British Columbia Court of Appeal
Wilson v. Wilson
Date: 1987-11-13

F. Potts, for appellant.

Respondent in person.

(Vancouver No. CA 007416)

November 13, 1987. Excerpt from the transcript.

[1] CRAIG J.A.: Mr. Justice Esson will give the first judgment.

[2] ESSON J.A.: This appeal concerns a question of maintenance for the two sons of the parties who were born in 1974 and 1976.

[3] The parties were married in 1968, separated in 1979, and in 1981 entered into a separation agreement. By the terms of that agreement the mother obtained custody of the children. It was provided that the father was to pay $200 per month for the maintenance of each child.

[4] In 1985 a decree nisi of divorce was granted on the petition of the father. By consent of the parties the separation agreement was incorporated in that judgment.

[5] The father made the maintenance payments regularly until May 1986. After that for three months he paid $150 for each child for a period of three months and thereafter made no further payments during 1986.

[6] That led to proceedings being brought which culminated in applications which came before Mr. Justice Lander on 30th January 1987. The father applied to have the maintenance varied to reduce the total from $400 to $300 per month. He expressly said in his affidavit that he was not relying on any change of circumstances, but rather on an oral agreement which he asserted he and his former wife had entered into in May 1986.

[7] There was on the other side of the matter an application by the mother to fix and enforce maintenance arrears.

[8] The chambers judge found against the father on the matter of the agreement to vary and he dismissed the application to vary. He also made an order fixing the arrears at $2,700 and setting out a schedule for payment of those arrears.

[9] The father did not comply with the terms of that order. On 30th January Mr. Justice Lander had made it a term of the order that he was to be seized of the future proceedings

and on 16th February 1987 the matter came back before him by way of an application by the mother to commit the father for contempt and also for an order charging his salary from his employer.

[10] The father had been represented by counsel on the application of 30th January and for some time prior to that but, by the time the matter came before the court on 16th February, he and his lawyer had parted company. He represented himself. A court reporter was present and we have a transcript of the whole of the proceedings of that day, which includes evidence given by Mr. Wilson under oath.

[11] After hearing the evidence the chambers judge indicated that he was not prepared to make an order for committal and he dismissed that aspect of the application. He went on to say this:

> I will tell you what I am going to do. I am not going to give you a charging order. She has got the cheques, $300 a month. I am going to adjourn this matter for six months, so the arrears … and this is not a final order, as it were, as to maintenance, but I am satisfied from hearing him that it really is not there, Mr. Potts, I am convinced. So there we are. So its going to be $300 a month and the matter of arrears is adjourned. Maybe six months is too long far away, four months.

[12] The reference there to cheques for $300 a month was to a quantity of post-dated cheques in that amount which the father had delivered to the mother prior to the bearing of the contempt application. The reference to Mr. Potts is to counsel for the mother.

[13] There were further submissions by Mr. Potts, who pointed out that there had been no application before the chambers judge to reduce the amount of maintenance. As to that the judge said:

> Well, I am going to do it because I can see that he cannot pay it at the moment. She has got the cheques, and that is something. And he has testified that he has made a deal.

And after some further exchanges the judge added this:

> Four months from now we are going to have another look at it, and I understand Mr. Potts is upset about it but I can see that it is … $400 is just too much in the circumstances, and there we are, $300 a month. And no committal. That is dismissed. You are going to have your costs. I agree you had to come back here often.

[14] The reference to costs is to the costs of that application which were awarded to the mother. I should note that at the time that application was heard on 16th February the order pronounced on 30th January had still not been entered. It was entered the next day, that is, 17th February. It is from the order of 16th February that this appeal is taken. The

appeal originally was directed at all aspects of it which were adverse to the mother, but it is now confined to the order reducing the monthly maintenance payments.

[15] The submission by the appellant is essentially that the grounds required by s. 17 of the Divorce Act were not present; there had not been the requisite change in circumstances.

[16] As a subsidiary submission the appellant relies upon what might be called the irregularity of the proceedings leading up to the making or the order on 16th February in that there was at that time before the chambers judge no application to reduce the monthly payments.

[17] In his argument Mr. Potts relies particularly upon certain language to be found in the judgment of Mr. Justice Lambert in *Davies v. Davies,* Vancouver No. CA003513, 18th November 1985, which might be taken to define with some strictness the nature of the circumstances that can be taken into account on an application of this kind.

[18] With respect to that authority I point out that, although both Mr. Justice Taggart and I agreed with the disposition of the appeal proposed by Mr. Justice Lambert, the passage relied on was not agreed with by either of us. Mr. Justice Taggart said:

> I prefer not to express an opinion as to what in any given case may constitute a change in circumstances warranting a change in the order for maintenance. Those circumstances will vary from case to case and the decision in any given case must depend on the facts of that case.

[19] With respect, I agree with that statement.

[20] The facts here are in a number of respects unusual. There undoubtedly was a degree of procedural irregularity in going ahead to reduce the maintenance on that day. Furthermore, the result of that irregularity is that the mother did not have as much opportunity as one might wish to meet the statements made by Mr. Wilson in his oral evidence. That evidence consisted of a fairly detailed examination of his present financial circumstances and it is clearly on the basis of that the chambers judge came to the conclusion he did, which was that Mr. Wilson was simply not in a position to make the payment of $400 per month. Viewing the matter in context, I think it is also important to keep in mind the judge obviously viewed this as an order which would not necessarily continue for a very long period. His intention was that the matter be reviewed within as short a period as four months. He indicated to counsel that he did not think anything useful was likely to come out of the further examination, but he nevertheless made an order

which gave to the mother the opportunity, if she wished to have it, to carry out an examination in aid of execution which would have permitted a full inquiry into the circumstances of the father. It is necessary in these matters to give some recognition to life as it is in chambers, where these issues must be dealt with. It is necessary to recognize the fearful price in costs which is created where proceedings are multiplied excessively. Looking at the history of this matter, one fears that it may be in some respects a sorry tale of the resources of both parties being expended to an excessive degree in this interlocutory warfare. I do not intend that as a criticism in particular of the mother and her counsel. I think it is clear that the father, in refusing to make maintenance payments during a large part of 1986, took a position which he should not have taken, however strongly he felt that the money was not being wisely spent. There is no doubt that his obduracy lies at the root of much of the difficulty. But, nevertheless, to suggest that, as the matter came before the chambers judge on 16th February, he should have granted no relief to Mr. Wilson is, I think, in the circumstances, unrealistic. If he did not, the likely result would have been a further hearing on another day, perhaps with the expenditure of several hundred more dollars in costs.

[21] In concluding that there is no proper ground upon which this court should allow the appeal, I am much influenced by the obviously temporary nature which the chambers judge intended this order to have. If there was a proper basis for applying for restoration of the original order, that matter could have been back before the judge in chambers months ago without the formidable additional layer of costs which has been created by bringing this appeal. In my view, the chambers judge had before him evidence which entitled him to conclude that there was a change in circumstances which justified a reduction in the monthly payment at that time and I think, having regard to the history of the matter, he was justified in acting upon that conclusion without requiring further formal proceedings. For those reasons I would dismiss the appeal but, in the circumstances, would make no order as to costs of it.

[22] CRAIG J.A.: Mr. Justice Esson has set out the facts and I will not reiterate them except to the extent I feel it necessary, because I have arrived at a contrary conclusion.

[23] On 29th March 1981 Mr. Wilson made an agreement with his wife, who is now his former wife, that he would pay her $200 a month for the maintenance of each child. Ultimately, when the parties were divorced on 18th April 1985, both parties were represented by counsel and both parties asked that this particular provision in the separation agreement be entered into the decree nisi.

[24] In his material filed in support of his application in response to the wife's application in January of this year the husband filed an affidavit on 20th January in which he stated in para. 11:

> That in answer to the Respondent's motion and her affidavit in support thereof, the grounds for my application to this honourable court are not based on a change in my circumstances, but are based upon the matters outlined hereinbefore and in particular, the existence of the oral agreement reached between us in May of 1986 …

[25] The chambers judge found that there was no such agreement entered into in May 1986. Notwithstanding that fact, he made the order which is the subject of this appeal.

[26] Under s. 17(4) of the Divorce Act, 1985 a judge has, to some extent, a discretion. In my opinion this judge erred in principle, notwithstanding the evidence of Mr. Wilson, in concluding that there was a change in Mr. Wilson's circumstances and that the change justified his reducing the payments from $400 to $300 per month. In my view, there was no proper change in circumstances supported by the evidence and, accordingly, I would hold the judge erred in principle and I would, therefore, allow the appeal.

[27] HUTCHISON J.A.: I agree with Mr. Justice Esson for the reasons given by him that this appeal should be dismissed.

[28] CRAIG J.A: The appeal is dismissed, I dissenting.

Appeal dismissed.