IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation : *G.M.J. v. L.F.B.* 2008 YKSC 51 Date : 2008 07 11
Docket No.: S.C. No. 04-B0084
Registry: Whitehorse

Between:

G.M.J.

Plaintiff
(Respondent)

And

L.F.B.

Defendant
(Applicant)

Publication of the name of a child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act*.

Appearances:
The Applicant in person
Emily R. Hill Counsel for the Respondent

Before: Mr. Justice J.Z. Vertes

REASONS FOR JUDGMENT

[1] The applicant, Levy Frederick Blanchard, seeks an order requiring the respondent, Gwendolyn May Johnnie, to re-pay the sum of $2,337.00 paid as child support between 2005 and 2007.

[2] The respondent is the mother of a young child, now almost 5 years old. On April 26,2005, she obtained an order from this court that required the applicant to pay $123.00 per month as child support (effective as of February 1, 2005). In her affidavit in support of her claim for child support, the respondent alleged that the applicant was the child's father. The applicant did not appear in court when the order was issued. He claims that he was confused about the court process and did not have access to a lawyer.

[3] On July 24, 2007, the applicant obtained leave of this court to conduct paternity testing. The result established that he was not the father of the child. Subsequently, on December 18, 2007, the applicant obtained an order terminating all support obligations and cancelling accumulated arrears. What was not addressed at that time was the applicant's request for repayment of the support that had been paid.

[4] In January, 2008, the applicant sought to recover the support payments by means of a claim in Small Claims Court. That action was dismissed due to a lack of jurisdiction. The judge presiding in Small Claims Court took the view that the issue had to be addressed in Supreme Court. I make no comment on the correctiveness of that view.

[5] On the hearing before me counsel for the respondent submitted that there is no jurisdiction to order a repayment. The child support order was made pursuant to the *Family Property and Support Act*, R.S.Y. 2002, c.83. Therefore the authority to order repayment must be found in that statute. The Act makes provision for variation, both prospectively and retroactively, but there is no provision for ordering repayments. Therefore, in counsel's submission, the claim should be dismissed. There may be some common-law action or equitable relief available to the applicant, such as a claim for restitution, but there is no remedy available within the parameters of the statute here.

[6] The question of whether a court can order a repayment by one party of an overpayment of support by the other party is not without some controversy. Many cases have simply assumed that this power was within the authority of the court. In *Sherman v. Roy*, [2003] N.W.T.J. No. 87 (S.C.), Schuler J. of the Northwest Territories court described such orders as a "recent phenomenon", one that is a matter of discretion. In *Gartley v. Thibert*, [2002] O.J. No. 3313 (S.C.J.), Aston J. of the Ontario Family Court questioned the court's power to order a repayment since the court's jurisdiction on matters of child support are strictly statutory. He noted that no precedent case has thoroughly examined the source or scope of this power.

[7] There is certainly ample authority for a court to vary, rescind or suspend arrears, as well as to make retroactive variations, including the power to order

necessary adjustments or set-offs: *Beynon v. Beynon* (2001), 21 R.F.L.(5th) 255 (Ont. S.C.J.); *Hanson v Hanson* (2001), 21 R.F.L.(5th) 279 (Sask. Q.B.); *Masotti v. Masotti* (2002), 32 R.F.L.(5th) 379 (Ont. S.C.J.); *Adams v. Adams* (2001), 15 R.F.L. (5th) 237 (Alta. Q.B.); *Janes v. Janes* (2002), 30 R.F.L.(5th) 127 (Nfld. & Lab. S.C.). But, in these types of cases, there is some ongoing support obligation or accumulated arrears against which an overpayment, usually created by a retroactive variation, can be credited.

[8] There are some cases that have awarded a "judgment" against a support recipient for an overpayment: *Newman v. Tibbetts,* [2005] N.B.J. No. 135 (C.A.); *Vlasveld v. Vlasveld* (1999), 47 R.F.L.(4th) 372 (B.C.S.C.). But in these cases, there is no discussion or analysis of the jurisdiction for issuing a judgment.

[9] As many of these cases point out, payment of child support does not arise as an obligation at common law. It is a statutory obligation. Therefore, any right to recover an overpayment of support must be found within the governing legislation.

[10] The *Family Property and Support Act* provides for the variation of a support order in s.44(3):

> (3) In the case of an order for support of a child, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines or that evidence not available on the previous hearing has become available, the court may
>
> > (a) discharge, vary, or suspend a term of the order, prospectively or retroactively;
> >
> > (b) relieve the respondent from the payment of all or part of the arrears or any interest due on them; and
> >
> > (c) make any other order for the support of a child that the court could make on an application under section 34.

[11] In this case, the paternity testing results constituted evidence that was not available at the previous hearing which set the applicant's child support obligation. As a result the earlier order was varied so as to discharge that

obligation. But there is no express authority given in s.44(3) to order the repayment of funds. Is such a power to be inferred? In my opinion, it cannot.

[12] Three cases demonstrate how any power to order repayment is a matter of statutory interpretation.

[13] In the previously noted case of *Gartley*, the issue was whether an order could issue requiring repayment of an overpayment of child support caused by a retroactive variation. The trial judge questioned the authority of the court to order repayment under the variation provisions of the *Divorce Act* (Canada). The issue was resolved in that case because the Ontario support enforcement statute contained an express provision authorizing the court to "order repayment in whole or in part". No such provision can be found in the Yukon statute.

[14] In *R.M.H. v. A.F.A.*, [2003] S.J. No. 621 (Q.B.), the circumstances were the same as in the present case. A support payor subsequently discovered that he was not the child's father and sought recovery of support payments. Those payments were made because of a support order that was set aside upon the results of the paternity test. The court held that the father could not recover the payments. The legislation in that case enabled the court to make any order "it considers appropriate". So it may be thought that the court has the broad power to order repayment. However, a further provision of the same statute stipulated that, where an order is discharged or varied, "rights and duties that have been exercised and observed are not affected". Therefore, the court could not order restitution of support payments made prior to the discharge of the order.

[15] In the Yukon statute, there is no broad power to make any order the court considers appropriate. The powers of the court are limited to "discharge, vary or suspend the order" and to relieving the payor from the "payment of all or part of the arrears or any interest due on them". It can be said that the discharge of the applicant's support obligation is a retroactive variation to zero. But that is not the same thing as an order requiring the payee to repay the support she received.

[16] Finally, there is the case of *R.S.A.O. v. R.B.*, [2005] Y.J. No. 49 (S.C.). There too the circumstances were the same as in this case. However, the applicant was only seeking to cancel arrears. He did not seek an order for repayment of what

had been paid. In ordering the cancellation of arrears, Gower J. held that the court could not allow the arrears to remain payable since the legal foundation justifying the liability, i.e., paternity, did not exist. Gower J. did not, however, address the question of repayment.

[17] What these cases show, in my opinion, is that any power exercised by the court must be found in the statute. As the respondent's counsel noted in her submissions, there is a long-standing public policy argument against the requirement to repay amounts that have been paid for the benefit of a child. If such a requirement should exist then it is up to the legislature to authorize it by statute.

[18] It may be that the applicant can still recover the payments by way of an action at common law but I make no definitive comment on that. That is not the issue before me.

[19] For these reasons, therefore, the application is dismissed.

[20] Under the circumstances there will be no order as to costs. I ask respondent's counsel to prepare the formal order. The need for the applicant's approval as to form and content is dispensed with since the draft order will be approved by me.

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Vertes J.