [2003] O.J. No. 1124, 2003 CarswellOnt 988 (Ont. S.C.) and the case of Mohr v. Baxter, [1999] O.J. No. 1541 (Ont. Prov. Div.).

24 Mr. Neary and Mr. Wise refer to statements in these cases that they submit are determinative of the issue.

25 First, in the judgment of Justice Donald J. Taliano in Wright v. Zaver, the court stated at paragraph [34] sqq. the following:

[34] Notwithstanding the clear wording of s. 5, the biological father relies on M.(C.) v. P.(R.), a decision of the Ontario Court of Appeal rendered on January 22, 1997, which apportioned child support between the biological father (15 per cent) and the stepfather (85 per cent). In doing so, the court adopted the words of L'Heureux-Dubé J. in Moge v. Moge, [1992] 3 S.C.R. 813 at p. 867, 43 R.F.L. (3d) 345 at p. 387, where she stated that the "courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act". The operative section of the Family Law Act that prevailed at the time M.(C.) v. P.(R.) was decided, authorized apportionment between parents. Section 33(7) of the Act provided that an order for support should recognize that the obligation of a natural parent or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent.

[35] However, M.(C.) v. P.(R.) was decided before the Child Support Guidelines came into force on December 1, 1997. In addition, s. 33(7) has since been amended so that it now reads as follows:

33.

- (7) An order for the support of a child should,

(a) recognize that each parent has an obligation to provide support for the child;

(b) apportion the obligation according to the child support guidelines. Accordingly, any apportionment of child support must be done in accordance with the Guidelines.

[36] Section 3 of the Guidelines contains a "presumptive rule" which provides that the amount of child support for children under the age of majority is the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought. According to this section, the ONLY relevant income for determining the Table amount is that of the parent from whom child support is sought.

[37] Exceptions to the presumptive rule are provided in ss. 3(2), which deals with children of or over the age of majority; s. 4, which deals with payor having an income over $150,000; s. 5, with which I have already dealt; s. 9, which deals with shared custody; and s. 10, which deals with undue hardship. With the exception of s. 5, none of these other sections are relied upon by the biological father.

[38] Accordingly, the unique circumstances of this case do not fit into any exceptions to the presumptive rule that the biological father should pay child support at the Table amount specified in the Guidelines. That result is perhaps troubling from the perspective that it might seem unfair to now require a father who has been shut out of his child's life for 15 years to commence paying support. The apparent unfairness stems, I think, from the expectation by an access parent that he is entitled to exercise a parental role in exchange for support payments. That, however, has never been the law. The obligation for support is entirely independent of the rights of access. In any event, who is to say that the father might not be able to establish a relationship with the child. It may not be too late and court sanctioned support may very well be a catalyst for such a relationship.

[39] With respect to the issue of double dipping, I can see no authority in the Act to order anything other than Table support for the child. If that means that the mother is able to provide her son with a standard of living that is slightly better than their basic needs require, so be it. The biological father is extremely well off. It will not be a hardship for him to share some of his wealth with his child. One of the objectives of the Guidelines was to ensure that children "benefit from the financial means of their parents". One might even suggest that the biological father has had a 15-year holiday from support obligations and it is now proper that he honour his moral and legal obligation to his child.

It should be noted that the Ontario Court of Appeal upheld Justice Taliano's judgment.

26 In K.C. v. S.B., Justice Andromache Karakatsanis, in a case that involved a biological father arguing that a stepfather should shoulder the burden of child support, stated as follows at paragraphs [13] and [14]:

[13] The fallacy of the father's argument is apparent in the legislation itself. A parent has an obligation to support his child even if other parents are supporting him. The Family Law Act, R.S.O. 1990, c. F-3 (the Act), subsection 33(7) provides that an order for the support of a child should recognize that each parent has an obligation to provide support for the child in accordance with the guidelines. Both the legislation and the guidelines clearly contemplate that there can be more than two parents. The presumptive support under subsection 3(1) focuses on the income of the parent against whom the order is sought. The specific needs of the child and the ability of other parents to support the child are not relevant under subsection 3(1). Furthermore, it is the parent who stands in the place of a parent and not the biological parent who can have regard to any other parent's legal duty to support the child under section 5 of the guidelines. Finally, if the mother and the husband were not separated, D. would be entitled to child support from his father even if the husband were supporting the family - likely to a greater extent than he is under the current order. There is no doubt that D. is entitled to support from his biological father - even if D. has two parents who have provided for him since birth and continue to do so. This is so even if the mother initially did not seek or request support. That circumstance will go to the issue of retroactive support.

APPLICABILITY OF THE CHILD SUPPORT GUIDELINES

[14] Subsections 33(11) and (12) of the Family Law Act provide that an order for child support shall be determined in accordance with the Child Support Guidelines unless the court is satisfied that:

(1) special provisions have been made;

(2) for the benefit of the child;

(3) that would render the guideline amount inequitable.

27 Finally, Provincial Judge Lucy C. Glenn of the Ontario Court of Justice (Provincial Division) in Mohr v. Baxter had the following to say at paragraphs [14] and [15]:

[14] Section 34(7) of the Family Law Act contemplates that, if a child has more than one parent, the duty to support that child should be apportioned between the parents. It makes clear, however that any apportionment must be in accordance with the Child Support Guidelines. Section 3(1) of the guidelines states that, if the child is under the age of majority, the amount of support that must be ordered by the court is the amount set out in the applicable table, unless otherwise provided by the guidelines. It is noted that there were no claims made by the mother under section 7 of the guidelines, nor did any of the parties claim reliance on section 4 (incomes over $150,000.00), section 9 (shared custody) or section 10 (undue hardship). Any one of these sections allows a court to exercise discretion in ordering something other than the table amount of child support payable by a natural parent.

[15] The natural father however attempts to rely on section 5 of the guidelines in his request that the court exercises its discretion to order an amount less than the table amount of child support. The difficulty with this is that he is specifically excluded from that relief under this section. The court can only exercise the discretion available under section 5 if:

1. The parent is a spouse who stands in the place of a parent for the child or

2. The parent is not a natural or adoptive parent.

3: DECISION

28 It is apparent to me that clause 33(7)(b) of the Family Law Act cannot be interpreted as conferring the right upon a court to apportion child support under the table amounts of the guidelines as between a biological parent and step-parent where a biological parent adds a step-parent as a party. Any discretion to apportion did not survive the amendments made to the Family Law Act. It is the legislation itself that restricts any apportionment to be in accordance with the child support guidelines. The legislation, therefore, adopts the regulation and should not be read independently of it. In my view, "apportion" as it is referred to in clause 33(7)(b) is simply a recognition that the purpose of any child support is to apportion the obligation of support between the person seeking support and the person paying support. There is an implicit recognition in the clause that the guidelines themselves apportion the obligation to pay support once an order is

made. It is important to note, as Mr. Wise did in his argument, that the word "apportion" does not refer to the "child support tables" but does refer to the "guidelines". Mr. Wise submits that nowhere in the guidelines does the concept of apportionment appear. There are a number of sections that allow a court to order amounts that are different than the table amounts - for example, if there is a child over the age of majority, if the payor has an income over $150,000, if there is shared custody and if there is undue hardship. None of these issues are raised by Mr. Br in this case.

29 Having had the benefit of counsel's very able submissions, having reviewed the law, there will be an order that Mr. Br is not able to apportion the table amount of child support found owing by him between him and Mr. W for the support of S. This order is made under subrule 16(12) of the Family Law Rules.

30 As stated at the outset, Mr. W has been made a party to this application. There is a claim for section 7 expenses by the applicant. Although I have not been called upon to decide the issue of party status and allocation of section 7 expenses, it seems that Mr. W needs fully to participate in that inquiry and will have the opportunity to do so at trial, if the matter does not settle earlier.

31 There was some lively discussion during the hearing of the motion as to the possibility of Mr. Br' requesting that Mr. W pay support to the applicant for Seither in the full table amount or in some reduced amount under section 5 of the guidelines.

32 The issue appears to be the right of a non-custodial responding party to obtain an order that support be paid to a custodial parent by another party in circumstances where the custodial party either has no reason, or possibly a very good reason, not to sue that other party. Once again, the court was not called upon to decide this issue.