

SUPREME COURT OF YUKON

Citation: *L.A.R.A. v. D.S.B.*, 2009 YKSC 74

Date: 20091125
S.C. No. 09-B0029
Registry: Whitehorse

Between:

L.A.R.A.

Applicant

And

D.S.B.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Philippa Lawson

Counsel for the Director of Maintenance
Enforcement Program

Norah Mooney

Counsel for the Respondent

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] This is an application by L.A. under the *Interjurisdictional Support Orders Act*, R.S.Y. 2001, c.19, for an order for child support for two children, aged seven and eight.

The applicant mother and the respondent father, D.B., were in a relationship from mid1999 to approximately August 2002. The mother now resides in Campbell River, British Columbia, with the two children, as a single parent. The father has since become involved in a relationship with B.B. and resides in Dawson City, Yukon. B.B. has a child from another relationship, and she and D.B. have just recently had another child together.

[2] The mother acknowledges that D.B. has paid over \$5,000 in voluntary child support since the separation, and that he has also been responsible for paying the significant costs associated with his having access to the two children. In recent years that has involved extended access over the children's summer and Christmas school holidays. I am informed that the general arrangement is that the father's own mother (the paternal grandmother) travels from Dawson City to Campbell River to pick up the children, returns with them to Dawson City, and then following each access visit, travels back to Campbell River with the children to return them to the mother. Not surprisingly these access costs have been very high. For example, the father has deposed that it cost \$3,748 for airfare alone for Christmas access in 2006, and a similar amount for airfare for the summer access in 2009. He estimates the total cost for Christmas access this year will be almost \$5,400 including airfare, hotels, car rental and fuel. His estimate for the summer access visit in 2010 for those same expenses is over \$5,500.

[3] Based on these high expenses, the father has made a claim of undue hardship under s. 10 of the *Yukon Child Support Guidelines*, seeking an order that he pay child support in a sum less than the table amount for his estimated gross income for 2009 and 2010.

[4] Counsel for the parties agree that unusually high expenses in relation to exercising access is a circumstance that may cause a parent to suffer undue hardship under the *Child Support Guidelines*. However, despite that determination, an application for undue hardship must be denied if the court is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child support payable, have a higher standard of living than the household of the other parent. In

making that determination, the court may use the Comparison of Household Standards of Living Test set out in Schedule II of the *Guidelines*. Although the use of that test is discretionary, I have already indicated to the parties that I intend to use it in this case.

[5] At the hearing, the father assumed that his gross income for 2009 would result in a table amount of child support payable for two children in the amount of \$375 per month. He offered to pay \$200 per month, on the understanding that the remaining \$175 per month would notionally go towards helping defray his high access costs.

[6] The mother was represented at the hearing by counsel for the Director of Maintenance Enforcement (for ease of reference I will refer to her here as “the mother’s counsel”). She argued that significant savings could be achieved by the father in exercising his access costs by making certain changes to the way things have been done over the last number of visits. Firstly, the mother has recently offered to drive from Campbell River to the Nanaimo ferry terminal to meet the paternal grandmother for the purposes of dropping off and picking up the children. That alone will save the father some costs.

[7] Secondly, the mother’s counsel proposed that the paternal grandmother travel from the Vancouver airport to the Nanaimo ferry terminal by bus and by ferry, rather than by air, as she has been doing. A helpful schedule of fares and sailing times was filed which indicates that this mode of travel is eminently viable, and could result in savings of several hundreds of dollars, as the paternal grandmother must make a total of four trips between the Vancouver airport and Nanaimo for each access visit.

[8] Thirdly, the mother’s counsel suggested that more attention be paid to the schedule of travel by the paternal grandmother in order to minimize the need for

potentially unnecessary hotel accommodation. Where hotels are unavoidable, it is suggested that less expensive, but still reasonable accommodations would suffice.

[9] At the hearing, there was a good deal of discussion between the lawyers about these and various other potential costs savings for access which might be achieved. Since the father was present at the hearing, it is unnecessary for me to detail those discussions in these reasons. In summary, the mother's counsel estimated that the father could save between \$2,500 - \$3,000 per trip, such that the total reasonable access costs per year should be no more than \$6,000. The father's counsel estimated that for each access visit, the father's probable costs would be roughly as follows:

Airfare	\$2,200
Meals (two trips)	\$ 400
Hotels	\$ 500
Gas (two trips)	\$ 400
Bus and ferry	<u>\$ 210</u>
Total	\$3,710

[10] The case law in this area is not particularly controversial. It is well summarized in *Peterson v. Peterson*, 2007 BCSC 497, at para. 7:

"In order to establish undue hardship, the payor parent must prove: first, that the table amount would cause undue hardship having regard to the criteria in s. 10(2); and second, that paying the table amount would result in a lower standard of living for the payor parent's household than the recipient parent's household (see *Van Gool v. Van Gool* (1998), 59 B.C.L.R. (3d) 395 (B.C.C.A.) at para. 45). According to *Van Gool*, *supra* at para. 51:

Hardship is not sufficient; the hardship must be "undue", that is, "exceptional", "excessive" or "disproportionate" in all of the circumstances. The onus is on the party applying under s. 10 to establish undue hardship; it will not be presumed simply because

the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.”

[11] The case law acknowledges that, in dealing with access costs as grounds for undue hardship, the determinations are fact specific. Further, the courts have recognized that even the most ordinary access arrangements involve some basic expenditure for transportation and meals and that it is only amounts in excess of these basic expenditures that can be considered “unusually high”. The cases have considered factors such whether the modes of transportation are reasonable given other alternatives, the overall distances travelled, the frequency of access, and the overall cost of exercising access in relation to the access parent’s income. Many of the undue hardship claims have failed on the second branch of the test, that being despite high access costs, the access parent nevertheless maintains a higher standard of living than the other parent. See *Deveau v. Groskopf*, 2000 S.K.Q.B. 186, at para. 10.

[12] I indicated to the parties at the hearing that I was prepared to allow the father a total of \$7,000 per year as reasonable access costs, which could be deducted from his gross household income, together with his other annual tax deductions, EI premiums and CPP contributions, for the purpose of comparing his household income with that of the mother.

[13] Based on information provided by the lawyers, I have prepared a table comparing the household incomes of the father and mother for each of the years 2009 and 2010. A copy of that table may be attached as an appendix to the published version of these reasons. For today’s purposes, I have provided each counsel with a copy. I

also note that the father's counsel submitted a memorandum to me after the hearing, with the consent of the mother's counsel, because she had a misunderstanding with her client over the father's 2009 income. She wished to clarify the details of that income, as well as the father's deductions for 2009. She provided similar clarification with respect to the father's current partner, B.B., for 2009. I have assumed all of the information provided by the father's counsel to be reasonable and accurate and have used that information in my comparison of household incomes. The assumptions I have made are noted in the table.

[14] The result of the comparison is that, in 2009, the father is likely to have a household income ratio of 1.607, in comparison to that of the mother, which is estimated to be 1.262. This is a clear indication to me that, pursuant to s. 10(3) of the *Child Support Guidelines*, I must deny the father's undue hardship application for 2009. With respect to the child support payable in 2009, I have determined that, based upon the father's gross income of \$23,284, the table amount payable for two children is \$363 per month.

[15] Ordinarily, the child support payable in 2009 would be retroactive to the filing of the mother's application. Although the original application was dated April 28, 2009, it was not served on the father until June 28, 2009. Also, the father had already made arrangements for his summer access to the children, and carried out those arrangements, well prior to the hearing of the application. In other words, he had already incurred significant access costs, which I estimate to be likely in the vicinity of \$5,500, all-inclusive, before any determination was made as to the proper amount of child support payable by him in 2009. Further, I find that it is in the best interests of

children for the father to exercise the access he has been doing, which over the summer months is for a significant period of approximately six weeks. That in turn grants the mother some respite from her responsibilities as single parent and allows her to earn a little more money over that period by working longer hours. She also does not incur her normal child rearing costs while the children are in the care of the father.

[16] For all those reasons, I conclude that it is appropriate to exercise my discretion to backdate the child support payable for 2009 to commence October 1, 2009, and to be payable on the 1st day of each month following.

[17] With respect to 2010, my comparison of the parties' household standards of living results in an estimated household income ratio for father of 1.227, which is slightly higher than that of the mother at 1.173. Accordingly, I am once again required by the *Child Support Guidelines* to deny the father's application for undue hardship with respect to his anticipated income in 2010.

[18] If I am wrong about any of my assumptions for 2010, or my estimate of the father's reasonable access costs, it is conceivable he could end up actually having a slightly lower household income than that of the mother. However, even in that event, I would refer to *Weeks v. Weeks*, 2006 PESCTD 26, where MacDonald J. said, at paras.

27-29:

"The *Guidelines* are silent as to what should be considered in determining the amount of support or even if it should be paid, in a situation where the claim of undue hardship is valid.

It could be argued that the payor's household standard of living should not be lower than the household of the payee. However, undue hardship under the *Guidelines* is not to be determined merely by looking at a comparison of the parties standard of living.

A finding of undue hardship is made by a judge using a broad discretion and viewing all the facts pertaining to the payor. In this particular instance, it would be unjust to have a great disparity between the standard of living of the two parties...”

[19] The household incomes of each of the father and the mother will be roughly equivalent after the father pays his reasonable access costs of \$7,000 per year and child support of \$4,200 per year, based on the table amount for two children and the father’s estimated gross income of \$22,400. The father also has the support of his partner, B.B., who presumably will be returning to work after her maternity benefits expire, as well as his parents and his First Nation. Accordingly, I conclude that it would be fair to require the father to continue to pay the table amount for 2010.

[20] I specifically order the father to provide annual financial disclosure to the mother on or before June 30th of each year, as required by s.21 of the *Child Support Guidelines*. At a minimum, this should include a copy of the father’s notice of assessment from Revenue Canada, as well as copy of his most recent pay stub, if he is then receiving employment income or other income. This is important, because the father is currently in a two year renewable resources management program at Yukon College in Dawson City. He is being sponsored by his First Nation to attend that program and is currently receiving a living allowance of \$1,555 per month. However, once he graduates from that program, it is likely that his income will increase and that the amount of child support payable will similarly increase.

[21] The mother did not seek court costs, so none are ordered.

Appendix A

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Comparison of Household Standards of Living Test

	Applicant 2009	Applicant 2010	Respondent 2009	Respondent 2010
Total Annual Household Income	\$16,495 (Note 1)	\$16,495 (Note 1)	\$23,284 (Note 2a) + \$24,826 (Note 2b) = \$48,110	\$22,440 (Note 3a) + \$16,544 (Note 3b) = \$38,984
Deductions (Income Tax, EI, CPP)	\$0 (Note 1)	\$0 (Note 1)	\$2441 + \$935 = \$3376 (Note 4)	\$2,300 (Note 5)
Net Annual Household Income	\$16,495	\$16,495	\$44,734	\$36,684
LESS Reasonable Access Costs	-----	-----	- \$7,000	- \$7,000
Child Support Payable	+ \$5,772	+ \$4,200	- \$4,356 (Note 6)	- \$4,200 (Note 7)
Total Household Costs, after access costs and child support	\$22,267	\$20,695	\$33,378	\$25,484
Appl. Low Income threshold	\$17,649	\$17,649	\$20,764	\$20,764
Household Income Ratio	1.262	1.173	1.607	1.227

Note 1: Counsel for the parties agreed that it is reasonable to assume that L.A.:

- (a) will earn about the same in 2010 as she claimed to have earned in 2009; and
- (b) will not likely pay any significant amount of tax on that income.

Note 2(a): According to his counsel, in 2009 D.B. will earn:
 \$10,059.77 (employment earnings)
 \$ 7,004.00 (EI for 17 weeks x \$412/week)
 \$ 6,220.00 (Education Allowance for 4 months x \$1,555/month)
 \$ 23,283.77

- (b): According to D.B.'s counsel, in 2009 B.B. will earn:
\$ 1,250.00 (child support for 5 months x \$250/month)
\$ 1,305.00 (child tax credit for 3 months x \$435/month)
\$ 7,650.00 (child tax credit for 9 months x \$850/month)
\$ 14,621.00 (EI for 2009)
\$ 24,826.00

Note 3(a): Assuming D.B. earns:
\$12,440.00 (\$1,555 per month x 8 months)
\$10,000.00 (D.B.'s summer wages)
\$22,440.00; and

- (b) Assuming B.B. earns:
\$ 3,000.00 (child support for 12 months x \$250/month)
\$10,368.00 (child tax credit for 12 months x \$864/month)
\$ 3,176.00 (EI for 2 months)
\$16,544.00

Note 4(a): According to D.B.'s counsel, he had \$748 deducted from his EI earnings. The estimate of deductions from his employment earnings is \$1,119.04 (taxes), \$163.60 (EI premiums) and \$410.40 (CPP), for a total of \$1,693.04. Total deductions for D.B. in 2009 are estimated to be \$2,441.04 (\$784 + \$1,693.04).

- (b) D.B.'s counsel estimates B.B.'s total taxes for 2009 will be \$935.00.

Note 5: Assuming D.B. is taxed on his income of \$22,440 at approximately the same rate as for 2009, given that his anticipated earnings in 2010 will be slightly less than in 2009, I estimate he will incur about \$2,300 in total deductions.

Because over 80% of B.B.'s income is non-taxable, I have assumed she will not incur any significant deductions.

Note 6: Based on D.B.'s gross income for 2009 of \$23,284, the table amount for two children is \$363/month.

Note 7: Based on D.B.'s estimated gross income for 2010 of \$22,400, the table amount for two children is \$350/month.