Date: 19981119
Docket: CA024182
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT:

Before:

THE HONOURABLE MR. JUSTICE ESSON
THE HONOURABLE MR. JUSTICE DONALD
THE HONOURABLE MR. JUSTICE MACKENZIE

November 19, 1998
Vancouver, B.C.

BETWEEN:

TACEY KEIGHLEY

PETITIONER
(APPELLANT)

AND:

PETER JONATHAN KEIGHLEY

RESPONDENT
(RESPONDENT)

P.G. Kent-Snowsell — appearing for the Appellant
S.K. Jesperson — appearing for the Respondent

[1] **DONALD, J.A.:** This is an appeal from the refusal by a Chambers judge to make a retroactive order of child maintenance.

[2] In order to succeed on this appeal, the appellant mother must show that there was a material error in the making of the impugned order. The review test for maintenance orders was put

this way by Mr. Justice Sopinka, for the majority, in ***Willick v. Willick*** [1994] 3 S.C.R. 670 at 692:

> ... an appellate court should not intervene absent a material error in principle, a significant misapprehension of the evidence or an award which is clearly wrong.

[3] In my judgment such an error has not been demonstrated in this case. The learned chambers judge refused retroactive maintenance for the reason that the mother acquiesced in a proposal made by the father over the period covered by the request.

[4] The issue arose in the following circumstances. On 14 November 1996, the mother wrote to the father requesting an increase in maintenance. He was then paying $600.00 a month for two children of the marriage, Jonathan, born 17 April 1978, and Jeremy, born 15 May 1982. The parties were married on 21 May 1971, separated on 25 March 1983 and divorced on 15 October 1985. Child maintenance in the amount of $250.00 a month for each child was ordered by consent on 2 August 1985. The father voluntarily increased that by $50.00 a month per child in January, 1995.

[5] The father responded to the mother's request for an increase by a letter dated 2 December 1996 in which he offered to continue to pay $600.00 a month but with an allocation of

$450.00 to the younger son and $150.00 to the older. He also proposed that he would cease to deduct child maintenance from his income tax, thereby improving the mother's tax position. He requested that she provide full financial disclosure if she did not accept the offer. He said:

> In the interest of compromise, I am prepared to continue paying the sum of $600.00 per month, allocated $450.00/$150.000, Jeremy/Jonathan. I will not deduct these payments effective January 1st, 1997, and you will not be obliged to include them in income.
>
> If this proposal is not satisfactory to you, I will require a full financial disclosure from you and enclose a blank Form 89 for completion. Note the highlighted requirements on the first page. I will also required details of Jonathan's earnings for 1996 and confirmation of his Douglas College schedule for the past and upcoming term.

[6] As the learned Chambers judge found, the mother did nothing until 8 October 1997, when she brought the application to vary which ultimately led to the order under appeal. In that application, she asked for the increase to be made retroactive to 1 January 1997.

[7] The application was heard by Mr. Justice Lander on 3 December 1997 and was decided by him on 30 December 1997. He records in his reasons that the parties agreed that the older child, Jonathan, ceased to be a child of the marriage as of 1 December 1997. He said they also agreed that the support order for the younger child should be increased to $888.00 a month to

conform with the Federal Child Support Guidelines. The real contest was over back maintenance for both children.

[8] Mr. Justice Lander observed, correctly in my respectful view, that a lack of due diligence cannot estop a proper claim for retroactive support. But I infer from his finding of acquiesence that he did not regard this as a proper claim. To remain inactive is one thing, but to continue to accept payments on a proposal without rejecting the proposal and moving for a variation is quite another. When the proposal was made, there was an active dispute whether the older son continued to be a child of the marriage.

[9] It is argued for the mother that the learned Chambers judge misapprehended the evidence in finding acquiescence. This is founded on the contention that there was evidence of negotiations after the request was made in the fall of 1996 and through the period for which retroactivity is claimed. I have examined the evidence that is said to support such a contention and I am unable to agree with counsel's submission. The mother's affidavit only goes so far as to say that there were repeated requests for an increase, but that statement is not located in time, and could very well have been taken by the learned Chambers judge as preceding the letter of request.

[10] Counsel for the mother also argues that the father has a positive duty to inform the custodial parent of increases in

his earnings. Without discussing that proposition in any detail, I simply note that the father voluntarily increased his payments in 1995, and the mother seems to have been content with that until she raised the matter of maintenance again in the fall of 1996.

[11] The disposition in question here is consistent with the approach taken by Madam Justice Newbury in giving the reasons for the majority in ***Yiannitsopoulos v. Patseas*** (14 May 1997), Vancouver Registry No. CA021058 (B.C.C.A.), 1997 Can. Rep. B.C. 996. At para.12 she said:

> I think it bears emphasis that child support is generally intended to supply the current and ongoing needs of children and not, as noted in ***Dusterbeck v. Dusterbeck*** (1982) 27 R.F.L. (2d) 213 (Sask. Q.B.) at 215-6, to build up a capital fund, or as noted in ***McMillan v. McMillan*** (1983) 44 O.R. (2d) 1 at 9 (C.A.) (leave to appeal to S.C.C. refused (1984) 55 N.R. 76 n), to effect a division of assets under the guise of maintenance. Lump-sum awards, then, are "the exception rather than the rule" (see ***Hauff v. Hauff*** (1994) 5 R.F.L. (4th) 419 (Man. C.A.) at 423) and a retroactive award is even rarer given the focus on "current" needs. (See also ***Komori v. Malins*** (1996) 24 R.F.L. (4th) 1 (B.C.C.A.).)

Further on, she said at para.14:

> It is not surprising, then, that those cases in which retroactive lump-sum awards have been made, have involved clear and compelling evidence of unfairness.

[12] In my opinion, the finding of acquiescence goes to the question of fairness. If the mother was not content with the father's proposal and felt she was in pressing need, she could have moved more promptly. There was no unfairness that had to be redressed by way of a retroactive order and, as I have indicated, there is no basis for the contention that the learned Chambers judge misapprehended the evidence which led him to conclude that the mother had acquiesced in the offer presented by the father.

[13] For the foregoing reasons, I would dismiss the appeal.

[14] **ESSON, J.A.:** I agree.

[15] **MACKENZIE, J.A.:** I agree.

[16] **ESSON, J.A.:** The appeal is dismissed.

"The Honourable Mr. Justice Donald"