

Spousal Support

Dickson v. Dickson, [2011] MBCA 26

Facts:

Judith and Gerald Dickson separated on April 6, 2005. Judith filed her application under *The Family Maintenance Act* on June 30, 2005. The trial judge ordered Gerald to pay child support and spousal support from the date of separation. The husband did not object to paying retroactive child support given the SCC's decision in D.B.S. v. S.R.G. At the appeal hearing the husband argued that DBS should not be extended to retroactive spousal support applications. In *Kerr v. Baranow*, 2011 SCC 10, released after the hearing of the appeal, the Supreme Court upheld an order of spousal support under the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128, that was retroactive to the date of filing of the application. In that case, the Supreme Court of Canada concluded that DBS should apply when the court is considering an application for retroactive spousal support, notwithstanding the different legal foundation between child support and spousal support.

The Issue:

Did the trial judge have the jurisdiction to order the husband to pay spousal support retroactive to the date of separation rather than the date the wife filed her application?

The Decision:

The court decided that two questions must be answered to decide whether the trial judge had the jurisdiction to order retroactive spousal support to the date of separation:

- Was there an existing obligation to pay spousal support at the time of separation?
- Does *The Family Maintenance Act* restrict the court as to the date from which the support order takes effect?

The court decided that the husband had an obligation to pay spousal support at the time of separation and that the FMA did not restrict the date from which retroactive spousal support may take effect.

The husband's obligation to provide reasonable support existed at the time of separation. The wife's application under s. 9 of the FMA simply triggered the court's jurisdiction to enforce this obligation by making an order under s. 10(1). In the DBS case, Justice Bastarache stated: "while an application is a necessary trigger to the court's jurisdiction, the court may still retain the power to make a retroactive order once it is properly seized of a matter."

Discussion Questions:

1) What do you think about the level of analysis of case law and statutes the court had to use in order to make its decision?

2) Do you agree with the court's decision and how they came to their decision?

Relevant Law:

Family Maintenance Act

Sections 4(1), 5, 6, 7(1), 9(1), 10(1), 40.1, 46(2), 46(3)

Divorce Act

Sections 15.1(1), 15.2(1), 17(1)

Resources:

You can read the entire case at:
<http://canlii.ca/t/fkkjc>

You can find the *Divorce Act* at:

<http://laws-lois.justice.gc.ca/eng/acts/d-3.4/>

You can find *The Family Maintenance Act* at:

Web2.gov.mb.ca/laws/statutes/ccsm/f020e.php

The court felt that there was no express provision in *The Family Maintenance Act* that prohibits a retroactive spousal support order. In DBS, Justice Bastarache dealt with the same situation in the context of s. 15.1(1) of the Divorce Act, which allows a court to make an order requiring a parent to pay child support. Justice Bastarache interpreted this to mean that there is therefore no restriction as to the date from which the court may order that the child support take effect. Similarly, s. 15.2(1) of the *Divorce Act* provides that a court may make an order of spousal support on application by a spouse.

These references to make an order in the *Divorce Act* are similar to s. 10(1) of the FMA which also provides that a court may make an order of spousal support. Therefore, just as Justice Bastarache decided that there is no restriction in s. 15.1(1) of the *Divorce Act*, the court in the Dickson case decided that there is no restriction in s. 10(1) of *The Family Maintenance Act* about the date from which the court may order that the spousal support take effect.

The Law:

The court relied on two Supreme Court of Canada decisions. In the first case, D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, the Supreme Court of Canada decided that the court could make a retroactive child support order. In the second case, Kerr v. Baranow, the Supreme Court of Canada decided that the court could make a retroactive spousal support order.

Relevant Law:

The Family Maintenance Act

Mutual support obligation

4(1) Spouses and common-law partners have the mutual obligation to contribute reasonably to each other's support and maintenance.

Personal expenses

5 The right of a spouse or common-law partner to support and maintenance within the meaning of section 4 includes the right, while living with the other spouse or common-law partner, to periodic reasonable amounts for clothing and other personal expenses and the right to sole discretion free of all interference from the other spouse or common-law partner in the use of those amounts.

Onus of self-support after separation

6 Notwithstanding section 4, a spouse or common-law partner has the obligation after separation to take all reasonable steps to become financially independent of the other spouse or common-law partner.

Factors affecting order

7(1) In determining whether to make an order under this Part or section 46, what provisions the order should contain, and, in particular, what is

reasonable under sections 4, 5 and 6 for the purposes of the order, a court shall consider all the circumstances of the spouses or common-law partners, including the following:

- (a) the financial needs of each;
- (b) the financial means, earnings and earning capacity of each;
- (c) the standard of living of the spouses or common-law partners;
- (d) any obligation of either of them for the support and maintenance of a child or a person other than the other spouse or common-law partner;
- (e) any contribution of a spouse or common-law partner within the meaning of subsection (2);
- (f) the amount of any property settlement made between them;
- (g) where one of them is financially dependent upon the other, the measures available for the dependent person to become financially independent of the other, and the length of time and cost involved in taking those measures;
- (h) any impairment of the income-earning capacity and financial status of either resulting from the marriage or common-law relationship;
- (i) where one of them is financially dependent upon the other, whether and to what extent the dependent spouse or common-law partner is complying with the requirements of section 6;
- (j) the duration of the marriage or common-law relationship.

Application for order

9(1) A spouse or common-law partner, or any person on his or her behalf, may apply to a court for an order of support and maintenance where

- (a) the other spouse or common-law partner is in breach of an obligation under this Part; or
- (b) an order is desired to fix the amount of support and maintenance payable to the other spouse or common-law partner.

Order

10(1) Upon an application under this Part, a court may make an order ...:

- (a) That one spouse or common-law partner pay to the other spouse or common-law partner, or to a third person on his or her behalf, such lump sum or periodic sums or both for support and maintenance or for clothing and other personal expenses as the court may determine.

Application of Division 1

40.1 This Division applies to an order or an application for an order under

this Act.

Application to vary or discharge order

46(1) This section applies to an application to the court to vary or discharge

(a) an order made under

(i) this Act, other than a child support order governed by section 37.2, or

(ii) *The Wives' and Children's Maintenance Act* (now repealed); or

(b) an order made under *The Child Welfare Act* (now repealed) granting custody of, access to or maintenance for a child.

Order to vary or discharge

46(2) The court that made an order referred to in subsection (1) may, on application, vary or discharge that order if the court thinks it is fit and just to do so, having regard to any material change in circumstances that has occurred since the order was made or last varied.

Effective date of order

46(3) An order made under subsection (2) is not effective before the filing date of the application to the court to vary or discharge the order.

Divorce Act

Child support order

15.1 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Order for variation, rescission or suspension

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application ...;