

SUPREME COURT OF YUKON

Citation: *H.A.P. v. D.B.C.*, 2013 YKSC 109

Date: 20131018
S.C. No. 04-B0060
Registry: Whitehorse

BETWEEN:

H.A.P

Plaintiff

AND:

D.B.C.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:
Kathleen Kinchen
André Roothman

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): The mother and father have two children, J., who is 16 years old, and K., who is 13 years old. In 2005, I ordered that the parents shall have interim joint custody of the children.

[2] Initially, the children resided at the mother's residence, with the father having residency with the children for two days in the first week, and then four days in the second week. However, it is agreed that the residential arrangement has evolved into being one of one week with each of the mother and father. In other words, a week-on and a week-off.

[3] On October 25, 2011, Justice Gower ordered that J. be permitted to leave Whitehorse to attend a private school in British Columbia commencing September 2011 and each year thereafter. The maternal grandmother pays J.'s school fees. K. remains with the father in Whitehorse. The mother was ordered to consult with the father on J.'s schooling, with the mother making the final decision, and the father having the right to apply to this Court to review that decision.

[4] Unfortunately, the issue of child support has never been addressed by a court order. The mother applied for retroactive and prospective child support in 2011 for J. and K., but only the schooling aspect for J. was addressed. The mother now brings forward that application, as well as seeking a specified access order to K.

[5] The father now applies for custody of K., reasonable access to J., and retroactive and prospective child support for K. The father also applies for an order that the mother's income be imputed at \$45,239 for the support of K. from 2011 onwards, and that the parties share retroactive extraordinary expenses in proportion to their income.

[6] The mother lived and worked full time in Whitehorse before a boating accident in 2011 which resulted in her not being able to work for nine months. It has also affected her ability to stay on her feet for long periods of time. She has a personal injury action which has not yet been resolved. My view is that that is too speculative to be taken into consideration at this time. Her past income is as follows: 2008, \$38,157; 2009, \$43,068; 2010, \$45,239. Her recent income is as follows: for the 2011 year, the year of the accident, \$29,998; and for 2012, \$21,675.

[7] The father's income is as follows: in 2008, \$69,213; 2009, \$66,871; 2010, \$64,749; 2011, \$82,753; and 2012, \$86,928.

[8] The maternal grandmother paid for J.'s tuition and boarding fees in 2011-2012, and for most of 2012 and 2013, at least until the spring break.

[9] The mother says that K. alternated back and forth between the parents until July of 2012. The mother moved to British Columbia in September of 2012 for upgrading purposes, and presumably to be closer to J.

[10] J. then stopped residing at the private school at the spring break of 2013, and moved in with the mother. The maternal grandmother continues to pay for J.'s tuition, but not for expenses at the school. J. resided with the mother in the summer of 2013 as well.

[11] The father says that the mother had no financial concerns in 2006, as indicated in a custody and access report. This was based on the joint sharing of custody. The father was opposed to J. going to school in British Columbia. He says that K. has been in his custody 80 percent of the time since September of 2011. He also says that the mother did not raise her financial concerns until April of 2011. I must indicate that that is generally agreed to be the time when the notification was made that child support was being claimed.

[12] The father is concerned about a retroactive support order, as it will impact on his ability to support K. and also his second son, J. The father takes issue with the mother's lower income, and says she will receive a loss of income award in her personal injury

action. He also pays approximately \$8,000 a year for hockey expenses for K. The mother has only been able to contribute \$500 to K.'s hockey expenses.

[13] The father also expected that the maternal grandmother would pay J.'s tuition and boarding expenses, as that was the basis of the application in 2011. He expected the mother to return to Whitehorse after training, where she has been able to earn a better income.

[14] Sadly for the children of this relationship, there are very serious relationship difficulties. K. does not have a good relationship with his maternal grandmother, resulting from favouritism to J. He is also experiencing difficulties with his mother. On this basis, I will address the custody and access issues first.

[15] In 2005, I made an interim joint custody order for a reason. Parents do not lose their status as parents of their children simply because there is a separation or a divorce. It is in the best interests of every child to have a relationship with their respective parents. There are cases where the conduct of a parent may make joint custody inappropriate, but this is not such a case. My view, from reading the e-mails between the parents in 2011, is that their relationship and their relationships with their children, was working, although, obviously, not without problems. The schooling issue of J. has unfortunately been a divisive issue, but it has no doubt been beneficial to her.

[16] I conclude that both parents have relationship issues with the child that resides with the other parent, but they are not such that either parent should be deprived of a joint custody role, which speaks to the relationship between the parents, and attempts to improve communication between the parents, with respect to their children.

[17] The joint custody order will therefore remain, and the mother and father shall discuss health and education issues to the extent they can. However, the final decision in each case will be made with the parent with whom the child resides. The other parent is at liberty to bring any decision to the Court for a review.

[18] With respect to access, the mother shall have specified access to K. four times a year in Vancouver, and those dates are three days at spring break, three days after school is out in June, three days at Thanksgiving, and three days, December 29 to December 31st. The mother shall be responsible for transportation and expenses in Vancouver, and I should say that these dates are not chipped in stone, and if they conflict with hockey schedules or anything of that nature, I think the parents are capable of renegotiating different dates.

[19] The father shall have reasonable access to J., but it must be on the condition of her consent to that access. I trust that the mother will encourage her daughter to the extent she can.

[20] I will now address the claims for retroactive support. I wish to say at the outset that I do not consider this to be based on blameworthy conduct of either parent. The problem with all claims for retroactive support is that parents have conducted their financial affairs without a court order, and any order made will have consequences for both. In this case, I do not think it fair or appropriate to go back beyond the date when notice was clearly given to the father by the mother that she was unhappy with the previous arrangement. That date is April 2011, and there is no doubt that the major change to residential arrangements took place when J. went to school in British

Columbia in September of 2011. J. was receiving assistance from the maternal grandmother for that purpose. I find that it would be inappropriate to award retroactive support until September 2011, because that is when the major change in residential arrangements took place.

[21] I am going to base my calculation on Exhibit 1, and unfortunately, the parents do not have that in front of them, but that is a set-off calculation for child support. In applying the set-off principle, starting in September 1, 2011, and running through to the end of September 2013, the father owes the mother \$9,702, less \$1,304 for a total of \$8,398. I ask counsel to check those calculations, in the event I have made an error.

[22] I note that both parents claimed retroactively for child support, and while I appreciate how this may negatively affect the father's support for his two children that reside with him, I am going to ask counsel for submissions with respect to when and how that should be paid.

[23] With respect to the retroactive claims for hockey for K. and school expenses for J., I am not prepared to make any retroactive order. Hockey is clearly important to K., but it is a very extraordinary expense, and by the same token, the school expenses claimed in the amount of \$5,000 for J., are really covered by the retroactive child support award that I have made.

[24] Going forward, from October 1, 2013, I order that each parent pay the additional expenses for their child that resides with them, whether it be hockey or other trips. In other words, to be very clear, after October 1, 2013, each parent will pay child support according to the set-off principle, but no s. 7 expenses, extraordinary or otherwise,

should be paid from one parent to the other. The mother should not be required to contribute to hockey, nor should the father be required to contribute to J.'s additional expenses.

[25] With respect to the application that I impute a greater income to the mother, I think it is premature to do so, based on the accident in 2011. However, I do suggest that she make every effort to move towards her previous salary as she recovers, to avoid further litigation. Therefore, I order that from October 1, 2013, the mother shall pay child support based on \$21,675 and the father on his income of \$86,928, and on a set-off basis. The parents shall exchange their income information and notices of assessment on or before June 1 of each year, and recalculate their child support obligations.

[26] Counsel may speak to costs, if necessary, in case management, but it would be helpful now if you gave me some indication of your submissions with respect to the payment of retroactive child support.

[27] MS. KINCHEN: There was also, Your Honour, one issue that we also discussed and put before you, and that's that each of the parents would be free to travel outside of the country with the child that's in their care without the consent of the other parent.

[28] THE COURT: That can be included, absolutely.

[29] MR. ROOTHMAN: Yes. We would prefer to have that in the order.

[30] THE COURT: Please include that in the order. Do you --

[31] MS. KINCHEN: Sorry, with respect to the -- I wonder if we could, maybe -- because I haven't had an opportunity to talk to my client about this.

[32] THE COURT: Yes. I am sorry. I forgot that your client is on the phone.

[33] MS. KINCHEN: Yes. So I --

[34] THE COURT: We could do that in case management as well.

[35] MR. ROTHMAN: Yes.

[36] THE COURT: So the two things; the cost, if any application is made in respect of that; and proposals or submissions on how the retroactive child support should be paid.

[37] MS. KINCHEN: That would be great, thank you.

[38] THE COURT: Great. Thank you, very much.

VEALE J.