2002 CarswellOnt 1647
Ontario Superior Court of Justice

Gibson v. Gibson

2002 CarswellOnt 1647, [2002] O.J. No. 1784, 114 A.C.W.S. (3d) 103

Winnie Wai Yin Gibson v. Wayne Herbert Gibson

Mackinnon J.

Judgment: May 1, 2002
Docket: 97-FL-56385

Counsel: *Sean Jones*, for Applicant
Lorna Baldwin, for Respondent

Subject: Family; Contracts

Headnote

Family law --- Support — Child support under federal and provincial guidelines — Determination of award amount — Expenses for post-secondary education
Family law --- Support — Child support under federal and provincial guidelines — Variation or termination of award — General
Family law --- Support — Child support under federal and provincial guidelines — Variation or termination of award — Change in circumstances
Family law --- Support — Child support under federal and provincial guidelines — Determination of spouse's annual income — Imputed income

APPLICATION by wife for variation of child support.

***Mackinnon J.*:**

1 On December 14, 2000, the parties entered into a consent order to vary the terms of their Divorce Judgment as to child support. The effect of the consent order was that child support was no longer payable for the oldest child, Sean. He had discontinued his studies and was employed part-time. In addition, the child support for the two younger children was adjusted to reflect the father's current income and share of their extraordinary expenses.

2 The parties also agreed to add the following additional provisions into the court order:

> 3. The Judgment of the Honourable Justice Sirois dated September 30, 1999, is further varied to add the following additional provisions:
>
> > (a) The parties will exchange duplicate copies of their tax returns as filed (including copies of all T3s, T4s, T5s and schedules) by June 30 th of each year beginning on June 30, 2001.
> >
> > (b) The Respondent, Winnie Gibson shall provide copies of all proof of payment of add ons as defined by paragraph 6 of the Judgment of the Honourable Justice Sirois dated September 30, 1999, by no later than June 30 th of each year (proof of payment shall be by way of cancelled cheques and corresponding invoices so that the Applicant, Wayne Gibson, may readily determine the item claimed, the amount claimed and for which child the expense is claimed[)].

(c) Subject to the Respondent's right to contest the calculation, by no later than July 31 st of each year, the Applicant, Wayne Gibson, shall calculate any further decreases in his contribution to section 7 expenses and shall have the right to retroactively adjust his payment to reflect any such decreases.

(d) In performing the calculations referred to in paragraph 3(c) herein, Wayne Gibson shall produce to Winnie Gibson copies of the Divormate Guideline Calculator (or other computer software) printouts used to arrive at his calculations.

3 In the motion before the court, Winnie Gibson seeks contribution to the post secondary expenses for the oldest child, who has now returned to college. She seeks to adjust the Table support and contribution to special expenses for the two younger children to reflect the existing incomes of the parents. She claims that the Respondent owes her arrears for child support in the sum of $2,652.99, which arrears, she says, arise due to the Respondent's inclusion of capital gains in her income for the year 2000. The Applicant's position is that the capital gains were a non-recurring amount that ought not to be included in her income for the purpose of calculating each parent's share of the children's special expenses in that year. Finally, she asks that the Respondent's share of the current special expenses be determined now rather than as set out in the December 14, 2000 order.

4 The Respondent father does not dispute that he should pay Table support for the two youngest children in accordance with his current income which is $91,707.00, up from the $85,430.00 set out in the December 14, 2000 consent order. He does dispute the claim that he contribute to Sean's post secondary expenses on the grounds that Sean has rejected his father, that Sean's income and assets have not been properly applied to his expenses, and that his expenses have not been satisfactorily proven to the court. Finally, the Respondent says that there is no basis to vary the terms of the December 14, 2000 consent order, that he has complied with that order and, as such, the balance of the Applicant's claims should also be dismissed.

The Claim for Sean

5 It is not disputed that a child who has ceased to be entitled to child support by reason of terminating his or her education, can, nonetheless, regain entitlement to support by returning to school. The Respondent father does call into question his obligation to contribute to Sean's expenses where, as an adult, Sean will not have a meaningful relationship with him. There is some authority for the proposition that where an adult child unilaterally terminates a relationship with a parent for no apparent reason, that this factor can be taken into account in determining whether support should be ordered: *Law v. Law* (1986), 2 R.F.L. (3d) 458 (Ont. H.C.); *Whitton v. Whitton* (1989), 21 R.F.L. (3d) 261 (Ont. C.A.). The relationship issues in the Gibson family are very complex. I have been provided with two reports prepared by Dr. Leonoff some three years following the separation when issues of custody and access remained unresolved. From these reports, I can conclude that both parents and Sean share in the responsibility for the damaged relationship between Sean and his father. It appears that the mother's attitude against the father has influenced the children and that the children have identified with their mother. It appears that the father was too insistent too early on to include his new partner in the lives of the children. It appears that his effort to assert has "paternal due" with the children has been viewed as aggression by the children. Dr. Leonoff described an impasse that would require the children to help resolve. He closes his second report by stating:

Although the children are surely not to blame for this sad state of affairs, they do bear some responsibility on their own, at least to help break this unfortunate impasse.

6 Recognizing the complexity of this relationship and the contribution of both parents to their creation and prolongation, one cannot conclude that the current state of affairs should be laid exclusively at Sean's feet in the form of a denial of support entitlement from his father. But, Sean is an adult and as noted years ago by Dr. Leonoff, he needs now to take responsibility as an adult for his side of the relationship with his father. To this end, the order with respect to his entitlement to receive contributions to his post secondary education from the Respondent should include the following terms which address Sean's obligations to his father in relation to his post secondary education:

1. Sean will provide all relevant information to the Respondent regarding any employment and sources of income he may have, including gifts, loans, scholarships and employment.

2. Sean will provide the Respondent with a copy of his income tax return as filed each year and a copy of the notice of assessment.

3. Sean will provide the Respondent with proof of enrollment for each school term, plus copies of all transcripts of marks upon receipt and details of his courses and course activities, on a quarterly basis.

4. Sean will prepare a budget for each school term and will provide it to the Respondent as least two weeks before the commencement of each term.

The 2001-2002 School Year

7 Sean is attending Fanshawe College in London, Ontario. He is enrolled in a Pre Health Science Program and hopes to enter a two year paramedic program in September 2002. In 2001, Sean earned $10,140.00 income. The evidence as to how this was used is that, while he lived with his mother and did not pay room and board, he was responsible for all other personal expenditures such as clothing and meals outside of the home. There was no evidence of what, if any, savings he accumulated from these earnings. In submissions, I was told he had no savings at all, but there was no evidence to this effect, including from Sean who filed an affidavit in support of the application. The Applicant has testified that she has paid for all of Sean's expenses for the 2001-2002 school year. There was evidence provided shortly before the motion was argued, that Sean holds some savings bonds in an undisclosed value, but which generated interest income in 2000 of $170.37, and that in 2000 and 2001 he has put aside $2,179.00 for RRSPs. The Court does not have his income tax return for 2001 and does not know whether he earned any interest income in that year.

8 The Applicant estimates Sean's expenses for the 2001-2002 academic year to total $20,000.00. Receipts have been provided which total $9,746.82. This does not include his monthly expenses for rent and utilities, which come to about $750 per month. The Applicant also includes a figure of $2,400.00 per term (or $600.00 per month for eight months) for "miscellaneous" which has not been detailed or explained, and I disregard it. I, therefore, conclude that Sean's expenses for the academic year in question total $15,500.00. Of that $15,500.00, what contribution should Sean have made? In the absence of clear evidence as to his means, I have inferred that he could have applied the money he earmarked for RRSPs to his education. He may also hold bonds which could have been applied to his expenses. From his $10,140 in income in 2001, I am told he purchased his own clothing and meals outside the home and other "personal expenses". I do not know what these expenses may have totaled. Again, in the absence of clear evidence, I infer from the evidence I do have, that Sean could have set aside significant savings to contribute to his post secondary expenses.

9 It is well known that an adult "child" has an obligation to contribute to his or her own post secondary education expenses in a reasonable way. Similarly, that individual and/or the parent putting forward the claim has an obligation to provide the court with accurate and meaningful information by which the court can assess what that contribution should be. This was not met here. The submission by Applicant's counsel that Sean saved nothing because he was not planning to go back to school is not evidence, but if it were, would not have met Sean's obligation to make a reasonable contribution commensurate with his ability.

10 In Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 2 nd ed. (Toronto: Butterworths, 1999) at p. 297, the authors' state:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not cal a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

11 In this case, given the evidence as to what Sean earned in 2001, and as to his interest income from bonds in 2000 and RRSP savings, without further explanation or even up to date information from him, I have drawn inferences as to his ability to

contribute to this year's education expenses, and determine that his parents should contribute $7,000.00 towards his 2001-2002 post secondary expenses.

12 The ratio between the parents in 2001 is 57 percent to the Applicant ($120,000 per annum) and 43 percent to the Respondent ($91,707 per annum). The Respondent's contribution for 2001-2002 is therefore $3,010.00. This should be paid to the Applicant in so far as she has already paid the costs of the current year.

13 For 2002-2003, I estimate that Sean's post secondary education costs will also total $15,500.00. Sean will receive $5,000 from the Canadian Scholarship Fund. He will also have summer employment from which he should make reasonable savings to contribute towards his expenses. When these savings are factored in, one expects that the Respondent's required contribution will be very similar to what it is for this year. Sean's income and savings in 2002 should be disclosed to the Respondent so that the exact calculation can be made of his share of the remaining expenses: i.e. $15,500 less $5,000, less Sean's savings, prorated between the parents. His contribution should be paid directly to Sean in two equal installments on September 1 and January 1. Should Sean continue on his program in the next academic year, the same estimate of his expenses will apply and the Respondent's share will also be paid in the same way.

The December 14, 2000 Order

14 It is not in dispute that the Respondent complied in all ways with the December 14, 20000 order as to special expenses. In so doing, he calculated the decrease in his contribution to special expenses and adjusted his payments to reflect his overpayment. The order allowed Ms. Gibson the right to contest his calculation by July 31, which deadline he extended by 30 days. She did not raise a dispute until November.

15 In order to set aside a consent order without subsequent consent, there must be proven the grounds of common mistake, misrepresentation or fraud, or any other ground which would invalidate a contract: *Chitel v. Rothbart* (1984), 42 C.P.C. 217 (Ont. Master); affirmed at (1985), 2 C.P.C. (2d) xlix (Ont. Div. Ct.). No such grounds are alleged or present.

16 Alternatively, the order could be varied if a material change in circumstances were alleged or proven. The well known summary of the threshold test for determining such a change in circumstances is that of Sopinka J. in *B. (G.) c. G. (L.)*, [1995] 3 S.C.R. 370 (S.C.C.) at para 73:

> In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

17 No such change has been established here. The only factor pointed to by the Applicant is the effect of the capital gains she received in 2000, a fact which would clearly have been known to her by December 14, 2000, and thus not capable of providing the basis for a variation.

18 Nor would I have found that the Respondent was wrong to have included the Applicant's capital gains as income for the 2000 year, in determining her income and thus her percentage share of the children's special expenses in that year. The applicant stated in her affidavit that in the 2000 tax year, she had a one time portfolio adjustment of Nortel shares. She decided to sell these shares which she owned prior to separation in 1996, realized a taxable gain of $140,000.00 and paid the related tax and reinvested the balance in different holdings with Investors.

19 The Applicant relies upon s. 17(1) of the *Child Support Guidelines* in support of her submission to exclude this non-recurring gain from income:

> **17.** (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and

> determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

20 Clearly, a capital gain is presumptively included in income as is made clear by s. 16 of the *Child Support Guidelines*. The onus is on the person who seeks to have it excluded from the determination of income to show the court that the s. 16 determination is not "the fairest determination" and that another amount is "fair and reasonable". In *Fung v. Lin*, [2001] O.J. No. 456 (Ont. S.C.J.), Perkins J. says at para. 11:

> Nevertheless I accept the proposition that a party who wishes the court, under s. 17, to use a three year income average or to exclude a "non-recurring amount" from income has the burden of persuading the court "that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income". This is certainly in accord with the presumption in favour of the guidelines amount and the tenor of the cases that deal with the exercise of any discretion the court may have.

21 He went on to ask and answer the following question at paras. 20 and 21:

> But as the mother's lawyer said, an unusual, dramatic increase in income does not of itself render the table amount unfair or inappropriate: see *Simon v. Simon* (1999), 46 O.R. (3d) 349 (C.A.). I return to the central question: why is it unfair to take the 1999 and 2000 capital gains into account in determining the father's guidelines income?
>
> ...I do not have any explanation that would discharge the father's onus of establishing first that the usual guidelines approach should not be used and second what other income number would be appropriate.

22 In this case, Ms. Gibson has basically told the court that she decided to sell certain shares and incurred a substantial gain, which she reinvested. Her counsel's submission is that since this is non-recurring and really amounts to moving an asset from one account to another, it should not be included as income. In considering whether the s. 16 approach is the fairest determination of income, I note that the purpose of the income determination in this case is to calculate the percentage share of special expenses for the children for that one year only. This is not a case where a non-recurring income amount would effect ongoing support payments in other years. In this case, the focus should be on the actual income earned by each parent in the year in question. See *Arnold v. Washburn* (2001), 57 O.R. (3d) 287 (Ont. C.A.)at para. 22:

> A fair determination of annual income under s. 17 requires a trial judge to consider the payer's pattern of income, including non-recurring or fluctuating amounts, and arrive at an amount that reflects as accurately as possible the actual income of the payer for the present and into the future. *(Emphasis mine.)*

23 Where, as here, the focus of the inquiry is to determine the fairest actual income for one particular year, as opposed to predicting an income for a future year, the onus to be met to exclude a non-recurring amount of income actually received in that year from the calculation of that year's income is high. The discretion to do so should be exercised in the context of the objectives of the child support law.

24 The *Divorce Act*, s. 26.1(2) provides as follows:

> (2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

25 The *Child Support Guidelines*, in section 1, set out the following objectives:

> **1.** The objectives of these Guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) to ensure consistent treatment of spouses and children who are in similar circumstances.

26 Here, the Applicant, in essence, says that by choosing to reinvest a non-recurring capital gain rather than using the gain as disposable income, she has met the onus of showing that the s. 16 method of income calculation is not the fairest determination. I cannot accept that a pure and simple choice as to how to spend what is income, standing alone, could justify the exercise of discretion to exclude that amount. So doing would not meet the objectives of objectivity or consistency and would not fairly reflect the financial means of both parents.

27 For these reasons, I find that the Applicant has not met the requirements to change the December 14, 2000 consent order and that, in any event, it is proper to include her capital gain income for 2000 in the calculation of the parents' respective percentage contributions to special expenses in that year.

28 Counsel may deliver written submissions as to costs within 10 working days, with a five day right of reply.

Order accordingly.