SUPREME COURT OF YUKON

Citation: *C.J.G. v. J.A.L.*, 2023 YKSC 16

Date: 20230320
S.C. No. 13-B0052
Registry: Whitehorse

BETWEEN:

C.J.G.

PLAINTIFF

AND

J.A.L.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — Malcolm E.J. Campbell (by telephone)

Counsel for the Defendant — Greg Johannson-Koptyev

This decision was delivered in the form of Oral Reasons on March 20, 2023. The Reasons have since been edited for transcription without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): This is an application by the defendant, J.L., for an adjustment in his child support obligations to the plaintiff for the two children of the relationship, T.R.S.G. born [redacted] and T.J.L.G. born [redacted]. The relationship between the parents ended in 2010. The defendant has a son from another relationship, born [redacted], for whom he has sole responsibilities.

[2] The defendant is currently unemployed and his only income is social assistance. He has been without work since March 2020. While he was receiving unemployment insurance during 2020, Maintenance Enforcement deducted 50% of his income from unemployment insurance towards child support. Since he has been receiving social assistance, Maintenance Enforcement has not made any deductions.

[3] A previous court order in January 2015, requires J.L. to pay child support calculated on an imputed annual income of $54,080 commencing January 1, 2011, to be enforced by Maintenance Enforcement. He did not make the required payments regularly and arrears accumulated. His annual income fluctuated between 2014 and 2019.

[4] On April 15, 2019, another Court order was issued setting out arrears owing from 2014 to April 2019, based on his line 150 income from his income tax assessment for each year instead of calculated on the imputed income of $54,080 for 2015 when his actual income was $34,073. The Court in 2019 also ordered payment of $100 a month towards the arrears and ongoing child support based on his annual line 150 income, which amounted to $1,104 a month for 2019.

[5] A further order for retroactive support for the years 2011 to 2014 was made in March 2020 based again on his line 150 income for those years.

[6] The issue in the current application is the amount of the defendant's annual income.

[7] The defendant seeks to leave the situation as ordered in April 2019, meaning he will continue not to pay any child support while he is on social assistance and Maintenance Enforcement will not enforce any of the payments, including the arrears

payments of $100 a month, and future years of support will be based on the defendant's line 150 annual income if he starts working again.

[8] The plaintiff, in response and opposing this application, argues that the defendant is intentionally unemployed. She asks the Court to impute income to him at his 2019 earnings level, and for arrears since 2020 as well as ongoing child support to be calculated on that basis.

[9] This is the main issue to be decided in this application, that is, whether or not income should be imputed to J.L.

[10] A secondary issue is whether support obligations should continue for T.R.S.G., as she is 19 years old and will be 20 in September of 2023. The question is whether she is a dependent and still entitled to child support.

[11] The plaintiff also brought an application but the issues raised there have been resolved. The *ex parte* order granted in August of 2022 staying the April 15, 2019 order was set aside in December of 2022 and the defendant has now consented to the requested name change of his son.

[12] My short conclusion is this: J.L. is intentionally unemployed. The needs of his seven-year-old child from another relationship are not sufficient to justify his unemployment. Income will be imputed to him for 2022 and half of 2021, based on the average of his earnings from 2015 to 2019. This is to take into account the variables of COVID, which I accept may have limited his employment opportunities in 2020 and at least part of 2021.

[13] Section 32 of the *Family Property and Support Act*, RSY 2002, c 83, states as follows:

> Every parent has an obligation, to the extent the parent is capable of doing so, to provide support for their child.

[14] Section 36 of the *Family Property and Support Act* provides that obligations are payable according to the *Child Support Guidelines*, OIC 2000/63.

[15] Section 17(1)(a) of the *Child Support Guidelines*, which is applicable here, states as follows:

> 17.(1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances. The circumstances to be considered include
>
> > (a) the parent is intentionally under-employed or unemployed, other than where the underemployment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent; ...

[16] Imputing income is an exercise of judicial discretion. It requires a three-stage analysis:

- first, a finding on the basis of evidence — not speculation — that the underemployment or unemployment was intentional;
- second, that it was not as a result of the needs of a child; and
- third, whether income should be imputed and what is a reasonable and not arbitrary basis for that imputation.

[17] J.L. argues:

- He was laid off from his job at Energy North as a mechanical insulator in March of 2020 due to a shortage of work as a result of the COVID-19 pandemic.

- Other possible jobs were not suitable because: one was in Carmacks and he did not want to commute or relocate and it was not in the best interests of his seven-year-old child; or the other jobs were part-time. He has been trying since February of 2023 to get work locally with the Kwanlin Dün First Nation but nothing is available.
- His son from the other relationship has needs, as a result of his global developmental delay. J.L. is his sole support because the mother has no interest and has disappeared. This limits his availability for full-time work, as he sometimes must pick the child up from school depending on his mood.
- The Court should exercise discretion in his favour because his living situation is precarious. He is renting a room in a house of a former partner, sleeping on the couch while his son and others with whom he lives in the house have their own rooms.
- He has necessary expenses of truck payments, gas, groceries, and rent, he lives close to the poverty line, and it is difficult for him to get out of this financial debt.
- Finally, he has difficulty reading and writing, so his employment opportunities are limited.

[18] I have some sympathy for the predicament J.L. finds himself in, recognizing his limited job opportunities both because of his own educational challenges, the challenges of the external environment — especially during COVID — and his childcare responsibilities as sole support for his seven-year-old son.

[19] However, I am required to apply the law. There is no hardship application here.

[20] I have also reviewed J.L.'s job history and income earnings over the last 10 years or so, including the last seven when he was the sole support for his seven-year-old son. While there has been some fluctuation before March of 2020, his annual income was as follows:

- $83,069 in 2011;
- $74,617 in 2012;
- $40,205 in 2013;
- $12,864 in 2014;
- $34,073 in 2015;
- $10,186 in 2016;
- $52,223 in 2017;
- $72,306 in 2018;
- $64,203 in 2019.

[21] Very telling was J.L.'s affidavit of September 7, 2022, on which he relies for this application, and which he wrote when he was self-represented. He states at para. 22:

> … [I]t makes no financial sense for me to return to work if [Maintenance Enforcement] is able to garnish a significant portion of my income, preventing me to provide for my son and get further into debt, both on child support as well as my other bills. … Staying on social assistance also allows me to spend more time with my son and be a more involved father to him and meet his special needs.

[22] Also in this affidavit, he refers to the physical demands of his job and how he had to take pain medications while working. However, there is no medical evidence to support this claim of physical debilitation.

[23] The statement in his affidavit about support payments is supported and echoed by his former employer Stan Fordyce of Energy North. Mr. Fordyce's job offer letter of August 2022 was strangely worded. He wrote as follows:

> Energy North Construction has had J.L. working for us in past years and had to leave his job to take care of his family through the social welfare programs primarily due to the program for garnisheeing [as written] wages had left him without an income whatsoever.
>
> We have work for him in town if he is able to work and start making a living and not having all of it taken off every cheque.
>
> If there is a minimum deduction that can be initiated for him to pay that will allow him to start working again and have some funds left over to feed and cloth [as written] his family, we would gladly bring him back to work in our shop and in the field.

[24] Mr. Fordyce then stated in a later affidavit, dated February 10, 2023, that he actually did not have a full-time job for J.L. in town at that time but instead had very small projects that were suitable for J.L. that were not full-time.

[25] The defendant J.L. stated in his affidavit, dated February 10, 2023, that the job Energy North was willing to offer him was in Carmacks to work on the arena, but Mr. Fordyce said nothing about the Carmacks job in his February 10th affidavit.

[26] J.L. provided no evidence that he was or has been looking for work until he was represented again by counsel in early 2023. He submitted a letter from Kwanlin Dün First Nation human resources department confirming his expression of interest in a job with Community Services/Housing. Nothing has yet materialized from this one attempt, which he says would be suitable because of childcare availability and flexibility of the job to allow him to meet his child's needs.

[27] All of this evidence suggests that J.L. has made a choice to stay on social assistance because in his view there is no point in working, taking time away from being with his son, “wrecking his body" as he said in his affidavit, only to have his earnings diminished because of his child support obligations.

[28] This approach, unfortunately, shows a denial of responsibility of J.L.’s legal obligations to his older children. Payment of child support by a parent is a legal obligation. He is not entitled to an exemption unless there are exceptional circumstances, none of which exists here.

[29] The second step of the analysis is whether the unemployment is a result of a child’s needs. There was a suggestion in the material that the diagnosis of global developmental delay — not further explained — is a special need of the child requiring J.L. to be available at any time and after school because childcare is difficult to find.

[30] A more recent physician’s letter indicated that an assessment for motor and language delay of the child will be made soon. However, there has been no diagnosis yet and little evidence connecting the child’s assessment with the difficulty in finding after-school care for him and with the requirement of J.L. to be available during school hours.

[31] I cannot accept that J.L.’s decision to remain on social assistance and not employed is due to the needs of his younger son. There is just not enough evidence.

[32] This brings me to the third step in the analysis, which is whether I should exercise discretion to impute income; and, if so, what amount is reasonable, evidence-based, and not arbitrary.

[33] Reasonableness is determined by assessing the parent's capacity to earn income in light of his employment history, age, education, skills, health, and available employment opportunities. In this case, the best determinant of reasonableness is an average of J.L.'s past earnings. He has skills, which have allowed him to earn up to $74,000 annually. He is relatively young. He is healthy. There is no medical evidence to the contrary.

[34] I take judicial notice of the fact that the unemployment rate in Whitehorse and the Yukon generally is very low. There may be some variables, however, related to work availability from time to time. The variation in J.L.'s annual income over the previous years, before he stopped working in 2020, may be a reflection of those variables.

[35] So, I will impute his income as an average of those five years, from 2015 to 2019, which amounts to $46,598 annually. This will amount to a retroactive payment owing for 2022 of $720.25 a month and half of this amount for 2021. There will be nothing owing for 2020 because deductions were made from unemployment insurance, and I also accept that there was shortage of work due to COVID during that time.

[36] The secondary issue of T.R.S.G.'s support requirements is resolved by the evidence of the plaintiff. She confirmed through her counsel at the hearing the affidavit statements remain accurate, and that is that T.R.S.G. remains dependent upon her. T.R.S.G. is living at home, working part-time at a minimal wage, and saving money for her further education outside the Territory.

[37] The definition of "child" under the *Family Property and Support Act* includes one who is over the age of majority, which is 19 in the Yukon, but unable to withdraw from a parent's charge or to obtain the necessities of life.

[38] When this situation changes, though, the plaintiff shall advise the defendant.

[39] J.L. has to recognize that he has a legal obligation to support his children as long as they are dependents. While it may be difficult, especially with all of the accumulated arrears, I cannot excuse or exempt him from the payments on the evidence that he has provided and that the law says he is obligated to make for his children's well-being. Choosing not to work because too much of his pay cheque goes to child support is not a valid reason.

[40] So, the income will be imputed as I have said for 2022 and half of 2021 at the amount of $46,598.

[41] In addition, the requirement to pay $100 a month towards arrears will remain; and going forward, his income will continue to be imputed at this amount.

[42] The plaintiff shall advise the defendant of T.R.S.G.'s ongoing work and education status.

[43] J.L. will be required to provide his financial information in June of each year, which will include a notice of assessment and his T1 forms.

[44] I just recalled, as I was delivering this decision, that I forgot to deal with the issue of costs in my prepared decision. I know, Mr. Campbell, you had asked for costs to be assessed primarily based on the need to come to court for the change of name application that C.J.G. felt that she had to bring. When Mr. Johannson got on the record, he advised that he told Mr. Campbell quite early on that J.L. would be consenting to this application. I appreciate that it was necessary to bring an application in the first place, but I note that the application was not lengthy. Consent was provided

shortly after counsel got on the record. In the circumstances, I am not going to make an order of costs for that purpose. So, no order as to costs.

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DUNCAN C.J.