SUPREME COURT OF YUKON

Citation: *S.N.S. v. E.G.S.*, 2012 YKSC 104

Date: 20121219
S.C. No. 96-B0017
Registry: Whitehorse

Between:

S.N.S.

Plaintiff

And

E.G.S.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Malcolm E.J. Campbell — Counsel for the Plaintiff
André Roothman — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiff to vary a child support order from September 1996 requiring the defendant to pay $100 per month for their child who is now 18 years old. There is no dispute over the fact that the defendant's salary has increased considerably. The primary issue is the length of retroactive child support based on the principles established in *D.B.S.* v. *S.R.G.*, 2006 SCC 37.

BACKGROUND

[2] The parents had a 2-year common-law relationship. The child was born on July 15, 1993.

[3] On September 10, 1996, this Court ordered the defendant father to pay interim child support for the child of the relationship in the amount of $100 per month. This award was based on the Child Support Guidelines and included a cost of living increase each year. The child support order did not include a determination of the father's 1996 income.

[4] The defendant has faithfully paid $100 a month for his child since the 1996 court order, although he has not paid the cost of living increase ordered. However, he has had a significant salary for approximately 14 years, and one which is substantially greater than the income of approximately $12,600, which is the current table amount for $100 a month child support. The father also indicated that, in 1996, he was supporting three other children in the approximate amount of $345 per month. He now says that he is paying $300 biweekly for four other children.

[5] His income for the last five years has been:

Years	Income	Approximate Table Amount of Child Support
2007	70,012	650.00
2008	62,325	586.00
2009	87,951	804.00
2010	96,375	876.00
2011	86,685	792.00

[6] I note that the table amounts were provided by counsel for the mother.

[7] The mother did not make a formal written demand to the father for an increase in child support until she sent an email on November 28, 2011, stating the following:

> I am requesting more child support from you based on your income. I have spoken to a lawyer and we can settle this matter outside of court, or if you decide not to, then I will be

> proceeding with court. I am also asking that support continues until [child] is 22 or 23 due to his health, as he is dependent on me and he is very limited to what he can do in his life. You can come and talk to me about this if you need more information, but if I do not hear from you then I will proceed with this matter.

[8] Although she made the request in writing after consulting a lawyer, I am satisfied that she broached the subject at an earlier date as she stated in her affidavit:

> Over the years I have asked the Defendant on numerous occasions to voluntarily increase the amount of child support that he pays for [the child]. The Defendant generally does not respond to these requests.
>
> …
>
> For the past ten years, I have also asked the Defendant for assistance with buying groceries to help feed my son. He has only ever bought one package of wieners and some hotdog buns.

[9] The defendant's response to the mother's assertion that she has broached the subject before her e-mail of November 28, 2011, is as follows:

> I have no recollection of any requests for increased child support being made by the plaintiff, other than the email from the plaintiff on November 28, 2011. At the time I have not considered the request to be reasonable, given the fact that [the child] has earned a substantial amount during the summer holidays, as mentioned above.

[10] Taking into account the fact that these affidavits were carefully prepared by counsel in each case, I do not consider the statement "I have no recollection of any requests for increased child support made by [the mother]" to be a denial of oral requests to increase child support.

[11] The father also stated that he does not oppose the payment of reasonable child support if there is a need for it. He opposes any child support for 2011 based on the child's summer earnings.

[12] The child has significant cognitive and social problems resulting from a cerebral lesion which affects his awareness and makes him susceptible to seizures. He has a cerebral arteriovenous malformation in his left temporal lobe which interferes with memory. This was not diagnosed until late 2009. The medication he takes to prevent the seizures has side effects such as grogginess and does not always effectively control his spells. I have no doubt that the child is unable to withdraw from his mother's care and control and will remain a child of the marriage dependent upon his mother's care for the foreseeable future. He has completed high school despite his challenges.

[13] His mother has made many trips to Vancouver for his medical treatment, specifically: November 17, 2009; March 1, 2010; March 26, 2010; July 2, 2010 and January 31, 2011.

[14] Remarkably, the son has been capable of working and in the summer of 2011 earned approximately $10,000 on a greenhouse project. The father is hopeful that his son will obtain permanent employment with a nearby mine. For the purpose of this application, I am advised that the child is working full time at the mine. Counsel for the mother indicates she is limiting her claim for arrears from 2007 to July 2012, when the child started permanent employment. She reserves the right to return to court if the child is unable to find employment in the future.

[15] The child was 18 years old at the time this application was filed and is presently 19 years of age. The mother and father live in a small First Nation community several hours drive from Whitehorse.

The Law of Retroactive Child Support.

[16] This application for retroactive child support is governed by the following provisions of the *Family Property and Support Act*, R.S.Y. 2002, c. 83:

> s. 32 Every parent has an obligation, to the extent the parent is capable of doing so, to provide support for their child.
>
> …
>
> s. 34(1) A court may, on application, order a person to provide support for their dependants and determine the amount thereof.
>
> …
>
> s. 36(1) A court making an order for the support of a child shall do so in accordance with the child support guidelines.
>
> …
>
> s. 39 If practicable, the court shall exercise its jurisdiction under this Part so as to encourage the dependant to achieve financial independence.
>
> …
>
> s. 44 (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.
>
> (4) A court making an order under subsection (3) shall do so in accordance with the child support guidelines.

[17] I am satisfied that the court has jurisdiction to hear this variation application as the child was 18 years old at the time of the application. By the *Act's* definition, a child is under 19, the Yukon age of majority, and not withdrawn from his mother's charge (s. 1).

[18] The *Yukon Child Support Guidelines*, O.I.C. 2000/63, as amended by O.I.C. 2005/35, has the following applicable provisions:

> VARIATION OF ORDERS FOR CHILD SUPPORT
> Circumstances for variation
>
> s. 12 For the purposes of subsection 44(3) of the Act any one of the following constitutes a change of circumstances:
>
> (a) if the amount of child support includes a determination made in accordance with the table, any change in circumstances that would result in a different order for the support of the child; and
>
> (b) if the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs, or other circumstances of either parent or of any child who is entitled to child support.
>
> …
>
> Continuing obligation to provide income information
>
> s. 23(1) The financial statement that is required under section 45(3) of the Act must include
>
> (a) the documents referred to in subsection 19(1) for any of the three most recent taxation years for which the parent has not previously provided the documents;

> (b) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and
> (c) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship
>
> …
>
> (3) If information about the income of the parent in favour of whom an order for child support is made is used to determine the amount of the order, that parent must, on the written request of the other parent or party, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide the other parent or party with the documents and information referred to in subsection (1).

[19] The 1996 Child Support Order did not contain a term requiring an annual production of s. 23(1) income information.

[20] *D.B.S. v. S.R.G.*, cited above, states at para. 59, that application-based statutory regimes like the Yukon place responsibility on both parents to ensure their child is receiving a proper amount of support:

> … While the payor parent does not shoulder the burden of automatically adjusting payments, or automatically disclosing income increases, this does not mean that (s)he will satisfy his/her child support obligation by doing nothing. If his/her income rises and the amount of child support paid does not, there will remain an unfulfilled obligation that could later merit enforcement by a court.

[21] The Supreme Court of Canada adds that while an application is necessary to trigger the court's jurisdiction "… courts should not be discouraged from defending the rights of children when they have the opportunity to do so." (para. 60)

Awarding Retroactive Support Where There Has Already Been a Court Order for Child Support to Be Paid

[22] The Supreme Court of Canada in *D.B.S. v. S.R.G.* sets out the tension in applications for retroactive support between the certainty that the payor has come to expect and the possibility that child support orders may be varied to ensure that children receive the appropriate amount of support. (paras. 63 – 64)

[23] The Supreme Court of Canada's analysis begins with the principle that a court order for child support is "presumptively valid". However, the presumption is not absolute, and a variation may be required when there has been a material change in the payor's income, as in the case at bar. In fact, the Court concludes the retroactive awards are not truly retroactive, as a child's right to support is commensurate with the parents' income. When this changes, so too does the obligation (paras. 65 – 70).

[24] The Supreme Court of Canada summarized the situation at para. 74:

> In summary, a payor parent who diligently pays the child support amount ordered by a court must be presumed to have fulfilled his/her support obligation towards his/her children. Acting consistently with the court order should provide the payor parent with the benefit of predictability, and a degree of certainty in managing his/her affairs. However, the court order does not absolve the payor parent -- or the recipient parent, for that matter -- of the responsibility of continually ensuring that the children are receiving an appropriate amount of support. As the circumstances underlying the original award change, the value of that award in defining parents' obligations necessarily diminishes. In a situation where the payor parent is found to be deficient in his/her support obligation to his/her children, it will be open for a court, acting pursuant to the Divorce Act or the Parentage and Maintenance Act, to vary an existing order retroactively. The consequence will be that amounts that should have been paid earlier will become immediately enforceable.

Factors to be Considered in Retroactive Child Support Applications

[25] In its discussion of factors that should be considered in retroactive child support applications, the Supreme Court of Canada makes it clear that none of the factors are decisive and that it may be appropriate to award retroactive child support even when there is no blameworthy conduct on the part of the payor.

Reasonable Excuse why Support Was Not Sought Earlier

[26] The Court stated at para. 101 of *D.B.S. v. S.R.G.*:

> Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see *Chrintz v. Chrintz* (1998), 41 R.F.L. (4th) 219 (Ont. Ct. (Gen. Div.)), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.

[27] The Court is clear that unreasonable delay does not necessarily eliminate the payor's obligation but rather is a factor in exercising its discretion to order a retroactive award. (para. 104)

Conduct of the Payor Parent

[28] In paras. 105 – 109 of *D.B.S. v. S.R.G.*, the Court characterizes blameworthy conduct as "anything that privileges the payor parent's own interests" over the right of the children to appropriate support. Thus, a payor parent who knowingly diminishes their support obligation should not be allowed to profit from such conduct.

[29] A court should consider the difference between the amount the payor paid and the amount he or she should have been paying. The closer the two amounts, the more reasonable the payor's belief that the obligation had been met. Conversely, where the change in circumstances is "sufficiently pronounced", the payor is no longer reasonable in relying on the existing court order. The court may also consider payor contribution in other appropriate ways beyond the statutory obligation where appropriate.

Circumstances of the Child

[30] The Supreme Court of Canada recognizes that a retroactive award is a poor substitute for a payment when the child needs it the most. Courts must consider the current living standard of the child to determine if a retroactive award is appropriate, however, the court must also consider the need of the child in the past, which may be compensated by a retroactive award.

Hardship Occasioned by a Retroactive Award

[31] This factor considers that the payor parent may have other children and a retroactive award may disrupt that parent's financial affairs. Thus, a court should attempt to minimize hardship where possible, but it is less a concern where there has been blameworthy conduct.

ANALYSIS

[32] I will now consider the above factors to determine if a retroactive child support order should be made in this case.

[33] There is no doubt that the mother has delayed in bringing her application. The fact that she is in a small somewhat remote northern community without easy access to medical and legal support is certainly a consideration. There is also no doubt that she

has numerous obligations, including working while trying to raise a child with significant cognitive and social problems.

[34] On the other hand, the father is not blameless in the matter as he has failed to pay the cost of living increase and the difference between what he was paying and what he should have been paying is substantial.

[35] The circumstances of the child are unusual, given his cerebral lesion and susceptibility to seizures. While his current living standard has improved considerably, it must be balanced with the acute need he would have had while trying to determine a diagnosis in Vancouver from 2009 onwards.

[36] The hardship to the father and his current family must also be considered. The father indicates that he is paying $300 biweekly for four other children from the relationship he commenced when his relationship with the mother terminated. Unfortunately, there are few details on the ages or circumstances of the children. The father's Tax Summary also indicates a line 220 spousal support payment deductions, which have ranged from a low of $675 in 2009 to a high of $6,650 in 2008.

[37] Considering all these factors, including the child's medical needs and the fact that the father is not blameless in the circumstances, I conclude that the mother's delay is not unreasonable to the point where the father should be relieved of any retroactive child support obligation. Thus, a retroactive child support award should be ordered and I now turn to the date of retroactivity and the amount of the award sufficient to meet the payor's obligation.

Date of Retroactivity

[38] Determining the date of retroactivity is a challenging exercise of discretion and I am going to set out some general principles from *D.B.S. v. S.R.G.* at paras. 118 and 124:

1. as a general rule, the date of retroactivity should be the date of effective notice (para. 118);
2. parents should not be penalized for treating judicial recourse as a last resort, as it is costly and hostile with the ultimate results being fewer resources available for the children (para. 120);
3. effective notice does not require legal action; all that is required is that “the topic be broached” so that the payor can no longer assume the original order is fair. (para. 121);
4. it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor (para. 123);
5. blameworthiness of the payor in not disclosing the change of circumstances could move the date of retroactivity back to the date there was a material change of circumstances (para. 124)

[39] In the circumstances of the case at bar, it must be remembered that the mother limited her application to a period from January 1, 2007 to July 2012. Counsel for the father submits that November 2011, the date of actual notice should be the date of retroactivity.

[40] There are two relevant factors to the issue of when the mother “broached the subject”. The mother states that she asked the father to voluntarily increase the amount of child support “over the years”. She also refers to her requests for groceries “for the past ten years”. I am satisfied that the mother “broached the subject” well before the November 2011 date of formal notice.

[41] Three years before the formal notice takes the date of retroactivity back to November 2008 and I have no difficulty accepting that the matter was “broached” prior to November 2011. As a result, I am satisfied that the date of retroactivity should be November 1, 2008.

[42] The end date for retroactivity should be June 30, 2012, when the child started permanent employment.

Quantum of the Retroactivity Award

[43] In *D.B.S. v. S.R.G.*, the Supreme Court of Canada determined that the quantum of the retroactive award should follow the *Child Support Guidelines*. However, s. 44(3)(b) of the *Family Support Act* gives the court discretion to tailor the award to the circumstances. There is also discretion provided in the *Child Support Guidelines* for situations of undue hardship.

[44] Section 10 of the Yukon *Child Support Guidelines* sets out the factors upon which undue hardship can be found. The applicable factor here is the father’s apparent legal duty to support four other children in the amount of $300 biweekly. Unfortunately, the father did not complete Part 7 – Undue Hardship in the Financial Statement he filed on July 6, 2012. Nor was there sufficient information or analysis to indicate whether the father would, after determining the amount of child support, have a higher standard of

living than the mother. Thus, while a determination of undue hardship may have been appropriate, it must be denied under s. 10(3) which states as follows:

> (3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8, or 9, have a higher standard of living than the household of the other parent.

[45] Nevertheless, the Court's discretion under s. 44(3)(b) remains.

[46] Counsel for the father indicated that the father was prepared to pay $500 a month on arrears, which would be somewhat less than the appropriate table amount in para. 5 of this judgment. In all the circumstances of this case, I find that $500 a month is an appropriate retroactive monthly child support award given the father's other obligations.

[47] I therefore order a retroactive award for 44 months for a total of $22,000 payable at a monthly amount of $500 commencing January 1, 2013. Costs may be spoken to in case management.

VEALE J.