Perry v. Gerry: The Support Rights of Children Born Outside of Marriage in Saskatchewan

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The Children of Unmarried Parents Act[1] requires an application for support to be launched within 1 year of the birth of the child. That provision, as well as a number of other provisions in the legislation, has been struck down in the past few years by various judges who ruled that a child born to unmarried parents was being discriminated against and dealt with differently from a child born to married parents: *W. (D.S.) V. H. (R.)*[2] and *B. (L.M.) V. H. (T.)*.[3] Miss Perry did not launch proceedings within 1 year of the birth of the child. Her right to recovery was statute barred prior to the *Charter*.[4] One of the issues in *Perry v. Gerry*[5] was how to deal with the question of back maintenance. His Honour Judge Smith awarded $60,500 in child support for the previous 15 years of the child's life, stating as follows:

> Clearly throughout the life of an illegitimate child, so called, the right to enforce maintenance against the father is preserved. It would be inconceivable that that right should not, in 1990, be parallel with respect to what we used to call illegitimate children.

While the thinking is commendable, one could query whether there is a parallel with back support for a legitimate child. Sizeable lump sum child maintenance awards are uncommon, but if the trial were in *foro conscientiae*, it would be fair to examine, as did Judge Smith, why the mother waited 15 years to press her claim.

Regarding laches note *Re Steele*[6] and *Blackford v. Blackford*.[7] Whether the child is born in or out of wedlock, why should the child suffer as a result of inaction by the parent? If the child has need and the parent has the ability to pay a "catch-up" award, where is the lack of logic in making such an award?

[1] R.S.S. 1978, c. C-8.

[2] (1988), 18 R.F.L. (3d) 162, 71 Sask. R. 66 (C.A.), leave to appeal to S.C.C. refused (1989), 19 R.F.L. (3d) xxxv (note), 76 Sask. R. 57 (note) (S.C.C.)

[3] (1987), 58 Sask. R. 212 (Q.B.).

[4] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of *The Canada Act 1982* (U.K.) 1982, c. 11.

[5] (28 June 1990), (Sask Prov. Ct.) [unreported].

[6] [1967] 2 O.R. 97, 62 D.L.R. (2d) 444 (Surr. Ct.)

[7] (1984), 33 Sask R. 211 (Q.B.)

In *Vermeulen v. Siebert*[8] and *Studlin v. Stringer*,[9] Judge Smith focused on the financial loss for the mother in giving birth to the child. Philosophically, he asked why the mother, who will shoulder the burden of childcare and inconvenience, as well as the joys, should also have to carry the burden of the financial loss. Why should her wage loss not be factored into that consideration, he asked. In *Trapp v. Wendell*,[10] Halvorson J., sitting in the Unified Family Court in Saskatoon, which has jurisdiction over *The Children of Unmarried Parents Act* in that area, held that the word "maintenance" encompasses only expenses for, and effects of, the child. Halvorson J.'s decision preceded *Vermeulen* and *Studlin*, but applied a more restrictive view to the assessment of loss than that taken by Judge Smith. His Honour Judge Henning in *Reynolds v. Bertram*[11] assessed the cost of maintaining the mother and child and appeared to take her earnings into consideration in relation to her ability to contribute to the joint requirement of the mother and father to support the mother and child immediately before and after the birth of the child. However, Henning Prov. Ct. J. similarly declined to hold that wage loss could be included in expenses. Carter J. in *Felsing v. Klimek*[12] awarded reimbursement to the mother for the 2 ½ months when she could not work after the child was born, based on the mother's salary of $1,700 per month. Through the inattention of counsel, *Felsing* was not considered by Halvorson J. or Henning Prov. Ct. J. Like Halvorson J., Madam Justice Carter is a member of the Court of Queen's Bench, but all the referenced decisions were "equal" in rank, being exercised by courts of first jurisdiction.

Carter J. inferentially also held that support levels under *The Children of Unmarried Parents Act* should be no different than levels under the *Divorce Act*[13] or *The Infants Act*.[14]

Other cases of interest to counsel striking down sections of similar provincial legislation include *Stagman v. Hamm*;[15] *Christante v. Schmitz*,[16] permitting an application for support under *The Infants Act* regaring an illegitimate child; and *Shewchuk v. Ricard*,[17] In other cases the requirements for corroboration in

[8](2 August 1989), (Sask Prov. Ct.) [unreported].
[9](28 March 1989), (Sask. Prov. Ct.) [unreported].
[10](1988), 68 Sask R. 1.
[11](6 February 1990), (Sask. Prov. Ct.) [unreported].
[12](1987), 65 Sask. R. 129 (Q.B.)
[13]R.S.C. 1985 (2nd Supp.), c.3.
[14]R.S.S. 1978, c. H-13.
[15](1984) 5 W.W.R. 148 (Sask C.A.).
[16](1990), 25 R.F.L. (3d) 378 (Sask. Q.B.).
[17]1 R.F.L. (3d) 337, [1986] 4 W.W.R. 289 (B.C.C.A.), leave to appeal to S.C.C. refused [1987] 2 W.W.R. 1xx (note)(note).

establishing paternity have also been ruled unconstitutional.

The Children of Unmarried Parents Act ends support at 16 years. It is hard to imagine that that different treatment before the law of illegitimate and legitimate children would be sustained. While the writer disagrees with the development of the law by which legitimate children may demand support through university,[18] should it not be arguable that illegitimate children are entitled to the same generous treatment? As judges work their way around the wording of provincial acts, in an effort to treat children born in and out of wedlock equally, one wonders why the entire Saskatchewan Acct has not been declared unconstitutional. The Saskatchewan government is about to enact new legislation, but where it differs from the developed law under the *Divorce Act* and *The Infants Act*, could a court not cogently hold that the new legislation, by creating different entitlements for illegitimate children, is resulting in inequality for them?

[18]*Saunders v. Saunders* (1987), 10 R.F.L. (3d) 437 (Sask Q.B.), aff'd (1988), 14 R.F.L.. (3d) 225 (Sask C.A.), and *Duncan v. Duncan* (1989), 18 R.F.L. (3d) 46 (Sask. Q.B.).