Date of Release: April 4, 1995 No. A933042

Vancouver Registry

In the Supreme Court of British Columbia

Between:)

)

PARMINDER KAUR SARAN) REASONS FOR JUDGMENT

)

PLAINTIFF)

OF THE HONOURABLE

)

And:)

MR. JUSTICE HUNTER

)

JARNAIL SINGH SARAN) (IN CHAMBERS)

)

DEFENDANT)

Appearances:

F.G. POTTS - Counsel for the Plaintiff

JAMES A.W. SCHUMAN and

JOANNE S. TAYLOR - Counsel for the Defendant

Dates of Hearing: March 10th and 17th, 1995 in Vancouver

1 The defendant Jarnail Singh Saran (Mr. Saran) appeals from the decision of Master Horn of November 4th, 1994 on the issue of his obligation to pay continuing child maintenance, claiming he is not the biological father of the child, Jessica, and the plaintiff Parminder Kaur Saran (Mrs. Saran) claims, in opposing the appeal that Mr. Saran is estopped from raising that issue, or alternately, that Mr. Saran is a "parent" as defined in the ***Family Relations Act***. Mrs. Saran cross-appeals on other grounds to which I will later refer.

2 Also before me is an application under Rule 18A by Mrs. Saran in these proceedings. There is also a divorce action (Vancouver Registry DO87180) in which Mr. Saran is the petitioner and Mrs. Saran the respondent. Mr. Saran, in that action, alleges adultery on the part of the co-respondent in those proceedings, Kalvinder Jit Singh Atwal. Michael Frost appeared as counsel for Mr. Atwal at these proceedings. It is unclear to me as to why Mr. Atwal was represented on these applications, although he has some interest in the outcome. I say that because the appeal and cross-appeal from the Master's order and the Rule 18A application all arise in Action No. A933042, a claim under the ***Family Relations Act***. It is clear that Mrs. Saran seeks maintenance for the children in both actions.

3 The parties in these actions were married in April of 1976. Three children were born during the marriage, the oldest two being now approximately 17 and 15 years of age, and Jessica, who was born on January 26th, 1991, and is therefore just over 4 years of age. Mr. and Mrs. Saran are 45 and 40 years of age respectively. It is unclear from the material as to when they separated (counsel advise that it was in January/February 1993), however, in February of 1993, Mrs. Saran commenced these proceedings under the ***Family Relations Act***, and in March of 1993 Mr. Saran commenced proceedings under the ***Divorce Act***.

4 While Mr. Saran alleged adultery in the divorce proceedings, the divorce was apparently granted on grounds of one year's separation.

5 At the end of the second day of these proceedings, as the allotted time for the hearing of these matters expired, the 18A application was adjourned generally. If it is necessary to proceed with that application, counsel will make submissions on the question of whether it should be heard by me.

6 As I understand the argument of counsel for Mr. Saran, it is that he is not the father of Jessica and, therefore, is not obliged at law to maintain and support her.

7 Counsel for Mrs. Saran, on the other hand, argues that Mr. Saran is estopped from raising such an argument because he did not raise that issue at either the hearing before Master Donaldson in September 1993 or at the appeal from Master Donaldson's order heard by Hall J. on November 26th, 1993. Alternately, Mrs. Saran argues that Mr. Saran is caught by the definition of "parent" in the ***Family Relations Act***, even though he is not the natural father of the child, and must therefore provide reasonable maintenance and support for the child.

8 I will describe a brief history of events since separation. By order of a Master in March of 1993, and by consent, Mrs. Saran was granted interim sole custody of the children with reasonable access to Mr. Saran. On April 2nd, 1993, Mr. Saran was ordered by Master Brandreth-Gibbs to pay a lump sum of $1,300.00 per month to Mrs. Saran for all three children. Her claim for maintenance was adjourned generally on that date.

9 On September 15th, 1993, Mrs. Saran applied before Master Donaldson for an increase in child maintenance payments. Master Donaldson made an order increasing Mr. Saran's obligation retroactively to April 1, 1993 from $1,300.00 to $4,000.00 per month. The learned Master found that Mr. Saran had been unreliable, both in his financial disclosure and his affidavit testimony. Maintenance was reduced on appeal by Hall J. to $2,700.00 per month, that is, $900.00 per month for each of the three children but Mr. Saran was ordered to pay the monthly mortgage payment of $1,100.00 on the matrimonial home. On June 10th, 1994, Mr. Saran applied to vary the amount of child maintenance. In his supporting affidavit he stated that he did not believe that he was the natural father of Jessica and referred to D.N.A. test results from a laboratory in Seattle, Washington, received by him in October 1993, which apparently confirmed this. In December 1993, he obtained an order permitting him to amend his statement of defence in these proceedings, denying paternity of the child.

10 In the divorce proceedings, Mr. Saran obtained an order in December of 1993 requiring Mrs. Saran and the child to submit to D.N.A. and H.L.A. tests, which tests confirmed that he was not the father.

11 On November 4th, 1994, Master Horn refused to vary Hall J.'s interim maintenance order and held that Mr. Saran was estopped from raising Jessica's paternity as a change of circumstances, and further held that Mr. Saran was a "parent" pursuant to the ***Family Relations Act***, and that Jessica was a "child of the marriage" pursuant to the ***Divorce Act***.

12 Master Horn also held that the issue of paternity on an interim application for child maintenance was an issue which survived an interim maintenance order and thus could come up for consideration at trial. This is the subject of Mrs. Saran's cross-appeal.

13 The basis for the estoppel argument is that Mr. Saran has not moved in a timely way to seek a declaration that he is not the biological father and, in fact, has continued to act as a parent with knowledge that he may not be the biological father. Mr. Potts refers to Mr. Saran's knowledge of this potential conclusion at an early date and points to the following circumstances as examples of that:

(1) In an affidavit sworn in divorce proceedings on March 2, 1993, he alleges that she committed adultery with the co-respondent in January of 1993.

(2) In his statement of defence in these proceedings filed March 24, 1993, he alleges that adultery.

(3) In an affidavit filed April 2, 1993, opposing his wife's application for maintenance before Master Brandreth-Gibbs, which resulted in the order of April 2, 1993, he describes all three children as children of the marriage, that he has a loving relationship with each and that he has always been a joint caretaker of all of them.

(4) Significantly, Mr. Saran, in his answer to the counter-petition in the divorce action filed June 15, 1993, declares that the paternity of Jessica is in question.

(5) In his affidavit, filed July 21, 1993, by which time Mr. Schuman was acting for him, Mr. Saran details his financial circumstances in answer to what he knew to be his wife's application for an increase in the amount of maintenance payments for all three children, yet there is no mention by him in this affidavit of the paternity issue.

(6) Mr. Saran does not raise the issue of paternity either before Master Donaldson or before Hall J. on appeal. Master Donaldson's order was made September 15, 1993 and filed April 6, 1994. This order, of course, requires Mr. Saran to continue to pay for the maintenance of Jessica. That appeal proceeded before Hall J. on November 26th, 1993 and oral judgment was given that day. Mr. Saran obtained the D.N.A. test results from Seattle, Washington in October of 1993.

(7) Mr. Saran actually made maintenance payments for Jessica between November of 1993 and June of 1994, that is, after he had the D.N.A. test results.

(8) Mr. Saran took no legal steps to raise the issue that he is not the child's father until a notice of motion was filed on his behalf on December 10th, 1993 seeking to amend the pleadings in this action to deny paternity of Jessica, and to claim that therefore he is not obligated to provide child support for her.

(9) On June 10th, 1994, Mr. Saran filed a notice of motion seeking an order varying the amount of interim maintenance pronounced by Master Brandreth-Gibbs on April 2nd and varied by Hall J. on November 26th, 1993 on appeal from the order of Master Donaldson pronounced November 15th, 1993. It is in the affidavit filed by Mr. Saran on June 10, 1994 that he first raises the paternity issue in the context of his obligation to pay maintenance for Jessica. This application was made by Mr. Saran pursuant to s.61.1 and s. 62 of the ***Family Relations Act***, and s.17 of the ***Divorce Act***. **(CHECK S.17 OF DIVORCE ACT).**

(10) Mr. Potts submits that it is surprising that there is no mention in Mr. Saran's affidavit of June 10th, 1994, nor in his later affidavit sworn October 17th, 1994, that had he (Mr. Saran) known in March and April 1993 that he was not the child's father, he would not have paid maintenance for her. Nor, says Mr. Potts, is there an allegation before this court that Mrs. Saran misled him nor is there an explanation as to why Mr. Saran continued maintenance payments after the D.N.A. test results were made known to him. Mr. Potts submits that Mr. Saran, after learning of the results of the D.N.A. testing, did not move in a timely way to seek a declaration that he was not the father. I say this, recognizing that even if I am wrong in deciding that Mr. Saran fails on the issue estoppel argument, that Mr. Saran will fail in any event if he meets the definition of "parent" in the ***Family Relations Act***, which is Mrs. Saran's alternate ground.

(11) There is no evidence nor allegation in the pleadings that, had Mr. Saran known the true circumstances, he would not have made these maintenance payments for the child.

MRS. SARAN'S CROSS-APPEAL — WHETHER "PATERNITY" IS A THRESHOLD

ISSUE TO AN INTERIM CHILD MAINTENANCE ORDER

14 Mrs. Saran's cross-appeal from Master Horn is essentially that the determination that the child is a "child of the marriage," and that Mr. Saran is a "parent" of this child has already been made in the earlier proceedings before the Master. Accordingly, Mrs. Saran submits that Master Horn erred when he stated, in dismissing Mr. Saran's variation application, that this dismissal was without prejudice to a later trial on the issue of paternity. Mr. Potts submits that the issue of "paternity" is a threshold issue which must be resolved before an interim maintenance order is made, that Mr. Saran had the opportunity to raise that issue before the Master and, for whatever reason, chose not to. Mr. Potts says, therefore, that the threshold issue of paternity is resolved at the time of making the interim maintenance order and does not, therefore, remain an issue to be canvassed at trial.

15 It seems to me that there could well be circumstances on an interim maintenance application for child maintenance on which the court would apply a lesser test to the issue of paternity, for example, where the husband raised the issue but the evidence was not convincing and the Master did not wish to postpone the wife's entitlement to interim maintenance pending a full hearing on the paternity issue.

16 Because of the conclusions which I have reached on the other issues, I have decided that it is unnecessary for me to deal with the issue raised on the cross-appeal.

ISSUE ESTOPPEL

17 I have already recited the circumstances which give rise to the issue estoppel argument. The general principle is set forth in ***Saskatoon Credit Union Ltd.*** v. ***Central Park Enterprises Ltd.****(1988) 22 B.C.L.R. (2d) 89 (B.C.S.C.). I refer to a quote by McEachern C.J.S.C. (now C.J.B.C.) at p.94 from* ***Angle*** v. ***M.N.R.*** [1975] 2 S.C.R. 248, as follows:

" Lord Guest in ***Carl Zeiss Stiftung*** v. ***Rayner & Keeler Ltd. (No.2)***, [1967] 1 A.C. 853 at p.935, defined the requirements of issue estoppel as:

' . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. "

And at p.97:

" Without deciding anything about the question of mutuality, it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing. "

18 In ***Bank of British Columbia*** v. ***Singh*** (1987), 17 B.C.L.R. (2d) 256 (B.C.S.C.) the court, at p.260 referred to a quote from ***Henderson*** v. ***Henderson*** (1843), 3 Hare 100, 67 E.R. 313, in which Wigram V.-C. stated at pp.114-15:

" In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case . . . . "

19 I refer also to ***Bennett*** v. ***British Columbia*** (1992), 69 B.C.L.R. (2d) 171, and to a comment by our Court of Appeal per curiam, at p.184:

" We are of the view that issue estoppel only applies as between parties and that it is an exclusionary rule of evidence which binds a party by way of preventing reliance upon or denying the existing of certain facts . . . . "

20 There is also authority for the proposition that Mr. Saran, having had an opportunity of proving he was not the father, but not doing so, is prevented from raising it later. I refer to the maxim ***"nemo debet bis vexari." In Canadian Imperial Bank of Commerce*** v. ***Holowaty, Dunn***, 16 B.C.L.R. 231, MacDonald J. referred to that maxim on p.235:

" The maxim***nemo debet bis vexari*** was also discussed by Lush J., in ***Ord*** v. ***Ord***, [1923] 2 K.B. 432 (P.C.), where he said at p.443:

' The maxim "***nemo debet bis vexari***" prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to reply on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deals with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been. ' "

21 I am satisfied that Mr. Saran has missed his opportunity to raise the issue of paternity. It may be that this issue should have been raised by him before Master Brandreth-Gibbs in April of 1993. Certainly it could have been raised before Master Donaldson on September 15, 1993, if only to seek an adjournment to await the results of the D.N.A. testing conducted in Seattle (which were available in October of 1993). Rather, he chose to defend against his wife's application for an increase in child maintenance on the basis of his income capacity and her need, with no mention of the paternity issue. Again, on the appeal before Hall J. on November 26th, 1993, there is no mention by Mr. Saran of the paternity issue and, perhaps more significantly, there is his subsequent conduct in continuing to make monthly maintenance payments for this child from November 1993 until June 1994.

22 Accordingly, I have concluded that Mr. Saran is estopped from raising the issue of paternity in these proceedings.

WHETHER MR. SARAN IS A "PARENT" UNDER THE FAMILY RELATIONS ACT

23 In the event that I am wrong on the issue estoppel argument I will address the alternate argument raised by Mrs. Saran that Mr. Saran, even though he is not the biological father, is obliged to pay maintenance for the child because he fits within the definition of "parent" in the ***Family Relations Act***.

24 Section 1 of that Act defines "parent" as follows:

" In this Act . . .

'parent' includes

(b) where this person contributes to the support and maintenance of a child for not less than one year,

(i) the stepmother or stepfather of the child, where a stepparent relationship is established

(A) by marriage between the stepparent and the mother or father of the child; or

(B) by the stepparent and the mother or father of the child living together as man and wife for not less than 2 years although not married to each other

and the proceeding by or against the stepparent is commenced

within one year after the date the stepparent last contributed to the maintenance and support of the child; "

25 In ***Leveque*** v. ***Leveque***, 25 R.F.L. (3d) 1 (B.C.C.A.), the Court of Appeal held that under the ***Family Relations Act*** no difference is to be drawn, regarding the parental obligation to support children, between a natural parent and a step-parent. The court considered the definition of "parent" under the ***Family Relations Act***, and considered ss.56 and 61(2) of the Act in assessing the maintenance obligations of a parent.

26 Finally I turn to the decision of Master Horn in these proceedings, particularly at p.7:

" If I turn to the ***Family Relations Act***, the Act provides that Jessica is entitled to support from her parents and "parent" is defined in Part 1 to include a stepfather. The relationship of stepfather is established by one of two means. The first means is by marriage between the stepparent and the mother of the child. In this case the husband did marry the mother of the child. The fact that he married the mother before the child was born does not seem to me to be material. The definition of "parent" in s.1 of the Act under s-s (b)(i)((A) does not indicate that the marriage must have taken place before the child is born. In my view the husband falls under the definition of "parent" in the ***Family Relations Act*** as well as under the ***Divorce Act.*** "

27 I am satisfied that Master Horn reached the correct conclusion, that is, that Mr. Saran fits within the definition of "parent" and is thus obliged to provide maintenance for the child, Jessica.

28 Mrs. Saran shall have her costs on Scale 3 on the appeal and on the cross-appeal.

"R.B. Hunter"

HUNTER J.

Kamloops, B.C.

April 3, 1995