SUPREME COURT OF YUKON

Citation: *C.M.S.* v. *M.R.J.S.*, 2011 YKSC 05

Date: 20110111
Docket: 08-B0031
Registry: Whitehorse

BETWEEN:

C.M.S.

Plaintiff

M.R.J.S.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
C.S. — Appearing on her own behalf
M.S. — Appearing on his own behalf

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): I have gone back into the file and pulled Ms. S.'s financial statement that was filed at the time of the trial. At that time, her Guideline income for basic child support was $26,001. If there had been a s. 9 set-off at that time starting May 1, 2009, because of the 50/50 shared custody arrangement, then she would have been required to pay child support of $232 per month versus the amount of $413 payable by Mr. S., resulting in a difference of $181 per month. That would have been the case until the end of July, when Ms. S.'s maternity benefits ran out. So three months at $181 would have resulted in $543 total payable by Mr. S.

[2] From August 1, 2009, to October 31, 2010, which was the month of the last payment made by Mr. S., there is a period of 15 months, and I have used the current income information, which is not disputed, and that is that Mr. S. has an income of $46,982.24, which would result in child support payable of $403 per month. Ms. S. has an income of $43,003.15, which would result in $369 per month. The set-off amount is $34, which would be payable by Mr. S. to Ms. S. for a period of 15 months, equalling a total of $510. The two amounts, $543 plus $510 equals $1,053 payable by Mr. S. to Ms. S. The total amount that Mr. S. did in fact pay, he advises me, is $7,227.50, less the amount that he should have paid, is $6,174.50.

[3] Now, I come to the issue of Mr. S.'s rather peculiar delay in addressing what he says was a mistake, both by his lawyer and by me, as the trial judge, in not understanding that he did not want to pay child support in the event that the child's residency was split 50/50 between the parties. He says that it was clear in his mind that he only intended to offer to pay child support in the event that Ms. S. obtained sole custody of the child and moved to Ontario. That said, there was no objection raised to that assumption in my reasons for judgment, which were filed April 21, 2009, until this application was brought December 30, 2010. That is notwithstanding the fact that there was a subsequent application on the issue of court costs quite soon after the trial judgment was released, which I issued a ruling on, on June 15, 2009. At no time prior to the current application did Mr. S. raise what he says was a mistaken assumption made on the part of his lawyer and myself, or both.

[4] In my view, Mr. S. has to bear some consequences for that in not bringing forward this application to vary in a more timely fashion. Sit down, sir, or I will have you

removed from the courtroom. Sit down. The time for your submissions is over. What Mr. S.'s actions did, in effect, was create a situation where Ms. S. came to rely upon the child support that was being paid as being voluntarily paid with no complaint --

[5] THE DEFENDANT: That is incorrect.

[6] THE COURT: -- and presumably it was put towards the child's best interests.

[7] THE DEFENDANT: I brought it up with C.

[8] THE COURT: I am not listening to you, sir, and if you say one more word, I will have you physically removed from this courtroom, and I am not joking. If you think this is a game, it is not, so remain quiet while I am issuing my reasons for judgment.

[9] In my view, Mr. S. had an obligation to bring the application to vary in a more timely fashion, and he was not diligent in that regard, and the reliance that Ms. S. had on the receipt of this child support must be taken into account as reasonable in all of the circumstances.

[10] I am going to order that Ms. S. repay some of the child support, but not all, and in the circumstances, it seems appropriate to me to arbitrarily reduce the amount of overpayment by one-half, so that would take it down from $6,174.50 to $3,087.25. If that is allowed to be repaid over a period of 24 months, which I find reasonable, then those payments will be in the neighbourhood of $130 per month, and that is what I am going to order.

[11] In particular, and I will have my staff draft up an order to vary the order dated April 21, 2009, that order will be varied as follows: Paragraph 5 will be vacated and will be replaced with a paragraph, which I will word appropriately, which reflects what I just said in that there should be retroactively imposed a s. 9 set-off and it can be worded to commence May 1, 2009, rather than January 1, as in the original order. That will go until the end of July 2009, and there will be a further paragraph to reflect the s. 9 set-off from August 1, 2009, to October 31, 2010.

[12] Paragraph 6 will be amended to state that the special or extraordinary expenses will be shared, with each party paying 50 percent.

[13] Paragraph 7 will be vacated, and that is the paragraph dealing with the exchange of income tax information.

[14] For the benefit of Mr. S. and to make matters, hopefully, easier with respect to each party's dealings with Revenue Canada, I will make a declaration that from January 1, 2009, to date, that the child was a dependent of both parties, and hopefully that will allow Mr. S. to make an amended tax return for 2009 so that he can obtain the child tax credits due to him for that year. On a go-forward basis, I understand that the new rotation is on a six-month basis, so I will leave it to the parties to make their own arrangements with Revenue Canada as the next rotation, I think, for Mr. S. would begin May 1 of this year for a period of six months.

GOWER J.