
JUDITH BAILEY (*Complainant*) APPELLANT;

AND

KENNETH REX BAILEY (*Defendant*) . . RESPONDENT.

1968
}
*Feb. 22
May 13
—

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Husband and wife—Wife leaving matrimonial home in Winnipeg and taking up residence in Ontario—Husband continuing to reside in Manitoba—Provisional maintenance order made by Family Court in Toronto—Application to Winnipeg Family Court to confirm order—Jurisdiction of Ontario Court to make provisional order—The Deserted Wives' and Children's Maintenance Act, R.S.O. 1960, c. 105—The Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1960, c. 346—The Reciprocal Enforcement of Maintenance Orders Act, 1961 (Man.), c. 36.

The appellant wife and the respondent husband had their matrimonial home in Winnipeg. The appellant, taking the two infant children of

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Hall JJ.
90291—8

1968
BAILEY
v.
BAILEY
—

the marriage with her, left the said matrimonial home, without the knowledge or consent of the respondent, and moved to Ontario. Upon the complaint of the appellant, a provisional maintenance order was made against the respondent, under the provisions of *The Deserted Wives' and Children's Maintenance Act*, R.S.O. 1960, c. 105, and *The Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1960, c. 346, by a judge of the Juvenile and Family Court of the Municipality of Metropolitan Toronto. On an application to the Winnipeg Juvenile and Family Court for confirmation, under *The Reciprocal Enforcement of Maintenance Orders Act*, 1961 (Man.), c. 36, of the aforementioned order, it was held that the Court in Metropolitan Toronto was without jurisdiction to make the said order, on the ground that the matrimonial disputes alleged by the appellant took place outside Ontario. An appeal by way of stated case from the decision of the judge of the Winnipeg Juvenile and Family Court was dismissed by the Court of Appeal. With leave, an appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be allowed and the matter remitted to the judge of the Winnipeg Juvenile and Family Court to be dealt with on the merits.

The object of the reciprocal enforcement of maintenance orders legislation was to enable a deserted wife, resident in a state or province the courts of which do not have jurisdiction over the husband who, allegedly, has deserted her and who is residing in a reciprocating state, to initiate proceedings in the province where she is and so to avoid the necessity of travelling to the province in which the husband is, a course which would often be a practical impossibility. To hold that a provisional order can be made only by a court which has jurisdiction to make a final and binding order of maintenance against the husband would be to defeat the whole purpose of this part of the legislative scheme. *Andrie v. Andrie* (1967), 60 W.W.R. 53, applied; *Smith v. Smith* (1953), 9 W.W.R. (N.S.) 144, distinguished.

APPEAL from a judgment of the Court of Appeal for Manitoba¹, dismissing an appeal by way of stated case from a decision of N. M. Sanders, Judge of the Winnipeg Juvenile and Family Court, refusing to confirm a provisional maintenance order of the Juvenile and Family Court of the Municipality of Metropolitan Toronto. Appeal allowed.

L. R. Mitchell and *J. D. Raichura*, for the appellant.

Murray D. Zaslov, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Manitoba¹ pronounced on June 14,

¹ (1967), 60 W.W.R. 625, 63 D.L.R. (2d) 71.

1967, dismissing an appeal by way of stated case from a decision of Her Honour N. M. Sanders, Judge of the Winnipeg Juvenile and Family Court, given on February 1, 1967, refusing to confirm a provisional order of the Juvenile and Family Court of the Municipality of Metropolitan Toronto dated July 19, 1966.

1968
 BAILEY
 v.
 BAILEY
 Cartwright
 C.J.

The provisional order of July 19, 1966, recites that it was made under the provisions of *The Deserted Wives' and Children's Maintenance Act*, R.S.O. 1960, c. 105, and *The Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1960, c. 346, and that it appears "that the said Judith Bailey is entitled to the benefit of the said Act". It is signed by N. K. Bennett, Judge of the Juvenile and Family Court of the Municipality of Metropolitan Toronto. The operative portion of the order reads as follows:

I, the undersigned, do hereby Order that the said Kenneth Rex Bailey do pay hereafter to his said wife at The Juvenile and Family Court, 311 Jarvis Street in the City of Toronto, the sum of \$40.00 a week for the support of wife and two children of the said Kenneth Rex Bailey.

The first payment to be made on the day set by the Judge or Magistrate confirming this Provisional Order.

THIS ORDER is provisional only and shall have no force and effect until confirmed by a Court of Competent Jurisdiction where the Defendant is residing.

Given under my hand this 19th day of July, 1966.

The course followed in the Winnipeg Family Court is set out in the stated case submitted to the Court of Appeal for Manitoba by Her Honour Judge Sanders. The Court of Appeal, in dealing with the matter, confined itself to the facts as set out in the stated case and it will be convenient to set out the stated case in full. It is headed:

IN THE MATTER OF AN APPEAL TO THE
 COURT OF APPEAL BY WAY OF STATED
 CASE FROM AN ORDER MADE UNDER SEC-
 TION 6 OF THE RECIPROCAL ENFORCEMENT
 OF MAINTENANCE ORDERS ACT, CHAPTER
 36, STATUTES OF MANITOBA, 1961.

BETWEEN:

JUDITH BAILEY,

(Complainant) Appellant

—AND—

KENNETH REX BAILEY,

(Defendant) Respondent

1968

BAILEY

v.

BAILEY

Cartwright

C.J.

It is signed by Judge Sanders and reads as follows:

1. On 19th day of July, 1966 upon the complaint of the Appellant, a Provisional Maintenance Order pursuant to the provisions contained in The Deserted Wives' and Children's Maintenance Act, Chapter 105 of the Revised Statutes of Ontario, 1960 and The Reciprocal Enforcement of Maintenance Orders Act, Chapter 346 of the Revised Statutes of Ontario, 1960 was made against the Respondent by N. K. Bennett, Esq., Judge of the Juvenile and Family Court of the Municipality of Metropolitan Toronto.

2. The said Provisional Order, together with the transcript of evidence heard in Toronto, was sent to this Court by the Department of the Attorney General of Manitoba for filing and confirmation, pursuant to Section 6 of The Reciprocal Enforcement of Maintenance Orders Act, Chapter 36, Statutes of Manitoba, 1961.

3. On the 24th day of October, 1966, the date set for the hearing of this matter, and without my calling the Respondent on the merits herein, counsel for Respondent raised a preliminary objection to the effect that on the evidence of the locus of the alleged matrimonial disputes contained in the said transcript of evidence, the said Juvenile Court and Family Court of the Municipality of Metropolitan Toronto was without jurisdiction to make the said Provisional Order, and asked me to refuse to confirm same.

4. The said transcript of evidence was read by me for the limited purposes of determining the preliminary question of jurisdiction and said transcript of evidence shows that:

(a) the Appellant and the Respondent are married and at all times material hereto had their matrimonial home in the City of Winnipeg, in Manitoba;

(b) on the 19th day of May, 1966, the Appellant, taking the two infant children of the marriage with her, left the said matrimonial home, without the knowledge or consent of the Respondent;

(c) at the time of the making of the said Provisional Order, the Appellant was residing in the City of Toronto, in Ontario.

5. On the 24th day of October, 1966, legal submissions on the question of jurisdiction were made to me by counsel for the Respondent and for the Crown. I reserved my ruling on this point, and I requested further submissions in writing which were subsequently provided by both counsel.

6. On the 23rd day of January, 1967, I orally delivered my reserved ruling on the preliminary objection as to jurisdiction raised by counsel for the Respondent, and held that the said Juvenile and Family Court of the Municipality of Metropolitan Toronto did not have jurisdiction to make the Provisional Maintenance Order hereinbefore referred to on the grounds that the matrimonial disputes alleged by the Appellant took place outside Ontario. I made no findings on the merits herein.

The Attorney General of Manitoba on behalf of the Appellant desires to question the validity of my said ruling on the ground that it is erroneous in point of law, and the points of the case being stated for the opinion and decision of the Court of Appeal for Manitoba are as follows:

(1) Did I err in law in holding that the Juvenile and Family Court of the Municipality of Metropolitan Toronto was without jurisdiction to make the Provisional Maintenance Order dated the 19th day of July, 1966, on the ground that the alleged matrimonial

disputes took place at the City of Winnipeg in Manitoba, and therefore the said Court in Ontario had no jurisdiction to make the said Provisional Order?

(2) Did I err in law in holding that the said Deserted Wives' and Children's Maintenance Act of Ontario, claims no extra-territorial jurisdiction?

(3) Did I err in holding that the matrimonial disputes between spouses should be adjudicated by the Courts of the Province of their matrimonial home, and one Province to which the wife may happen to go should not attempt to adjudicate such disputes particularly where the spouses were resident in another Province at the time of the break-up of the marriage?

(4) Did I err in law in holding that the facts herein present a clear example of the first ground found in the statement of grounds of defence upon which the making of the Order could have been opposed in Ontario, namely that the Court had no jurisdiction to make the Order?

The question for the determination of the Court of Appeal is whether or not the Summary Conviction Court came to the correct determination and decision on these points of law, and if not, the Court of Appeal is respectfully requested to revise or amend the decision of the Summary Conviction Court insofar as it relates to the question of jurisdiction.

Under *The Reciprocal Enforcement of Maintenance Orders Act*, 1961 (Man.), c. 36, Ontario has been declared to be a reciprocating State and under *The Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1960, c. 346, Manitoba has been declared to be a reciprocating State.

Pursuant to s. 4(3) of *The Reciprocal Enforcement of Maintenance Orders Act* of Ontario, a statement showing the grounds on which the making of the order might have been opposed was sent to the Attorney-General for transmission to the proper officer of Manitoba. These grounds were stated to be as follows:

1. The Court had no jurisdiction to make the Order.
2. The matter of the Complaint is not true.
3. There is no valid marriage subsisting between the Complainant and the Defendant.
4. A degree of judicial separation, or an Order having the effect of such a decree, is in force.
5. The Complainant had deserted the Defendant.
6. The Complainant had committed adultery which the Defendant has not condoned, connived at, or by wilful neglect and misconduct condoned to.
7. The Defendant has reasonable cause to leave the Complainant.
8. Under a decree or Order of a competent court, the Complainant is already entitled to alimony, and that such decree is being complied with.

1968
BAILEY
v.
BAILEY
Cartwright
C.J.

1968
 {
 BAILEY
 v.
 BAILEY
 —
 Cartwright
 C.J.
 —

9. The Defendant is not of sufficient ability to maintain the Complainant.
10. That the children, namely, KEVIN BORN MARCH 17th, 1962 and KAREN BORN JANUARY 15th, 1965 being over the age of sixteen years, (sic) no provision in respect to can be included in the Order.
11. The Defendant is not of sufficient ability to support the children.

It will be observed that the learned judge of the Winnipeg Family Court proceeded:

... on the ground that the alleged matrimonial disputes took place at the City of Winnipeg in Manitoba, and therefore the said Court in Ontario had no jurisdiction to make the said Provisional Order.

In the Court of Appeal, Guy J.A., who gave the unanimous reasons of the Court, contrasted the wording of s. 4(1) of *The Reciprocal Enforcement of Maintenance Orders Act* of Ontario with s. 5(1) the corresponding section of the Manitoba Act. In the Manitoba Act, s. 5(1) opens with the words: "Where an application is made to a court in Manitoba by a dependent who is resident in the province", while in Ontario the words of s. 4(1) are: "Where an application is made to a court in Ontario for a maintenance order". Guy J.A. took the view that the absence in the Ontario Act of the words "who is resident in the province" prevents the appellant from arguing that jurisdiction is specifically conferred on the Ontario Court by reason of her residence. With respect, this difference in wording does not appear to me to be of great significance; if a difference exists, the words of the Ontario statute are more general, not more restrictive, than those of the Manitoba Act. They are wide enough to include an applicant who is resident in Ontario as the appellant is.

The next matter with which Guy J.A. dealt was the English decision of *Re Wheat*², in which it was held that desertion was looked upon as a continuing offence, its local *situs* corresponding with the residence from time to time of the deserted spouse. Guy J.A. rejected the argument of the appellant that if a wife was deserted in Manitoba and went to live in Ontario, the desertion would be deemed to be continuing in her new place of residence so that the Courts of Ontario would be vested with jurisdiction to

² [1932] 2 K.B. 716.

entertain an application by her for maintenance. He phrased his reasons for rejecting this argument as follows:

1968

BAILEY

v.

BAILEY

Cartwright
C.J.

Concerning that submission we make two comments. In the first place, on the facts as found by the learned Family Court Judge, it is not open to us to say that the wife was deserted in Manitoba, or indeed deserted at all. We merely know that on May 19th, 1966, the appellant took the two infant children of the marriage and left the Winnipeg matrimonial home, without the knowledge or consent of the husband. Such a statement of facts cannot support a conclusion that the wife was deserted. Accordingly an argument based on the *Wheat* case can have no application here.

In the second place this Court in *Smith v. Smith*, (1953), 9 W.W.R. (N.S.) 144, affirming a judgment of Tritschler J. (as he then was), held that the provisions of *The Wives' and Children's Maintenance Act* did not apply to persons resident in another province. "The offences of cruelty, desertion and non-support committed outside Manitoba are not acts 'over which the Legislature of the province has legislative authority'...", was the wording used in the *Smith* decision. Desertion in one province should not accordingly be regarded as giving a basis for jurisdiction of the courts of another province to which the deserted spouse may have gone.

I find myself unable to agree with this reasoning. The depositions which were taken in Ontario are not before us and we should limit ourselves, as did the Court of Appeal, to the facts stated in the stated case.

In so far as the question is whether or not desertion occurred, all we know is what is set out in para. 4(b) of the stated case quoted above and which reads as follows:

- (b) on the 19th day of May, 1966, the Appellant, taking the two infant children of the marriage with her, left the said matrimonial home, without the knowledge or consent of the Respondent;

Under *The Deserted Wives' Maintenance Act* of Ontario, a married woman may be deemed to have been deserted by her husband although it is she who has left him. This is set out in s. 1(2) and (3) of the Act which read as follows:

1(2) A married woman shall be deemed to have been deserted within the meaning of this section when she is living apart from her husband because of his acts of cruelty, or of his refusal or neglect, without sufficient cause, to supply her with food and other necessities when able so to do, or of the husband having been guilty of adultery that has not been condoned and that is duly proved, notwithstanding the existence of a separation agreement where there has been default under it and whether or not it contains express provisions excluding the operation of this Act.

(3) Without restricting in any way the generality of subsection 2, conduct causing reasonable apprehension of bodily injury, or of injury to health, without proof of actual personal violence, that renders the home an unfit place, either for a wife or a child, may be held to constitute acts of cruelty within the meaning of subsection 2.

1968
BAILEY
v.
BAILEY
Cartwright
C.J.

In my opinion we are bound to assume that there was evidence before the judge of the Family Court in Ontario which made out a *prima facie* case of desertion. Otherwise he would not have made the provisional order. It will of course be open to the respondent to contend at the hearing in Manitoba that in fact he has not deserted the appellant.

Guy J.A. based his judgment to some extent on the earlier judgment of the Court of Appeal for Manitoba in *Smith v. Smith*³, in which it was held that the Court in Manitoba had no jurisdiction to make an order for maintenance against a husband who was both resident and domiciled in British Columbia. With respect, I do not think this case, which dealt with a final order, is of assistance in deciding whether or not the Ontario Court had jurisdiction to make a provisional order.

Section 17 of the Manitoba *Reciprocal Enforcement of Maintenance Orders Act* directs that the Act shall be so interpreted as to effect its general purpose of making uniform the law of the provinces that enact it and, while there are minor differences in wording, the Ontario Act and the Manitoba Act are substantially the same. The purpose of the Acts appears to be to permit a dependent who is living in one jurisdiction to obtain a provisional order against her husband who is resident in another jurisdiction which is one of the reciprocating states referred to in the Acts. The order so made is expressly stated to be provisional only and the husband is given an opportunity to defend on any ground which would have been open to him in the state making the provisional order. It is clear that it is not in the contemplation of the legislative scheme that the provisional order shall be in any sense final or binding. It is in the nature of an *ex parte* proceeding to establish a *prima facie* case.

It is interesting to note that s. 6(2) of the Manitoba Act and the corresponding s. 5(2) of the Ontario Act both use the words "at a hearing under this section the person on whom the summons was served may raise any defence that he might have raised in the original proceedings *if he had been a party thereto* but no other defence". Here, particularly in the words I have italicized, is clear statutory recognition of the fact that the husband is not a party to the

³ (1953), 9 W.W.R. (N.S.) 144, [1953] 3 D.L.R. 682.

proceedings for the granting of a provisional order; both statutes contemplate that this order may be made without any notice to him.

The question for the Manitoba Court under the first ground on which it is stated the husband can defend, is whether under the Ontario statute, the Ontario Court had jurisdiction to make the order which it made. In my view, it had that jurisdiction. It is scarcely necessary to repeat that all grounds of defence on the merits are open to the husband. It is difficult to think of any ground of defence which could be raised in any case which is not comprehended in the eleven grounds set out above and it has been held in *Re Wheat, supra*, at pp. 725 and 726, and appears from s. 6(2) of the Manitoba Act, that the list so furnished, while conclusive that the grounds specified exist, is not to be taken as excluding other proper grounds.

I agree with the reasoning and conclusion of Pope D.C.J. in *Andrie v. Andrie*⁴, which is accurately summarized in the headnote as follows:

The applicant was married in Saskatchewan and moved subsequently to Alberta where she was deserted by the respondent who then went to live in British Columbia. Applicant returned to live in Saskatchewan where she made the present application for an order under *The Deserted Wives' and Children's Maintenance Act*, R.S.S. 1965, ch. 341, and *The Maintenance Orders (Facilities for Enforcement) Act*, R.S.S. 1965, ch. 93. It was held that the applicant was entitled to an order, provisional and to be of no force or effect until confirmed by a court of competent jurisdiction in British Columbia. It was not necessary for the applicant to initiate the proceedings in the state where the desertion took place and the legislation was not to be construed as containing this requirement.

At the risk of appearing repetitious I will summarize my views. The primary object of that branch of the legislation providing for the reciprocal enforcement of maintenance orders with which we are concerned is to enable a deserted wife, resident in a state or province the courts of which do not have jurisdiction over the husband who has deserted her and is residing in a reciprocating state, to initiate proceedings in the province where she is and so to avoid the necessity of travelling to the province in which the husband is, a course which would often be a practical impossibility. To hold that a provisional order can be made only by a court which has jurisdiction to make a final and binding

1968
BAILEY
v.
BAILEY
Cartwright
C.J.

⁴ (1967), 60 W.W.R. 53.

1968
BAILEY
v.
BAILEY
Cartwright
C.J.

order of maintenance against the husband would be to defeat the whole purpose of this part of the legislative scheme.

I would allow the appeal, set aside the judgment of the Court of Appeal, declare that the provisional order was made with jurisdiction and direct that the matter be remitted to the Judge of the Winnipeg Juvenile and Family Court to be dealt with on the merits. Pursuant to the terms of the order granting leave to appeal the respondent will recover from the appellant his costs in this Court including the costs of the motion for leave to appeal.

Appeal allowed; costs to respondent pursuant to terms of order granting leave to appeal.

Solicitor for the appellant: The Attorney-General of Manitoba.

Solicitor for the respondent: Murray D. Zaslov, Winnipeg.
