

Case Name:
Savage v. Agnello

**Between
Savage, and
Agnello**

[2002] O.J. No. 4653

118 A.C.W.S. (3d) 690

Court File No. 907-02

Ontario Superior Court of Justice

Eberhard J.

November 28, 2002.

(14 paras.)

Family law -- Maintenance of wives and children -- Persons obligated to support children (in loco parentis) -- Interim relief -- Interim maintenance -- Maintenance of children -- Obligation of spouse to support other spouse's children -- Common law or same-sex relationships -- Maintenance.

Application by the mother, Savage, for interim child and spousal support. The respondent father, Agnello, stood in loco parentis to the child. The father earned \$99,000 per year and the mother earned \$55,000. The mother expected her income to be reduced in the future. The child's biological father agreed to pay child support of \$907 per month. The parties jointly owned their home.

HELD: Application allowed. The father was ordered to pay \$600 per month in interim child support and interim spousal support of \$700 per month. The mother was in need of spousal support. The mother's income was fixed at \$50,000. The primary focus of the support order was to stabilize the parties' financial situation until they could deal with the assets of the relationship.

Statutes, Regulations and Rules Cited:

Child Support Guidelines, s. 5.

Counsel:

P. Daffern, for the applicant.

S. Brenner, for the respondent.

1 EBERHARD J. (endorsement):-- The Respondent stands in loco parentis to the child Kaitlyn. Little else is agreed, such as length of cohabitation or separation date but those findings, with their inherent credibility component, are not necessary for this interim determination of child and spousal support.

2 The Respondent's 2001 tax return shows income of some \$99,000 and the Applicant's some \$55,000. Both parties agree that if present income turns out to be different than I find it, based on evidence available today, it can be adjusted later, when the facts are known. My purpose however is to fix income as close as I can to what seems to be the current annualized income so as not to leave either party at an unfair advantage at this interim stage. This approach has the attraction of not slowing down the impetus to final settlement because the interim figure favours one party and also protects against onerous readjustments.

3 As of July 2001, the Applicant's income reduced and it is expected to reduce further in April 2003. She will not receive her current rate of pay for any full year so an actual annualized income figure is impossible. However, I fix her current income at an annualized rate of \$50,000. I do not consider imputing income at this interim stage arising from her own conduct resulting in the reduction. That finding would depend on evidence that is not yet developed.

4 A June year to date income statement for 24 weeks, if annualized, shows the Respondent on a track to earn more than \$99,000 as his base pay. Moreover, he has not produced the evidence, available through his employer, to persuade this court that there is not some personal expense component in the reimbursements he gets while working on the road. That is not yet quantifiable but without the information as to how, and how often he is reimbursed for staying at his parent's home in Parry Sound, and receipts showing that he actually pays that money to his parents, I find that his income is enhanced to some extent. I find that the income figure of \$115,000 will be less inaccurate when the facts are known and 2002 income has been fully earned than the \$99,000 figure he proposes.

5 Kaitlyn's biological father recently agreed to pay child support of \$907/month. I find that it cannot be said that he is unlikely to be regular in his payments. In the early years he had an agreed support holiday due to transfer of the matrimonial home and more recently the Applicant did not really pursue support by obtaining binding agreements or seeking enforcement. I do not assume he will not pay.

6 Where the support payor is not the biological parent of the child the quantum to be paid is the amount the court "considers appropriate" having regard to the guideline amount and any other parent's obligation to support the child. CSG, s. 5.

7 Child Support Guidelines table support would be \$873/month. I fix the interim obligation of the Respondent at \$600 commencing July 1, 2002 the month next following the issuance of the claim.

8 I find that the Applicant is entitled to interim spousal support based primarily on the economic interdependence in relation to their joint home. The Respondent has the ability to pay. I make no finding as to duration but I will say that the need of the Applicant is at its zenith now, at this interim stage, when the failure to adequately address the interdependence at the time of separation has put continued ownership of the residence in jeopardy. Because I am not considering duration of the obligation, I see no reason to consider at this stage the implications of ill health and the potential for declining employability. My purpose is to get the parties through the interim stage, preserving their financial viability until final settlement is reached. Otherwise the options narrow considerably.

9 I have redone support calculations using the income figures I have found. I find that a fair interim distribution is reached by the Respondent paying \$700/month in interim spousal support also commencing July 1, 2002. That figure is half of the monthly mortgage payment so he derives some benefit from the payment in that it will preserve equity in an asset that has not yet been settled. The arrears already owing on the spousal and child support will go a long way towards putting the mortgage back in good standing. The on-going interim support will allow the Applicant to make payments on the mortgage and also opportunity to determine very quickly whether she will be able to maintain the home, thus focussing the settlement discussions.

10 I also require that the Respondent continue the payments (insurance, internet, car insurance, joint loan, water softener loan, security system) that he says total about \$300 pending final resolution.

11 This quantum of periodic spousal support is more than the Applicant named in her submissions but I have chosen to deal with the period since separation as set out herein rather than order the lump sum requested to address mortgage concerns. The quantum is also patently interim. It is the means by which this court intends to stabilize the financial implications of separation while the parties, with the help of their counsel, resolve the disputed issues in an orderly way. If litigation is not finalized in a timely manner, I would expect that the interim order will have to be reconsidered, because the income figures demonstrate themselves wrong when 2002 income is fully earned, because the order has already accomplished its purpose of re-establishing stability, or because it has failed to do so and left one party at a disadvantage.

12 My hope is that the Respondent will take immediate steps to pay the retroactive support forthwith. Any payment of retroactive support received prior to the January settlement conference is to paid by the Applicant on the mortgage. That way, the crisis can be averted, the parties can come to final resolution of their financial obligations in an orderly way and the availability of the home without the immediate threat of Power of Sale will be a factor to be considered in determining whether there is continuing financial interdependence. If the Respondent has not made the retroactive payments (July to November) before December 31, 2002 the Applicant may move without notice for the independent right to enforce the arrears.

13 A Support Deduction Order shall issue but the parties may agree to make the first payments directly through counsel so as to put fund into the hands of the Applicant immediately to stave off the threatened Power of Sale.

14 The matter is adjourned to the previously set settlement conference at which the issue of cost may be argued.

EBERHARD J.

cp/e/nc/qw/qlhcc