SUPREME COURT OF YUKON

Citation: *GM v VM*, 2022 YKSC 71

Date: 20220114
S.C. No. 18-B0036
Registry: Whitehorse

BETWEEN:

G.M.

PLAINTIFF

AND

V.M.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — Gregory Johannson (by videoconference)

Counsel for the Defendant — Jeremy Lewsaw (by videoconference)

This decision was delivered in the form of Oral Reasons on January 14, 2022. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): This is an application brought by the father for primary residence of the child of the relationship, L.M., and P.R., the mother's child from another relationship.

[2] The father seeks shared parenting and significant access with both children. He seeks an order that the mother be prohibited from leaving the Territory without permission. He also requests a check-in with this Court in April 2022. The father also seeks a determination of the defendant mother's gross annual income and financial

disclosure from her. He seeks set-off from any amount of retroactive support payments that this Court may order.

[3] The mother seeks an order for retroactive child support in the amount of $180.80 per month from July 1, 2019 to December 1, 2019. She seeks an imputation of annual income to the father in the amount of $50,000 for 2020 and 2021; and monthly child support payments of $457 commencing January 1, 2020 and ongoing until further order of the Court. The mother opposes the change of primary residence for the children and the shared parenting proposal of the father.

[4] As a general comment at the outset, these applications suffer from an absence of certain evidence in support of the order sought, or in support of objections to those orders, making it difficult to reach conclusions in some of these matters. Below, I will reference the specifics.

[5] This matter was last before the Court for a substantive ruling in June 2019. At that time, the defendant mother was successful in persuading the Court that there had been a material change in circumstances since the previous order issued in December 2018. At that time, the plaintiff father was living in Whitehorse and the defendant mother was in Ross River. They briefly reconciled in early 2019 and lived together in Whitehorse until April 2019. There was an altercation between them witnessed by the child of the relationship, L.M., born [redacted]. The defendant mother's other child, P.R., born [redacted], also witnessed the altercation, although the effects were less traumatic because of her age.

[6] I will not repeat my reasons here — they are found at paras. 16 to 20 of *GM v VM*, 2019 YKSC 72 — but, in summary, the seriousness of the incident relative to

previous domestic violence incidents in the relationship combined with the effect of the incident, particularly on L.M., led to my conclusion that there was a material change in circumstances.

[7] My assessment of L.M.'s best interests on the necessary fresh inquiry was that her primary residence should be in Ross River for cultural, family, and stability reasons. Joint custody was not at issue and generous access for the father was ordered, recognizing his obvious commitment to and caring for L.M. I ordered access every weekend, which caused some difficulties because the father has no driver's licence and the mother had to drive every weekend from Ross River to Whitehorse and back.

[8] In November 2020, the father moved to Faro, 72.4 kilometres from Ross River. Despite the much closer proximity, the father has not had access to the child L.M. since September 26, 2021. The order has not been complied with and no real explanation was provided by the mother for this failure to comply. The father still does not have a driver's licence and it was explained in submissions at this most recent hearing that this is due to his failure to make child support payments for children from another relationship who are now in Saskatchewan. The father has not seen P.R. since approximately June 2020.

[9] The mother did depose that she does not like being only a weekday parent, with the father having the child every weekend. The mother also complains that she is not able to take the child to Whitehorse on weekends for pampering treats, given the current circumstances, assuming she complies with the order. The mother suggests that father's access time be revised to every second weekend, long weekends, and more holiday time during the summer.

[10] The father seeks a shared parenting regime relationship. He suggests one week on/one week off or one year of primary residence with him and one year with the mother. He laments the loss of the relationship with P.R. and the diminished relationship with L.M.

[11] As noted in my June 2019 decision and confirmed by counsel in their submissions at the hearing of this matter, the test for a material change in circumstances was set out by the Supreme Court of Canada in *Gordon v Goertz*, [1996] 2 SCR 27. There are three parts to that test:

(i) the change has to be a change in the condition, means, needs, or circumstances of the child and/or the ability of the parents to meet the needs of the child;

(ii) the change has to materially affect the child; and

(iii) the change was not foreseen or could not have been reasonably contemplated by the judge who made the original order that is now sought to be varied.

[12] In this application, as in the last one, one of the orders sought is a change in primary residence or a shared parenting arrangement that allows the father more time with the child. With such a request, contrary to a request for a change in custody, less compelling evidence is required to vary an order.

[13] The father presents three bases for his argument that there has been a material change in circumstances. They are:

(i) L.M. is now in Grade 1;

(ii) the father has moved to Faro; and

(iii) he was acquitted in the assault charge arising out of the April 2019 incident.

[14] He also notes that the mother has breached the order multiple times, although it is not clear whether he is relying on this as a material change in circumstances.

[15] I am not persuaded that any of these factors amount to a material change in circumstances that meet the test for variation. However, there is another factor that I believe amounts to a material change in circumstances, that is, the passage of time and a renewed relationship between L.M. and the father.

[16] L.M. was attending kindergarten in 2020-2021 when she was commuting to Whitehorse and later to Faro on weekends. I do not see her promotion to Grade 1 as a substantial enough change to her condition, needs, means, or circumstances, including her schooling schedule, to reach the level of material change.

[17] The father's move to Faro from Whitehorse is a significant change that should remove some of the logistical awkwardness created by geography. However, Faro is still a different community from Ross River. While a one-hour commute is certainly an improvement over a five-hour commute, it still does not allow easily for a 50-50 shared parenting arrangement. Driving is still required and it appears that the responsibility continues to fall disproportionately on the mother.

[18] No evidence was provided by the father to support his suggestion of a one week on/one week off or a one year alternating shared parenting arrangement from the schools or the Department of Education or L.M.'s counsellor. There was no evidence as to how this arrangement might affect her educational needs or how her stability might be affected. It is not clear whether the extracurricular activities L.M. is currently

participating in in Ross River could be replicated in Faro, that is, the Bible club or attending the family cabin for hunting, fishing, and exploring, or whether it would be in her best interests if she could no longer participate in these activities.

[19] I recognize that the father spends time in the bush and has been taking L.M. to archery. However, the same challenges that existed when the two communities were Ross River and Whitehorse still exist when the two communities are Ross River and Faro. This does not satisfy the test of material change in circumstances.

[20] Finally, the acquittal on the assault charge. I agree with the submissions of counsel for the mother that this acquittal is not a material change in circumstances. It is not an outcome that was unforeseen and, in any event, the matter before the Court today is not a criminal matter requiring a standard of proof beyond a reasonable doubt. The factors I took into account in June 2019, as counsel for the mother noted, were the presence of the children during the altercation, their observation of it, and the effects of the altercation on L.M., especially as it related to her father.

[21] However, time has passed since that altercation. With this passage of time, the effects on L.M. may have diminished. There is evidence from the father that L.M. appears to have a continuing strong relationship with him, demonstrated by her staying with him for extended periods of time in February and March 2020, June 2020, and almost every weekend in Faro between November 2020 until at least April 2021. It appears that any negative effects of witnessing the altercation have diminished or disappeared and the positive relationship with the father has been restored.

[22] This leads then to a fresh inquiry into the best interests of the child. In assessing this, I am guided by s. 30 of the *Children's Law Act*, RSY 2002, c.31, except for the

provision where the views and preferences of the child are considered because of the age of L.M. Here again, evidence is lacking for me to make this determination easily.

[23] The father raises concerns about the mother's parenting skills, which are focused on her failure to arrange for counselling for L.M.; her smoking of part of a joint before driving the children back to Ross River, which resulted in a 24-hour licence suspension; some evidence of diaper rashes, urine-soaked diapers, and cracked hand skin; and absences from school. The father also notes the failure of the mother to share information with him about L.M. and that Ross River may not be an ideal environment because of excessive drug and alcohol use. There is no evidence that the mother has had any further drinking episodes.

[24] The mother has provided the report card for L.M. showing that she is doing very well in school. As noted, she attends Bible Club and spends time when possible at the family cabin and in the forest fishing, hunting, and exploring with extended family members. The mother explained that the majority of the school absences over the last year were COVID-related, supported by the notations on the report card. She explained the joint-smoking incident by saying that she took a couple of puffs only, was not intoxicated, and was not charged by the RCMP, nor was any potential intoxication assessed by the RCMP. The RCMP officer reported the matter to Family and Children's Services and the mother deposed that, after a conversation with Family and Children's Services, they closed their file, although no objective evidence of this was provided.

[25] The mother, in turn, expressed concerns about the father's parenting abilities, including exposing L.M. to his mother, who was engaging in self-harm and apparently receiving electric shock therapy, withholding the children from her on transfer times, and

telling the children that she would be going to jail. The father has deposed he will no longer be having visits with his mother and the children.

[26] There is, importantly, no evidence of the mother binge drinking or abandoning the children to do so, which was a serious concern in the past and a major reason why the father played a major role in caregiving after the initial breakup.

[27] I am unable to find significant enough evidence to change the existing order. While I have said in the June 2019 reasons that the ideal arrangement for L.M. would be 50-50 shared parenting, once again the geographic location of each parent prevents this from occurring now that L.M. is in school. As noted above in my discussion about the father's move to Faro, there is insufficient evidence for me to decide that moving L.M.'s primary residence to Faro for even one week on/one week off is in her best interests, given her roots and extended family in Ross River and her proficiency in school there.

[28] I do not find the concerns expressed by the father about the mother's parenting sufficient to justify a change in the status quo at this time. While the joint smoking before driving was clearly an exercise in bad judgment that cannot be condoned, the consequences of a 24-hour licence suspension and the opening of a Family and Children's Services file are significant. A repeat of this behaviour would be concerning and is something to be monitored, like the drinking.

[29] As noted earlier, generous access and as close to 50-50 as possible in a joint custody situation such as this where both parents are caring and have a strong bond with the child, is preferred. Access by the father every weekend is as close to this as

possible and, based on the current evidence, is in the child's best interests because of her schooling.

[30] While I understand why the mother prefers every second weekend supplemented by long weekends and longer times during holidays, this is less than the 50-50 ideal shared parenting time. I appreciate the mother's concerns about not being able to enjoy activities with her daughter on weekends. Again, geography is the culprit here. If both parents lived in the same community, shared parenting, as suggested by the father, would be possible and appropriate. If travel between the two communities were easier, either through shared driving or bussing, perhaps an arrangement of one or two overnights during the week and every second weekend could work. I encourage the parties to discuss these kinds of logistics further to see if some alternate arrangement such as this would be practical. For now, however, the current order shall remain.

[31] There was no evidence from the father of the reasons why the order has been breached by the mother (i.e. not driving the child to the father for access visits) except that it is not her preference for the reasons stated earlier. The continuous breach of the order since September 2021 is concerning. I understand the disproportionate driving required by the mother, without adequate compensation from the father as ordered, but since the father's move to Faro, this reason seems less compelling.

[32] Nevertheless, in order to provide more certain direction to the parties, I will order that the father be responsible for the transportation to and from Ross River every second weekend so as to remove one hundred percent of the transportation burden from the mother. And, indeed, the father has deposed in his November 16 affidavit that he has a friend who can drive him to Ross River.

[33] If in future further evidence is provided focused on the best interests of L.M. showing a material change in circumstances and why the current order is not in her best interests, then it may be varied. Of course, if the parties consent, this may be done at any time.

[34] The order has also been breached with respect to P.R. The father, G.M., not P.R.'s biological father, says he has not seen P.R. since June 2020. The mother submitted an affidavit from P.R.D., the biological father of P.R. who lives in Saskatchewan, expressing concerns about G.M.'s behaviour and that he, P.R.D., does not want G.M. to have access to P.R.

[35] No case law was provided to me on the effect of a biological father who is out of the jurisdiction objecting to an order for access by the mother's former partner who played a caregiving role for the child in early years. P.R.D.'s affidavit related one incident of G.M. swearing in front of P.R., another of him throwing a bag at P.R.D., and a third incident of P.R. saying that G.M. had been mean to her. The affidavit contains other very negative and critical information about G.M., which is not relevant to the issue I have to decide, nor is it substantiated. The father denies most, if not all, of the affidavit of P.R.D.

[36] There is no evidence of what kind of support, financial or otherwise, P.R.D. is providing to P.R. He is in Saskatchewan and refers to P.R. as having a "bright future in Saskatchewan". This is confusing as the mother assured this Court on previous occasions that she would remain in the Yukon with both children in response to the father's concern that she would leave the jurisdiction with the children to be with P.R.D. in Saskatchewan.

[37] The mother, who is a party, unlike P.R.D., has not expressed specific concerns about G.M. having access to P.R. No explanation has been provided by her for the breach of the order related to access made in December 2018 and not varied by the order of June 2019, other than commenting about the negative effect on P.R. of the long drive from Ross River to Whitehorse. That factor has been eliminated as of November 2020.

[38] The evidence from P.R.D., the biological father, of the three described incidents is insufficient for me to vary the order. It is not in P.R.'s or L.M.'s best interests to be separated from one another every weekend and so, at this time, I will not vary the current order providing access to P.R. by the father every second weekend.

[39] Much argument was spent by the mother on support, both retroactive and ongoing. She seeks retroactive support between July 2019 and December 2019 in the amount of $180.80 per month; retroactive support from January 2020 and ongoing at $457 per month, based on imputed income of $50,000 annually because of an absence of financial disclosure by the father.

[40] It is unclear on what the amount of imputed income of $50,000 is based. At G.M.'s previous full-time job in 2019-2020 at the Boys and Girls Club, his annual income was approximately $22,000. At Wildstone, where he worked for approximately two months, his earnings were $5,344.88.

[41] The mother further notes that there was no explanation for his leaving Wildstone in June 2021, no information about his efforts to look for employment after this, no explanation about what happened to his application for a recreational assistance job, and no explanation of the discrepancy in social assistance payments he has been

receiving in 2021. The mother argues that he is intentionally unemployed or underemployed and, for this additional reason, income should be imputed.

[42] The father seeks to have any retroactive support award set off by an unspecified amount. He notes that financial disclosure for 2019 and 2021 has been provided, and only documentation for 2020 is missing. He argues that the common practice of averaging income over three years should be applied and that income imputation should not be done.

[43] The Supreme Court of Canada in *Michel v Graydon*, 2020 SCC 24 provided new insights into the last instructive Supreme Court of Canada decision about retroactive support payments (*DBS v SRG*, 2006 SCC 37) decided in 2006 relatively soon after the *Federal Child Support Guidelines*, SOR/97-175 were introduced. The Supreme Court of Canada in *Michel v Graydon* confirmed that child support obligations arise upon a child's birth or separation of the parents. The obligation exists whether or not an action has been started because child support is an independent continuing obligation not created by statute or court order. Retroactive awards are a recognized way to enforce such pre-existing freestanding obligations and to recover monies owed but yet unpaid. In other words, retroactive child support is a debt.

[44] Child support is the right of the child and the responsibility of the parents. The purpose of the *Child Support Guidelines* was to replace the previous focus by courts on the subjective and arbitrary determination of the needs of the child through the exercise of judicial discretion, with certainty, consistency, predictability, and efficiency. The *Child Support Guidelines* demonstrated the new emphasis on the child's entitlement to support and the tables prescribed the amount of that support based on the income of

the payor parent, thus providing certainty. This approach means that the accuracy of that income is essential. The best interests of the child is still the paramount consideration.

[45] The Supreme Court of Canada in *Michel v Graydon* confirmed the four factors developed in *DBS v SRG* to guide the determination of retroactive support:

> (i) the reason for any delay by the recipient parent in bringing their application for support;
>
> (ii) the conduct of the payor parent;
>
> (iii) the circumstances of the child; and
>
> (iv) the hardship the award creates for the payor parent.

[46] Here, the application for child support was originally brought by the mother in 2018, adjourned indefinitely by the Court in December 2018, and brought back on in October 2021. The father does not seriously argue that the adjournment of the application was a prejudicial delay. In applying the Supreme Court of Canada test in *Michel v Graydon*, that is, that a delay will be prejudicial only if it is deemed to be unreasonable, taking into account a generous appreciation of the social context in which the claimant's decision to seek child support was made, I agree that this is not a factor.

[47] The second consideration, blameworthy parent payor's conduct, such as a failure to disclose actual income that has the effect of privileging their interests over the child's right to support, can weigh in favour of an order for retroactive support, expand the temporal scope, or increase its amount through additional interest or cost. Here, the father has failed to disclose actual numbers of earnings in 2020 but has deposed as to his work activities during that year, namely, the Boys and Girls Club until March 2020, from where he was laid off due to the pandemic; CERB payments from March to August

2020; and then moving to Faro between August and November 2020 and beginning to look for work. He gave no explanation for his failure to disclose his actual 2020 income through documentary evidence. This is blameworthy conduct to a certain extent that must affect the award. But because of the information provided by the father in his affidavits, this conduct is not as blameworthy as it would have been if there were a complete absence of information.

[48] The third factor is hardship suffered by the child. This can be a factor in favour of an award of retroactive support. However, the Court in *DBS v SRG*, and endorsed in *Michel v Graydon*, said that a payor parent's obligation will not disappear where children do not "need" their financial support. Here, there is no evidence from the mother of any hardship suffered by L.M. due to a lack of child support from the father. However, as noted in *Michel v Graydon*, the obligation/debt exists regardless of the child's need.

[49] The final factor is whether an award would cause the payor undue hardship. This could weigh against an award or affect its temporal scope. It is not necessary that there be no hardship caused by the award for it to be granted. That hardship must be assessed after considering the hardship to the child and recipient parent of not ordering the payment of retroactive support. Again here, there is an absence of evidence about hardship to the payor. There is reference to another child or children in Saskatchewan for whom the father owes child support that is in arrears and has caused him to lose his driver's licence. But no details were provided about amounts owing, just submissions by his counsel that he is attempting to vary those amounts owing.

[50] Applying the principles of child support and weighing the factors to be considered for a retroactive award, I find as follows:

- the retroactive support owing from June 2019 to June 2020 is offset by the caregiving without support that was provided by the father from June 2018 to May 2019;
- from June 2020 to December 2020, retroactive support payments are owing based on income earned through the CERB, which is $500 per week for 28 weeks amounting to approximately $14,000; retroactive support payments will be based on the approximate $14,000 income;
- from January 2021 to December 2021, the father will be required to pay retroactive support based on his actual income, which is to be worked out by counsel because I could only see the social assistance payments between June and November, and the Wildstone payment for May and June. I was not clear, or maybe I missed it, what income was received in early 2021, so I would ask counsel to discuss and agree on the actual income earned by the father based on what the financial disclosure has produced. If there is disagreement between counsel, then you may come back to court with the evidence and the reasons why you disagree for it to be resolved. Going forward, child support payments will continue to be owed but based on G.M.'s actual income to be determined by his income tax information.

[51] I will order, as requested by the father in his amended application, that income tax information be exchanged every year by June, and that would include income tax returns and any recent pay stubs.

[52] Just by way of comment, the father deposed in his affidavit and his counsel repeated that being a father is a major part of his identity. While that may be very well how he feels — and it is commendable — it is also crucial to recognize that with fatherhood comes responsibility, including financial responsibility. This may require the father to be more intentional and consistent about finding and maintaining employment.

[53] The father has also asked for a check-in in several months. While I do not support constant court monitoring of family law cases, as parties especially in joint custody situations should be encouraged to and are expected to work matters out between themselves, because of the unique circumstances in this case and the past difficulties in implementing the court orders, I will order that a check-in be set up by counsel for April 2022. That check-in will be in the form of a family law case conference.

[54] I will also order that there should be a clause — I am not sure if that was in the existing order — prohibiting the mother from permanently leaving from the Territory with the children without permission.

[55] I think #12 can stay-that either party may travel with L.M. outside of the Yukon if the parent travelling with L.M. provides 14 days' notice to the other parent and an itinerary, including information about flights, locations where she will be, and phone numbers to contact her.

[56] I will also encourage the parents to share information about L.M. by email.

[DISCUSSIONS]

[57] Add to the order then, that T-slip information and any other confirmation of

income for 2020 and 2021 are to be disclosed by January 31, 2022.

_____
DUNCAN C.J.