SUPREME COURT OF YUKON

Citation: *J.C. v. S.A.W.*, 2013 YKSC 1

Date: 20130102
S.C. No. 00-D3306
Registry: Whitehorse

Between:

J.C.

Petitioner

And

S.A.W.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

J.C. — Appearing on her own behalf
Debbie Hoffman — Counsel for the respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] In this application the mother principally seeks a variation of child support based upon a reduction in the father's income as a result of his retirement on or about January 4, 2012. She also seeks a variation in the proportions in which each parent will contribute to the special or extraordinary expenses of the children, N., born December 12, 1994, and K., born February 27, 1997.

[2] The other relief sought by the mother is either consented to by the father or is not strenuously opposed:

a) that the principal residence of the children shall be with the mother;

b) that the children shall have such access to the father as they in their sole discretion shall determine is acceptable; and

c) that the father shall make reasonable efforts to obtain employment and advise the mother immediately upon doing so.

ISSUES

[3] The issues are as follows:

a) Is N., who will be under the age of majority until December 12, 2013, considered a “child of the marriage”, for the purposes of being entitled to child support, while she attends university outside the Yukon?

b) Should the variation in child support be retroactive to January 2012, when the father’s income was first reduced?

BACKGROUND

[4] Pursuant to a consent order dated November 18, 2008, the father agreed to pay $1200 per month in child support for the two children based on his then gross annual income of $81,404.

[5] On January 23, 2012, the father notified the mother by email that there was a change in his employment situation with the Yukon Government, in that he agreed he would “leave – retire” from the Government. He further said that he would soon know what his “retirement income” would be, that he then would let the mother know, and that the adjustment in child support could be worked out. He also stated that he would continue to look for other employment, but that in the meantime he would draft a “court document” and forward it to the mother for her review.

[6] On January 26, 2012, the mother replied by email that she would consider consenting to an order varying the child support payable upon receiving confirmation in writing from the father as to the amount of his retirement income and when that income was to come into effect. The father replied the same day indicating:

> "I will provide the documentation per your attachment as soon as I have it. Things are still in motion at this time and I expect to [have] the info soon. I will keep you updated as I have more information. I am seeking other work and have been for a while now."

[7] On March 20, 2012, the father emailed the mother stating, "I will soon receive information on what my pension will be.… I expect to have the final documents you ask for, by the end of this week or early next week."

[8] On March 31, 2012, the father forwarded to the mother further disclosure regarding his retirement. The first document was a redacted copy of a settlement agreement between the father, the Yukon Government and the Public Service Alliance of Canada, dated March 2, 2012. This document did not indicate the amount of the father's retirement income. The second document was entitled "Pension Benefit Estimates Statement" and was dated March 19, 2012. This document indicated that the father's estimated monthly pension, from January 4, 2012 until attaining age 65 would be $2351.33 (the father will turn 65 on June 25, 2015).

[9] On May 28, 2012, the father forwarded to the mother a draft consent order (drafted by his present counsel) proposing a variation retroactive to January 1, 2012, based on his estimated gross retirement income of $2351.33 monthly, plus his monthly rental income of $300, for a total of $31,816 annually.

[10] On May 29, 2012, the mother wrote to the father's counsel indicating that she was not prepared to agree to an order based on the pension estimate. Rather, she repeated her request for written confirmation of the exact amount of the father's pension income. The mother was also unwilling to accept a variation retroactive to January 1, 2012, since the father had not yet established to her satisfaction that his income reduction commenced in January.

[11] On May 31, 2012, the father wrote to the mother and enclosed a payment statement from Public Works and Government Services Canada entitled "Public Service Pension", dated May 15, 2012. This statement indicated a gross "Initial Payment" to the father of $11,528.60. Unfortunately, this statement did not indicate the specific time period over which it applied. However, the father's covering note suggested that the mother could obtain his monthly income ($2305.72) by dividing the amount of $11,528.60 by the five months from January through May.

[12] On June 5, 2012, the mother emailed the father repeating her request for confirmation of the exact amount of his reduced income and the start date of that income.

[13] On June 21, 2012, the mother received from the father a copy of a three page letter addressed to him from the Public Service Pension Center, Government of Canada (which administers Yukon Government pensions) dated June 4, 2012. This document confirmed that the father's pension commenced January 4, 2012 and would be in the monthly amount of $2271.36, plus a monthly "Bridge Benefit" of $514.22, which the father will receive until age 65, or until he starts receiving his Canada Pension Plan benefits, whichever occurs first. Finally, the document also indicated that the father's total monthly

pension would be indexed to the cost of living and would increase annually starting in January 2013.

[14] On June 29, 2012, the mother forwarded a draft consent order to the father based on the above confirmed income. The draft sought the full table amount of child support for both children, waived child support from September through December 2012 inclusive, but failed to reflect the father's request that the variation be effective commencing January 2012.

[15] On August 3, 2012, the father forwarded to the mother a second draft consent order based on his now agreed-upon gross annual income of $37,027. However, the draft proposed that the father not pay the table amount of child support for N. while she attends university outside the Yukon each year. He also sought to be credited with having overpaid child support for both children from January through August 2012, inclusive, which credit was to apply against future payments.

[16] N. began her first year of university in Nova Scotia in September 2012.

[17] The father continued to pay $1200 per month in child support for both children while the parties were in negotiations towards a consent variation.

[18] The mother notified the Maintenance Enforcement Program ("MEP") on October 4, 2012 that the father's income had been reduced and asked that MEP suspend its collection of child support from the father until an order varying the amount of child support was filed. Accordingly, the father paid no child support for November or December of this year.

[19] On October 18, 2012, the mother filed this application to vary. After allowing the father an adjournment for the purpose of filing an affidavit, the hearing of the application was on December 17, 2012.

ANALYSIS

Issue #1: Is N., who will be under the age of majority until December 12, 2013, considered a "child of the marriage", for the purposes of being entitled to child support, while she attends university outside the Yukon?

[20] Section 2(1) of the *Divorce Act*, R.S. 1985, c. 3 (2nd Supp.) provides:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;"

[21] In the *Child Support Guidelines*, SOR/97-175, as amended (the "*Guidelines*"), s. 3(1) is entitled the "Presumptive rule" and deals with children under the age of majority:

> "3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7."

[22] In s. 2(1) of the *Guidelines*, "child" is defined to mean "a child of the marriage" and therefore links to the definition in s. 2 of the *Divorce Act.*

[23] Section 3(2) of the *Guidelines* deals with children who have reached or are over the age of majority. Section 2(1) of the *Divorce Act* provides that "age of majority" is that determined by the laws of the province or territory where the child ordinarily resides. In the Yukon, that is age 19. Returning to the *Guidelines,* s. 3(2) provides:

> "(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child."

[24] The father's counsel argues that while N. is not actually living with the mother in her Whitehorse home, the mother is not incurring the usual kinds of expenses associated with raising a child, for example, groceries and bus fare. Further, counsel points to the fact that, while N. is attending university in Nova Scotia, her expenses are being covered in part by a combination of a $5000 Yukon Grant, $5000 that N. earned during her summer employment, and a $5000 contribution from N.'s Registered Education Savings Plan. Further, N. is considering looking for part-time employment during her second semester at university. Accordingly, as I understood the submission, counsel says that N. should not be considered a "child of the marriage" while she is in attendance at university because, although she will be under the age of majority until December 12, 2013, she has "withdrawn from [the parents'] charge", to use the language in the *Divorce Act*, in the sense that she is no longer financially dependent upon the parents while in attendance at university. Therefore, during those times, N. is not a "child" under the *Child*

Support Guidelines. Consequently, as I understood the argument, because the "Presumptive rule" under s. 3(1)(a) of the *Guidelines* pertaining to the amount of child support payable for a child "under the age of majority" begins with the phrase "Unless otherwise provided under these Guidelines…", and because N. does not fit within the definition of "child" while attending university, the rule does not apply. Therefore, while N. is attending university and not actually living in the mother's home, the father should not be required to pay the base table amount of child support for N. On the other hand, the father's counsel does not dispute that the father is still required to pay his proportionate share of N.'s special or extraordinary expenses under s. 7 of the *Guidelines* while she attends university, as required by s. 3 (1)(b) of the *Guidelines.*

[25] The father's counsel provided no case law in support of this argument, but assured me that there is not a lot of disagreement on the point within the Yukon bar. She explained that commonly the issue of child support payable to a child under the age of majority attending university is dealt with in separation agreements or consent orders, and that this may explain why there are no case authorities addressing the issue.

[26] Notwithstanding what the practice may be within the bar, I am unable to accept the argument. Firstly, there is a logical inconsistency which is fatal to the argument. Secondly, the case law is quite clear that a child over the age of majority, while in attendance at university, may still be considered a "child of the marriage", precisely because of their financial dependency upon their parents during those years.

[27] I will address the logical inconsistency first. If N. is not to be considered a "child" within the definition in the *Guidelines* because she has withdrawn from her parents' charge while attending university, and if the father wishes to rely upon the definition of

child as a matter "otherwise provided under these Guidelines", in order to avoid the presumptive application of s. 3(1)(a), then logically that argument should also apply to the father's obligation to pay his proportionate share of N.'s special or extraordinary expenses under s. 3(1)(b) of the *Guidelines*. In other words, if N. is not a "child" for the purposes of being entitled to the table amount of child support, then neither is she entitled to receive the father's proportionate share of her special or extraordinary expenses, of which post-secondary education expenses are specifically identified in s. 7(1)(e) of the *Guidelines*. This would seem to be an absurd result, particularly because the amount of child support payable for a child under the age of majority under s. 3(1) is to be both the table amount under para. (a) "and" the amount, if any, determined under s. 7.

[28] In *Merritt v. Merritt*, [1999] O.J. No. 1732 (S.C.), Heeney J. held that, for children under the age of majority, there was no discretion to depart from the presumptive application of s. 3(1) of the *Guidelines*, and that both the table amount and any justified special or extraordinary expenses were to be paid. At para. 51, he stated:

> "…The Guidelines state that where a child is under the age of majority, the amount of child support is the table amount, plus any add-ons pursuant to s. 7. There is no discretion to order any other amount of support…" (my emphasis)

[29] The Court of Appeal for Ontario approved of *Merritt* in *Lewi v. Lewi* (2006), 80 O.R. (3d) 321, and stated at para. 95:

> "[95] The Guidelines have been enormously beneficial to all those involved with child support issues, be they parents, children or courts. That is due, in large part, to the fact that the amount of child support can be determined quickly and consistently. Section 3(1) of the Guidelines provides that child support for a child under the age of majority is to be (a) the table amount plus (b) an amount for s. 7 expenses. Very often, parties need not have recourse to the courts because

> once the payor parent's income is known, the amount of table support can be determined and special expenses are shared in proportion to the parents' respective incomes." (My emphasis)

[30] The second reason I cannot accept the argument of the father's counsel is because the case law is quite clear that a child over the age of majority, while in attendance at university, may still be considered "a child of the marriage" because of their financial dependency on their parents during those years. Commonly, this applies during the child's initial post-secondary degree, but may also continue to apply in cases where the child seeks a second degree: see *W.P.N. v. B.J.N.*, 2005 BCCA 7, at paras. 4, 29, 30 and 51; *Davis v. Davis*, [1999] B.C.J. No. 1832, at paras. 20 and 21; and *G.T.F. v. K.L.F.*, 2009 YKSC 72, at para. 32. The issue with respect to adult children arises from the difference in the wording between subsections 3(1) and 3(2) of the *Guidelines*. Pursuant to s. 3(2), the amount of the child support payable may be determined under either paragraph (a) "or" (b). Under (a), the amount can be determined by applying the *Guidelines* as if the child were under the age of majority, in other words as if the calculation were done under s. 3(1), which could result in both the table amount and a proportionate share of special or extraordinary expenses. Alternatively, under paragraph (b), if the court considers the above approach to be "inappropriate", then it can order an a "appropriate" amount with regard to "the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child". Thus, if a child is not actually living with a parent while attending university, then it may not be appropriate for the payor parent to have to pay both the table amount and a proportionate share of the child's special or extraordinary expenses. This was the issue addressed by the British Columbia Court of Appeal in *W.P.N.*, at para.

35 and following; in *Davis v. Davis*, at para. 22; and by this Court in *G.T.F.*, all cited above. However, this is not the issue before me in the case at bar, since I am dealing with a child under the age of majority.

[31] In the result, I conclude that N. remains a "child" under the *Guidelines* while she is under the age of majority and attending university. Accordingly, until N. turns 19 years of age, the father must pay both the table amount of child support and his proportionate share of the section 7 expenses, as required by s. 3(1) of the *Guidelines*.

Issue # 2: Should the variation in child support be retroactive to January 2012, when the father's income was first reduced?

[32] In *Corcios v. Burgos*, 2011 ONSC 3326, Chappel J. dealt with the issue of retroactive reduction of child support. She also dealt with the issue of rescission of child support arrears, but as that is not in question in the case at bar, I will omit any references by Chappel J. to that issue. The question arose in *Corcios* whether the principles which the Supreme Court of Canada established in *D.B.S. v. S.R.G.*, 2006 SCC 37, also apply in cases where the moving party seeks a retroactive reduction of child support. Of course, *D.B.S.* dealt with the test to be applied in proceedings initiated for retroactive child support and retroactive increases to child support. As noted by Chappel J. at para. 47 of *Corcios*, the Supreme Court in *D.B.S.* concluded that the following factors should be considered in such cases:

1) Whether there was a reasonable excuse for why support or increased support was not sought earlier;
2) The conduct of the payor parent;
3) Consideration of the present circumstances of the child; and

4) Any hardship that may be occasioned by a retroactive order.

[33] Chappel J., at para. 55, applied these and other principles from *D.B.S*. to applications for retroactive *reduction* of child support. From within Chappel J.'s rather extensive list of considerations, those which I find to be most relevant to the case at bar are as follows:

a) ***Whether there is a reasonable excuse for the payor parent's delay in applying for relief.*** In this case, it is the recipient mother who applied for the variation on October 18, 2012. While that seems a long time after the father first raised the issue of his anticipated reduction in income on January 23, 2012, in context, the delay is more understandable. First, the father, apparently through no fault of his own, did not receive the final confirmation of his pension income from his employer until the letter of June 4, 2012. Prior to that, the father attempted to obtain a consent order from the mother based on his estimated pension income, but the mother was understandably insistent on receiving written confirmation of what his exact income would be and from what date. Second, following the receipt of the June 4th letter, the mother attempted to obtain a draft consent order from the father, but she did not agree to the variation being retroactive to January 2012. In response, the father forwarded a second draft consent order to the mother on August 3, 2012, but he did not agree to paying the table amount of child support for N. while she attends university outside the Yukon. He also sought retroactivity to January 2012 and credit for having paid the full amount of child support under the 2008 Order ($1200 per

month) in the meantime. Third, while there was a lull in the negotiations between the parents in September, that is understandable, given that the mother was likely preoccupied with assisting N. in getting established for her first year of university in Nova Scotia. Finally, according to his counsel, the father was hoping to avoid the necessity of a court proceeding to obtain the variation, and thus preferred to pursue negotiations rather than an application.

b) ***The ongoing financial capacity of the payor parent*****.** There has never been any disagreement by the mother that the child support would have to be varied to reflect the father's reduced pension income. However, she reasonably insisted on receiving specific written confirmation from the father's employer as to the amount and start date of the reduced income before agreeing to any order.

c) ***The conduct of the payor parent*****.** First, the father gave notice to the mother of his prospective reduction in income very soon after he received the news from his employer. The father maintains that his last day of work was on or about January 4th and he notified the mother by email within the month, on January 23rd. Second, notwithstanding that he received no income whatsoever from his employer until the May 15th "Initial Payment", the father continued to pay the full amount of the court ordered child support until the mother directed MEP to suspend their collection of child support, commencing in November 2012. Third, it appears that the father provided to the mother whatever information he was receiving from his

employer as he received it. While this information was sporadic and incomplete until the June 4th letter, it does not appear that the father was intentionally delaying disclosure or making incomplete disclosure. Fourth, the father was attempting to negotiate a settlement with the mother pending the receipt of the confirmatory income information. While the father did raise some extraneous and irrelevant issues in emails to the mother in June and October 2012, which only served to increase the level of conflict between the parents, he has since explained that these communications were written in frustration and has deposed that he now understands they were not helpful to the process or to his ongoing relations with the mother.

d) ***Any hardship that may be occasioned by a retroactive order*****.** The father is not seeking to have the mother repay money to him for any overpayment of child support. Rather, he asks that any such overpayment be credited against future payments due. This will help to relieve any hardship that the mother or the children may experience as a result of the reduction in child support. To the extent that the parents, and particularly the mother, will experience ongoing financial difficulties in attempting to put both children through university, that is not an uncommon problem. The mother informed me that it was N.'s specific choice to attend university in Nova Scotia, notwithstanding that the choice of that location would add significantly to N.'s overall educational expenses. Thus, while the parents may not wish N., or indeed the younger child, to be burdened with student loans to pay for such choices, that may be an inevitable consequence. As

Veale J. recognized in *G.T.F.*, at para. 31, there may be situations where the parental incomes are such that student loans are required.

e) ***What is the date of "effective notice" of the father's reduction in income?*** As noted in *D.B.S.*, effective notice does not require the payor parent to take legal action. Rather, what is required is that the topic be broached. That was clearly done on January 23, 2012, within the month in which the father first experienced his reduction in income. On the other hand, as noted in *Corcios*, at para. 55, effective notice also entails providing reasonable proof to support the reduction, so that the recipient parent can independently assess the situation in a meaningful way and respond appropriately. Unfortunately, the father was not in a position to do that until he received the letter of June 4, 2012, but as I said, that was apparently through no fault of his own. Even the mother agreed at the hearing that "he got it when he got it".

f) ***Once effective notice is given, a reasonable opportunity should be granted for the parties to enter into negotiations.*** Clearly, there was such an opportunity in this case. However, as noted in *Corcios,* at para. 55:

> "…the payor has a duty to initiate proceedings in a timely manner to address the issue if these negotiations are not successful and failure to do so may militate against relief for the Respondent, particularly where the Respondent has failed to provide disclosure of relevant materials to the recipient. *(M.(D.) v. A(S.), supra)*."

One might have hoped for a more timely court application by the father once he realized the mother was not prepared to agree to his draft consent

order of August 3, 2012. On the other hand, as I said, the father cannot be faulted for failing to provide disclosure of relevant materials to the mother.

g) ***There is an ongoing obligation on the payor parent to engage in dialogue with the recipient parent about any continuing changes in the payor's financial circumstances*****.** In this case, the father has provided significant evidence of his ongoing attempts to seek alternative employment. He has also deposed under oath that he has no problem advising the mother when he obtains such employment. While he does not feel it is necessary for such term to be part of the order resulting from this application, he did not strenuously oppose that relief.

[34] Taking all these circumstances into account, it seems fair and reasonable that the variation in child support should be retroactive to January 2012, when the father's income was first reduced.

CONCLUSION

[35] Based upon the father's gross annual income of $37,027, I order him to pay child support of $543 per month commencing January 1, 2012, for the two children of the marriage, and on the first day of each month hereafter until N. turns 19 years of age. If the parents are then unable to agree on the amount of child support to be paid for the two children, either may return to this Court for further directions. A further variation may become necessary when K. turns 19, and again, if the parents are unable to agree on that variation, then either may bring an application to this Court.

[36] The father shall be credited with having overpaid child support by the sum of $657 per month ($1200-$543 = $657) between January 1 and October 1, 2012 inclusive, when

he should have been paying $543 per month. This results in a total overpayment of $6570 ($657 x 10 months), which will be fully credited to the father in due course. However, to help reduce any potential hardship to the mother or the children, I intend to introduce the credit on an incremental and transitional basis. First, the father will receive a credit of $1086 by being relieved of his obligation to pay child support for the two children for November and December 2012. That will reduce the credit to $5484. Second, the father will receive an additional credit of $3000 by having his child support payments for the two children reduced by $250 per month ($543 - $250 = $293) from January 1, 2013 to and including December 1, 2013. That will reduce the credit to $2484. Lastly, the father will be credited with the remaining balance of $2484 by being relieved of his obligation to pay his share of the children's special or extraordinary expenses up to that amount.

[37] Based on the father's gross annual income of $37,027 and the mother's gross annual income of $52,067.06, the father shall pay 40%, and the mother shall pay 60%, of the children's special or extraordinary expenses. For greater certainty, I note that the father indicated at the hearing, through his counsel, that he had no disagreement with the statement of those expenses and the copies of the related invoices attached as exhibits to the mother's affidavit # 13, sworn December 11, 2012. The total of those invoices appears to be $4071. However, what is not clear is whether all of these expenses were incurred since January 1, 2012. To the extent that any were incurred prior to that date, then they are to be shared in proportion to their incomes set out in the last order of November 18, 2008.

[38] The principal residence of the children shall be with the mother. The children shall have such reasonable and generous access with the father as is arranged between them and the father, in accordance with the children's wishes.

[39] The father shall make reasonable efforts to obtain employment and shall advise the mother immediately upon his obtaining new employment.

[40] Costs were not sought by the mother in her application, nor were they addressed by the father's counsel at the hearing. However, as there was mixed success for both parties, I would expect each to bear their own costs.

Gower J.