SUPREME COURT OF YUKON

Citation: *T.E.A.* v. *R.S.A.,* 2012 YKSC 65 Date: 20120723
Docket S.C. No.: 07-D3944
Registry: Whitehorse

BETWEEN:

T.E.A.

Petitioner

AND:

R.S.A.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:
Lenore Morris — Appearing for the Petitioner
Kathleen Kinchen — Appearing for the Respondent

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): This is an application by the father to essentially reduce child support based on a change in circumstance with respect to one of the children of the marriage, who is no longer living in a shared residency. The application, in my view, is an application with respect to child support. I have indicated that if there is an issue arising at the end of my judgment with respect to spousal support, it is an application to be heard on another day.

Background

[2] There are three children of the marriage, G., born July 26, 1994, who is almost

18 years old, A., born March 24, 1996, 16 years old, and D., born December 4, 2000, aged 11. The mother and father separated in 2007 and entered into a separation agreement which contemplated a joint custody and shared parenting of the three children. In 2007 they initially agreed on a table amount of child support for the three children to be paid to the mother from the father in the amount of $1,185, plus an additional amount of $515 which was arrived at for a variety of reasons in the separation agreement. The father indicated he accepted a lower value for his interest in the house and that the mother received the child tax benefits. The mother's view was that she had accepted the sum of $1,700 per month based upon not taking the spousal support that she was entitled to.

[3] There are two provisions of the separation agreement that reflect this. Para. 4.08 which reads:

> Commencing July 5, 2007, R. shall pay child support for the Children to T. in the amount of $1,700 per month to be paid twice a month for so long as the Children are attending elementary or high school.

The words "barring any material change in circumstances" were deleted by the initials of both parties.

[4] Para. 4.13 indicates:

> The cost for post-secondary education will be shared equally by the parties after deducting all grants, bursaries and other funding that may be available to the Children by virtue of their Indian status.

[5] In the mother's affidavit, which was filed on June 18, 2008, at paras. 10 and 11, she said the following:

> 10. My lawyer advised me before I signed the Separation Agreement that the child support provisions in it can only be changed by consent or if there was a “material change in circumstances” justifying a reopening of the issue. In the year since it was signed, neither my nor my spouse’s financial circumstances have changed significantly.
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> 11. In signing the Separation Agreement, I waived my right to spousal support, to which my lawyer advised me I was entitled, largely in return for my spouse’s commitment to pay a specific amount of child support. My spouse is aware that this was a basis for my waiver, but he is now claiming that he is being unfairly burdened by having to pay excessive child support - even though his income has continued to rise.

[6] The actual change in circumstance that has taken place relates to the child A., who resides entirely with the father at this time, and that is the basis on which the father applies to have the child support paid to the mother reduced. There is a potential change in circumstance and that would be when the child G. stops going to school, which would take place in September of 2012. Whether or not that takes place is unknown at this point, but there is no doubt that the parents in the separation agreement agreed that child support would terminate for a child who was no longer in school. That means that the child, if they were no longer in high school or no longer in post-secondary school, so with respect to G., he could continue in post-secondary school and be supported according to the separation agreement, or he could continue in high school and be supported. But if he is in neither, then the father does not have to pay child support to the mother for the child. It is contemplated that G. would remain in the shared custody of the parents whether he continues in school or not.

Analysis

[7] Let me first deal with the issue of child support. There is no question that the agreement entered into in 2007 was an agreement that set a child support table amount

payable by the father to the mother, and that table amount was then increased by $515 reflecting several factors in the financial separation of the parties, but there was no question that the mother did not pursue spousal support based on that top-up of child support. My view would be that the conceptual arrangement of the parents in 2007, which is in the separation agreement, should continue in the future. That means that if one child changes residence so the child is exclusively in the residence of the other parent, then that would affect the amount of child support payable. The clause that the parents signed saying that they were deleting the "barring any material change in circumstances," in my view, is not a realistic approach because if it occurred that all three children were living full time with the mother, one could be assured that she would be coming to court seeking an increase in child support based on the fact that there was a change in residence.

[8] I am also of the view that the Court has the power with respect to children to order child support as appropriate in the circumstances and, in my view, the appropriate circumstance is to take into account that A. resides exclusively with the father with the result that the father's base child support for two children is $1,173 based on the 2011 incomes of the respective parents, and the sum of two-thirds of $515, the top-up figure, i.e. $343, should be added to that number, resulting in a child support payment of $1,516. There is an additional setoff required because the child A. is residing entirely with the father, so the $1,516 should be reduced by the $195 setoff child support amount that would have been payable by the mother to the father. The net child support payable to the mother is $1,321.

[9] I am not going to go into the details on what the change would be with respect to the child G. because that will be dependent on what occurs, but I think I have given my indication on how that should be dealt with consistently with the conceptual arrangement that the parents have made under this agreement.

[10] There were additional issues arising in the application and the mother sought a recommendation that a custody and access report be prepared based on parental alienation. I am not satisfied that this is a case of parental alienation based on the evidence before me, but nevertheless, there are some disturbing issues with respect to G. His educational achievement has plummeted rather dramatically and surprisingly, and there are also issues with respect to the other two children and their relationship with their mother. In my view, it is not appropriate to have a full custody and access report, which I might indicate would take many months before it was completed, if at all. But it would be appropriate, and I do recommend, that a children's lawyer be appointed and the lawyer should be directed to contact each child to determine if the child wishes to talk to them. Then, if the children's lawyer feels that there are issues arising that should be dealt with such as, for example, some kind of counselling or some treatment, and both counsel have referred to CATS, then we could come back to court to give consideration to those recommendations.

[11] With respect to the outstanding specials, the separation agreement indicated in paragraph 4.09 that the costs would be shared on a 50-50 basis and I see no reason to change that with the result that, as I understand it, the mother does owe $521.02 to the father, representing her one-half share of the special and extraordinary expenses.

[12] Counsel, anything that I have not addressed?

[13] MS. KINCHEN: Is it -- we did ask that it be noted A.'s primary residence is with the respondent.

[14] THE COURT: Yes. That should be made clear that A.'s residence has changed and it would remain a joint custody order, as I understand it, for the three children, but the primary residence of A. would change to the father rather than a shared residence as with the other two children.

[15] MS. KINCHEN: And I believe I had sought costs.

[16] MS. MORRIS: I would say that the success has been mixed on this and it's not an appropriate case for costs.

[17] THE COURT: I agree that the decision was probably a novel one that had not been considered and in the circumstances, it would be appropriate for each of the parties to bear their own legal expenses. Thank you.

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VEALE J.