1994 CarswellAlta 371, 2 R.F.L. (4th) 157, 149 A.R. 210, 63 W.A.C. 210, 113 D.L.R. (4th) 57

Theriault v. Theriault

JOSEPH GILLES GASTON THERIAULT v. MARIE ROSE RACHEL THERIAULT

Alberta Court of Appeal

Fraser C.J.A., Kerans and McFadyen JJ.A.

Judgment: March 3, 1994
Docket: Doc. Calgary Appeal 14099

Counsel: *Lesley Cooney-Burk,* for appellant.

Diann P. ***Castle***, for respondent.

Subject: Family

Family Law --- Support — Child support — Duty to contribute.

Family Law --- Support — Child support — Practice and procedure — Jurisdiction of court.

Family Law --- Relationship of parent and child — In loco parentis.

Children — Maintenance — Children born outside marriage — In loco parentis — Husband ordered to pay interim support for mother's two sons — Husband appealing — Husband unconditionally assuming role of step-parent — Person voluntarily assuming role of parent not entitled to abandon child — Obligation of parents being joint and several — Appeal dismissed — Divorce Act, 1985, S.C. 1986, c. 4.

Children — Maintenance — Interim maintenance — Full inquiry of support issues not being necessary on interim hearing — Applicant having onus of proving prima facie case for entitlement — Divorce Act, 1985, S.C. 1986, c. 4.

After the parties married the husband gave advice to and supervised the mother's two sons. When the marriage ended he did not try to extricate himself from the relationship that he had formed with the children; in fact, he continued to see them. In proceedings under the *Divorce Act, 1985*, the mother applied for interim child support. At the hearing the husband claimed that he had not stood in loco parentis to her sons and that, as a result, he should not have to support them financially. In the alternative, he alleged that even if he had stood in loco parentis, he no longer held that position, and has not since the hearing, by his own unilateral act. The chambers judge granted the mother's request.

The husband appealed.

Held:

The appeal was dismissed.

An appellate court may review an interim support order if the chambers judge erred in law. A full inquiry into the issue of support is not necessary or possible when interim relief is sought. An applicant must, however, establish a prima facie case for entitlement. In the case at bar, evidence indicated that the husband had voluntarily and unconditionally assumed the role of a step-parent. Once a person has made a permanent or indefinite unconditional commitment to stand in the place of a parent, the court may order him or her to pay support under the *Divorce Act, 1985*. Its jurisdiction to do so is not lost by that step-parent's subsequent disavowal of the child.

The obligations of parents are joint and several. If one parent is ordered to pay support, he or she may seek to have the other parent or parents contribute. A biological parent's obligation will not automatically be greater than that of a step-parent. The apportionment of the shared duty would be best decided in a contribution proceeding. Child support from one parent should not be denied because the custodial parent has not pursued another. Accordingly, the chambers judge did not err in ordering interim support and the appeal should be dismissed.

Annotation

In *Theriault v. Theriault* the Alberta Court of Appeal tackles the issue of whether a person who has assumed the role of a psychological parent may unilaterally withdraw from that position. Historically, those who have been found by a court to stand in loco parentis have not been permitted to renounce that status: see *McCarthy v. McCarthy* (1984), 44 R.F.L. (2d) 92, 49 O.R. (2d) 37 (U.F.C.). At best, such a person persuaded the court that the emotional bond between the child and himself or herself no longer existed and, as a result, it was not fit and just to impose a long-term support obligation on him or her. In *Carignan v. Carignan* (1989), 22 R.F.L. (3d) 376, [1990] 1 W.W.R. 641, 61 Man. R. (2d) 66, 64 D.L.R. (4th) 119, however, the Manitoba Court of Appeal reviewed the history of the in loco parentis doctrine and held that a person who had assumed a parental role could unilaterally withdraw from it. Although the case created a stir in the legal community, it has not been uniformly accepted. Since then, the rules governing child support cases have not been easy to state.

The Alberta Court of Appeal in *Theriault* sets out a reasonable compromise between the historic position, which is discrepant with the temporary nature of many families today, and the position adopted in *Carignan*, which left the child's right to support subject to the unilateral discretion of an adult. Kerans J.A. clearly states that the court would not accept *Carignan v. Carignan* as an accurate statement of the law. It did not, however, propagate the historic rules. Instead, the Court of Appeal ties the support obligation to the nature of the relationship between the adult and the child. If the relationship established was unconditional — not dependent on the relationship with the biological parent — the adult may not unilaterally abandon his or her parental responsibility. The court distinguishes between cases in which the adult was kind to the child because of his or her marriage to the child's parent, and those in which a loving relationship was formed. If the parental relationship transcended the spousal relationship, unilateral withdrawal would not be permissible.

No rules that could be applied to cases in which a conditional commitment was made are set out. It can be inferred, however, that if the relationship is contingent on the spousal relationship, the child support responsibility should also be conditional. In these cases the court could hold that a conditional commitment did not create a

parental status (see *Hines v. Davy* (1985), 45 R.F.L. (2d) 132 (Ont. Dist. Ct.)) or that the status was created but the adult could unilaterally withdraw from it.

The effect on parental status of a consensual termination of the adult-child relationship is not explored by the court. If all concerned are content that the bond end, will the parental status also end, or will the adult remain a parent but the court find that it would not be fit and just to order support? If pressed, the courts will likely accept the latter view. If an adult unconditionally assumes responsibility for a stepchild, then he or she becomes a parent in every sense of the word. He or she is in the same position, from the child's perspective, as a biological parent. But a biological parent's lack of involvement in his or her child's life does not mean that he or she is not a parent; it means that the court may decide that it would not be fit and just to maintain an economic relationship where no social or emotional relationship exists. In any event, the courts in those cases would probably order support if the child would suffer without assistance, unless the child were old enough to appreciate and accept the consequences of a decision to have nothing to do with the adult.

The courts in past cases seemed to operate on the basis that if parental status were assumed, it could not be discarded. Therefore, the cases involving conditional assumption were dealt with as if the role had not been undertaken. Now that the courts have acknowledged that it is possible to break the emotional bond between a stepparent and child, they will likely recognize that the role can be assumed conditionally and then abandoned. Ultimately, interaction and sharing in second families will be encouraged without adults having to worry about long-term obligations being forced on them. Given the confusion surrounding second family obligations, and, in particular, when a parental role is assumed and whether it can be abandoned, it will be interesting to see how other courts respond to *Theriault*.

James G. McLeod

Cases considered:

Andrews v. Andrews, 38 R.F.L. (3d) 200, [1992] 3 W.W.R. 1, 88 D.L.R. (4th) 426, 97 Sask. R. 213, 12 W.A.C. 213 (C.A.) — *referred to*

Blackmore v. Blackmore (1978), 7 R.F.L. (2d) 263, 21 O.R. (2d) 599 (Master) — *applied*

Carignan v. Carignan (1989), 22 R.F.L. (3d) 376, [1990] 1 W.W.R. 641, 61 Man. R. (2d) 66, 64 D.L.R. (4th) 119 (C.A.) — *not followed*

Desjardines v. Desjardines (1991), 31 R.F.L. (3d) 449, 113 A.R. 168 (Q.B.) — *not followed*

Ex parte Pye; Ex parte Dubost (1811), 34 E.R. 271, [1803-13] All E.R. Rep. 96 — *referred to*

H. (W.J.) v. H. (D.T.) (1993), 47 R.F.L. (3d) 111, 140 A.R. 268, 144 A.R. 156 (Q.B.) — *applied*

Johnson v. Johnson, 23 R.F.L. 293, [1975] W.W.D. 167 (Alta. T.D.) — *applied*

Lewis v. Lewis (1987), 11 R.F.L. (3d) 402 (Alta. Q.B.) — *not followed*

McGill v. McGill (December 1, 1988), Doc. Vancouver A870741, Boyd L.J.S.C. (B.C. S.C.), [1989] B.C.W.L.D. 204 — *applied*

Shtitz v. Canadian National Railway (1926), [1927] 1 W.W.R. 193, 21 Sask. L.R. 345, [1927] 1 D.L.R. 951

(C.A.) — *referred to*

Slama v. Slama (1991), 38 R.F.L. (3d) 187, 126 A.R. 210 (Q.B.) — *not followed*

Williamson v. Williamson (1991), 31 R.F.L. (3d) 378, 112 N.B.R. (2d) 368, 281 A.P.R. 368 (Q.B.) — *not followed*

Statutes considered:

Divorce Act, 1985, S.C. 1986, c. 4 [R.S.C. 1985, c. 3 (2nd Supp.)] —

s. 2(2)

Words and phrases considered:

in loco parentis — "A definition of the legal status known as in loco parentis is a necessary preliminary to the question whether the facts support a finding of parenthood. ... A person becomes a parent when he or she puts himself or herself in the situation of a lawful parent with reference to the office and duty of making provision for the child."

Appeal by husband from decision of McBain J. ordering him to pay interim support for mother's children pursuant to the *Divorce Act, 1985*.

The judgment of the court was delivered by *Kerans J.A.*:

1 This is an appeal from an interim maintenance award made to the mother and primary care-giver of two children, and made against her husband in a pending divorce suit. The children are not the issue of the husband.

2 The appellant husband raises three grounds of appeal. He says first that because he is not the natural parent he has no responsibility for the children unless he came to be in the place of a parent toward them. He says this never happened in fact. He alternatively says that, if that status was created, it ceased at or before the hearing by his own unilateral act. He says lastly that the natural father has the greater obligation and no award should be made against the stepfather if one might be made against the natural father.

3 Even though the appeal is from an interim award, each ground raises a reviewable point of law. A full inquiry into the issue of support is neither necessary nor possible when interim relief is sought: *Blackmore v. Blackmore* (1978), 7 R.F.L. (2d) 263 (Ont. Master). Nevertheless, the judge hearing the application for interim relief must decide at least whether there is a prima facie case for entitlement: *McGill v. McGill*, [1988] B.C.J. 2375 (B.C. S.C.), and the cases there cited. The second and third arguments of the appellant, if correct, would lead to the conclusion that there is here no entitlement at all. I therefore must deal with them. And my answer to the second ground requires some comment about the first.

4 I would dismiss the appeal. In sum, I offer these responses to his three complaints: as to the first, there was ample evidence to support the finding made; as to the second, a person who voluntarily assumes the status of step-parent cannot later abandon the child; as to the third, the obligation of parents is joint and several.

5 I will now explain these conclusions.

I

6 A definition of the legal status known as in loco parentis is a necessary preliminary to the question whether the facts support a finding of parenthood. I accept a definition of that status first stated by Lord Eldon in 1811 and adopted in Canada at least since 1927. See *Shtitz v. Canadian National Railway* (1926), [1927] 1 D.L.R. 951 (Sask. C.A.), at p. 959, and *Ex parte Pye; Ex parte Dubost* (1811), 34 E.R. 271. A person becomes a parent when he or she puts himself or herself in the situation of a lawful parent with reference to the office and duty of making provision for the child.

7 The *Divorce Act, 1985*, S.C. 1986, c. 4, merely codifies this old law when it provides, in s. 2(2), that a child of a marriage includes

(*a*) any child for whom they [the spouses] both stand in the place of parents; and

(*b*) any child of whom one is the parent and for whom the other stands in the place of a parent.

8 The application of the traditional in loco parentis concept to situations governed by the Act requires, however, consideration of one special factor. I refer to the distinction between a limited and an unlimited commitment to the place of a parent. One can take on that role in a way severely limited by place and time. Babysitters and schoolteachers, for example, are for some purposes in loco parentis. But the commitment in those examples, while it creates legal obligations and rights, has definite limits in terms of time and place. Sometimes, indeed, a lengthy commitment might be made but nevertheless may be conditional. For example, there are yet cases where, on account of illness or other family crisis, members of the extended family take on the care of a child for a lengthy period. But that commitment may be conditional on the continuation of the crisis.

9 For this case, I need deal only with commitments that might fairly be described as creating step-parenthood. Those, in my view, are unconditional commitments either to permanent care or to care for an indefinite term. I need not, as a result, deal with the question whether the power in the Act to order those in loco parentis to support a child extends beyond those who offer permanent or indefinite commitments. They might or might not, but that issue remains for another day when the facts raise a real issue.

10 I emphasize that one voluntarily assumes the status of step-parent. Often, there will not be evidence of a formal declaration of assumption (or refusal) of the office. The judge usually must infer intent from action. Sometimes that is easy because there is, in fact, unequivocal performance of all aspects of parenthood. Sometimes, however, the case is closer because the person in question holds back in one way or another. There are, of course, many aspects to the office of parent, only one of which is financial support. I need not say for the purposes of this case what is the minimal requirement, and would prefer to leave that until a set of facts requires it.

11 There was evidence before the learned chambers judge that the husband gave advice and supervision to the two boys for 14 years, indeed from infancy. A telling fact about intent was the evidence that the family left Quebec at his suggestion in order to minimize the in volvement of the natural father. Moreover, he never attempted to terminate that relationship even after he separated from his wife. His first formal disavowal was through his lawyer at the hearing for interim support. To be sure, some of this evidence was challenged. It was said for the appellant before us that his commitment arose from the fact of marriage and was conditional upon the continuation of that bond. That is a question of fact, not of law. Nevertheless, it was not unreasonable of the chambers judge to infer that, for the purposes of interim maintenance, a prima facie case had been made out that the appellant had made an indefinite and unconditional commitment to the care of the children. I would not interfere

with that finding.

II

12 It is said for the husband that, even if he had assumed a parental role, he had terminated it and had a right to do so. When pressed to say precisely when the stepfather had terminated this status, counsel said that this occurred on the occasion of the separation from the wife, despite the fact that the man thereafter continued, and to this day continues, to visit from time to time with the boys. Counsel was driven to say that the role was terminable at any time at the sole option of the parent.

13 I do not accept this as a satisfactory rule of law. Our society values parenthood as a vital adjunct to the upbringing of children. Adequate performance of that office is a duty imposed by law whenever our society judges that it is fair to impose it. In the case of the natural parent, the biological contribution towards the new life warrants the imposition of the duty. In the case of a step-parent, it is the voluntary assumption of that role. It is not in the best interests of children that step-parents or natural parents be permitted to abandon their children, and it is their best interests that should govern. Financial responsibility is simply one of the many aspects of the office of parent. A parent, or step-parent, who refuses or avoids this obligation neglects or abandons the child. This abandonment or neglect is as real as would be a refusal of medical care, or affection, or comfort, or any other need of a child.

14 This said, I accept that we do not need for this case to establish any rule other than a rule about financial support by step-parents. The rule I would affirm is this: once a person has made at least a permanent or indefinite unconditional commitment to stand in the place of a parent, the power granted to the courts by the *Divorce Act, 1985* to order support is triggered, and that jurisdiction is not necessarily lost by a subsequent disavowal of the child by the step-parent.

15 The husband relies upon the decision of the Manitoba Court of Appeal in *Carignan v. Carignan* (1989), 22 R.F.L. (3d) 376. I do not agree with that decision. I agree that any parent might, as a matter of fact, end a parental relationship. The question is, rather, whether the law should impose consequences for the creation of the relationship that would survive an attempt at termination. Huband J.A., in *Carignan*, could find "no hint in the cases in Chancery Court that, once having formed the relationship, the substitute parent is under any legal obligation to continue it" [at p. 380]. I am not at all sure that the court in *Carignan* was correct in its historical review. See Alison Diduck, "Carignan v. Carignan: When is the Father not a Father?" (1990) Man. L.J. 580. In any event, and for the reasons I have mentioned, I consider any rule permitting the abandonment of children to be, at the very least, inappropriate for this age. The view taken in *Carignan* seems to me virtually to repeal s. 2(2) of the *Divorce Act, 1985*.

16 Huband J.A. also expressed concern about a "double portion," the possibility that a child might collect double support. Elimination of an obligation is only one way to limit that possibility. Another method, one, in my view, more consistent with the purpose of the *Divorce Act, 1985*, is to offer the right of contribution I discuss below. No other Canadian appellate court has adopted the approach in *Carignan*, and the Saskatchewan court has explicitly rejected it. See *Andrews v. Andrews* (1992), 38 R.F.L. (3d) 200 (Sask. C.A.). I also reject it.

17 I would accordingly overrule the decisions in Queen's Bench in *Slama v. Slama* (1991), 126 A.R. 210, and *Desjardines v. Desjardines* (1991), 31 R.F.L. (3d) 449, which both adopted the position taken in *Carignan*. I would affirm the view recently taken by another Queen's Bench judge. See *H. (W.J.) v. H. (D.T.)* (14 May 1993), Peace River Doc. 4809 1974 [reported at 47 R.F.L. (3d) 111].

18 It is not necessary, for the purposes of this case, to offer analysis when a court might refrain from the exercise of the power to order support against a step-parent. I make no comment on issues of that sort at this time. It suffices for this case simply to say that a step-parent's attempt to terminate the relationship at hearing for no purpose other than to avoid a financial obligation should not stay the hand of the court.

19 I appreciate that it might be said that one consequence of the rule I propose is that both women and children will suffer. This argument turns on the prospects of a man who considers whether to perform the parental office. If he does so, he might become responsible in a financial way. As a result, he might, in order to avoid any risk of this obligation, refuse to have anything to do with the children in a new relationship. Indeed, a man might refuse to take on the role of husband for fear that the one commitment might lead to the other. My first response to this concern is that I must give paramount consideration to the best interests of children, not spouses. My second response is that we should not countenance some child neglect in response to a threat of more child neglect.

III

20 The last ground is that the suit is premature because the mother has not exhausted remedies against the natural father.

21 In my view, the obligations of parents, whether they be two or twenty, towards a child are all joint and several. As Professor McLeod observed, the law of contribution governs the apportionment of joint obligation. See case comment at J.G. McLeod, "Annotation on *Primeau v. Primeau*" (1986) 2 R.F.L. (3d) 114. That is an issue among the parents, not among the parents and the child. The child should not starve, nor should the primary care-giver be obliged exclusively to support the child, while the other obliged persons sort out who pays what. If the parent before us seeks contribution, he should sue for it. Meanwhile, he must support the child. I would reject this ground of appeal.

22 I do not agree with the somewhat contrary reasoning in *Lewis v. Lewis* (1987), 11 R.F.L. (3d) 402 (Alta. Q.B.), and *Williamson v. Williamson* (1991), 31 R.F.L. (3d) 378 (N.B. Q.B.). In these cases, the judges stated that the primary obligation for support of a child rests with the natural father. In both cases, the judge made support against the step-parent conditional on pursuit of the natural parent. The judge in *Lewis* offered no support for his statement, and the judge in *Williamson* cited *Lewis*.

23 It may well be that the obligation of the natural father has primacy, but that is not a universal proposition. It would very much depend on the circumstances of the case, including the actual roles performed by the two fathers in the course of the upbringing of the child. In any event, that is best decided in a proceeding for contribution among the parents, not a proceeding for support by or for the child.

24 It is not in the best interests of the child for a judge to deny support from one parent for lack of pursuit of another. I agree with the approach taken by Miller A.C.J.Q.B., as he then was, in *Johnson v. Johnson*, 23 R.F.L. 293, [1975] W.W.D. 167 (Alta. T.D.). He made an order for support against a step-parent despite the existence of an order against the natural parent. On the other hand, I have no quarrel with an admonition, almost always in the best interests of the child, that a further source of support be pursued on behalf of the child.

25 In this case, the wife has begun a suit for support against the natural father. Even if she had not, that inaction would not, in the ordinary course, be a reason to deny interim support against a person who is obliged. The learned chambers judge was right to assert the power to make the award. All issues about contribution must

await another day.

26 I would dismiss the appeal with costs. The monies paid into court pursuant to the stay should be released to the Director of Maintenance Enforcement for distribution to the respondent wife.

Appeal dismissed.

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