SUPREME COURT OF YUKON

Citation: *Carrothers v. Jean-Louis*, 2016 YKSC 69

Date: 20161219
S.C. No. 15-B0087
94-B0102
Registry: Whitehorse

Between:

Thomas Wesley Carrothers

Applicant

And

Sherrie Lynn Jean-Louis (Ne: Walker)

Respondent

Before Mr. Justice R.S. Veale

Appearances:

Thomas Wesley Carrothers	Appearing on his own behalf
Sherrie Lynn Jean-Louis	Appearing on her own behalf
Kelly McGill	Appearing for the Director of Maintenance Enforcement

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Carrothers brings an application pursuant to the *Interjurisdictional Support Orders Act,* S.Y. 2002, c. 19, for an order to set his unpaid child support arrears at $0 as of May 1, 2010. The child in question turned 18 on April 25, 2010.

[2] The outstanding arrears are fixed at $22,291.94 as at June 28, 2016.

[3] Based upon Mr. Carrothers' uncontradicted evidence, the Manitoba Queen's Bench (Family Division) made an interim order dated September 1, 2015, without notice to Ms. Walker (now Ms. Jean-Louis), that enforcement proceedings against Mr. Carrothers be suspended for a period of six months. This Interim Order followed an

Interim Order dated February 24, 2015, ordering a six-month suspension on the condition that Mr. Carrothers pay $1,000 per month towards his outstanding arrears.

BACKGROUND

[4] At the heart of this dispute is a Consent Order from the Yukon Supreme Court, dated October 16, 1995 (the "Consent Order"). The Consent Order required, among other things, that Mr. Carrothers pay child support in the amount of $400 per month commencing January 1, 1995, and also pay mortgage payments of an unstated amount on the Tagish property where the parties had resided. The Consent Order additionally required Mr. Carrothers to pay $600 per month child support commencing after the completion of the sale of the Tagish property until August 1, 1997.

[5] The Consent Order further stated as follows:

> 6. The Defendant shall pay child support to the Plaintiff in the amount of $800.00 per month commencing the 1st day of September, 1997 payable on the 1st day of each month thereafter until such time as the Child:
>
> (a) reaches the full age of 18 years; or
>
> (b) is 18 years of age or over and under the Plaintiff's care but unable by reason of illness, disability, full time attendance at an educational institution or other cause to withdraw from the Plaintiff's care or provide himself with the necessaries of life; or
>
> (c) marries.

[6] The Consent Order was a comprehensive settlement of a high-conflict family law case. It contained provisions for custody, access, child support, and real and personal property division between the parties. The Consent Order also required Mr. Carrothers to pay taxable costs to Ms. Walker up to August 11, 1995. It also appears that

Ms. Walker had the exclusive possession of the Tagish property from March 28, 1995, to March 15, 1996, when Mr. Carrothers was granted the right to reside at the Tagish property until its sale.

[7] The Consent Order set out the listing arrangements for the Tagish property and the division of proceeds on the sale. However, in April 1997, Ms. Walker applied for and was granted conduct of the sale of the Tagish property with costs against Mr. Carrothers. Her affidavit filed April 16, 1997 indicated:

1. she had maintained the Tagish property in good repair while she resided there until March 15, 1996;
2. when Mr. Carrothers had possession, he did not keep it in good repair;
3. he failed to pay the mortgage consistently and the mortgagee filed a foreclosure proceeding in April 1996;
4. in one specific instance, Ms. Walker alleged that Mr. Carrothers discouraged potential purchasers;
5. the pipes on the property froze twice on the Tagish property while under Mr. Carrothers' control;
6. Mr. Carrothers abandoned the Tagish property in February 1997, and Ms. Walker continued to maintain the property and took out a loan to do so.

[8] Mr. Carrothers is employed as a powerline lineman and he submits that the $800 a month child support order that he consented to is the equivalent of an annual income of $89,000 - $89,999 based on the 1997 Child Support Guidelines.

[9] His Revenue Canada Tax Return Line 150 incomes from 1995 to 2011 were reported as follows:

1995:	$77,632.00
1996:	$44,248.00
1997:	$48,366.00
1998:	$50,908.00
1999:	$21,438.00
2000:	$16,798.00
2001:	$0.00
2002:	$0.00
2003:	$0.00
2004:	$49,477.00
2005:	$107,183.00
2006:	$106,697.00
2007:	$90,768.00
2008:	$124,899.00
2009	$123,851.99
2010:	$135,679.46
2011:	$90,009.00

[10] Mr. Carrothers submits that calculating the years he was under $89,000 as against the years he was earning more than $89,000, he had a net total overcharge of child support of approximately $48,000 and therefore he should not pay any arrears of child support after May 1, 2011.

[11] Ms. Walker responds with the following:

> 4. It has been almost 22 years since I ended the relationship with the Applicant and during that time he has gone to great lengths to avoid paying child support. Over the years I have had to deal with several legal issues involving the Applicant, which has required me to prepare for at least 15 different court dates over various matters and caused me to incur a very substantial legal debt.
>
> 5. After I decided to end the relationship I had to go on welfare for a year due to the fact that at the time of our break-up I continued to live in our jointly owned home in Tagish, which is a small rural community and there was no meaningful employment there. Due to

the Applicant's unwillingness to co-operate and his lack of financial support I was forced to borrow money from the department of Social Services to maintain the family home, even though he had been court ordered to make the mortgage payments, which is stated in paragraph 3 of Exhibit A in the Applicant's documents. I have a letter from the department of Social Services which states the amounts that I had to borrow, Exhibit A.

6. In July of 1995 I had an opportunity to rent a small place in Whitehorse at a reasonable price. Since I was extremely anxious to get off of welfare and gain employment I vacated the home in Tagish and moved into town and immediately made plans to start my own business. Within 3 months I was able to get myself off of welfare.

…

10. For several years the only way I was able [to] collect any child support was by reporting the Applicant to the Informant Leads Program for failing to file his income tax returns. This program is an investigative unit with Revenue Canada, it investigates people and businesses who cheat on their taxes or don't file taxes. Revenue Canada would force him to file his taxes and then Maintenance Enforcement would garnishee his tax returns.

11. Over the years I have done an extensive amount of investigating on the internet searching for information on the Applicant. In 2010 I was able to find out several details of his whereabouts.

12. On December 16th 2001 the Applicant and his wife, Virginia Diane Kucheravy, were married in Nevada. Their residence was listed as California, Exhibit F.

13. In the financial information that the Applicant has provided with this application in regards to his income over the years. He claims that he had absolutely no income for the years 2001 2002 and 2003. And for the year 2004 it was a lower than normal income. He has also stated in his affidavit sworn on August 21 2015,

> paragraph 19, that there was little work available in the powerline trade during that time.
>
> 14. The Applicant is a registered Red Seal Journeyman Power Lineman. He graduated from SAIT College in 1987.
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> 15. I found out that the Applicant was living in California from 2001 until 2004. Exhibit G.
>
> 16. In July 2001 the Applicant purchased a home at, 26525 Nesmith Place in Escondido California, for the sum of $262,000. In April 2004 he sold that property for $469,000. This gave him a profit of $207,000 US dollars. Exhibit H.
>
> 17. I have researched the addresses that the Applicant was living at during the time that he was in California. The first address that is listed on Exhibit C, is 306 El Norte Pkwy Escondido California. This address belongs to an electrical company called Arayman Electric, Exhibit I. I am assuming that he was employed by this company.

[12] In his response affidavit filed June 27, 2006, Mr. Carrothers did not respond to Ms. Walker's paragraphs 10 – 16, except as follows:

> 6. That in response to paragraph 13 of Sherry's *[sic]* affidavit, during the course of my employment in this field over a number of years I have, and continue to experience, fluctuations and sometimes extreme fluctuations in employment. At present I have been laid off from my previous employment from December 2015. Despite repeated communication with my previous employer regarding the availability of employment I continue to be laid off. Since shortly after my layoff I have been and continue to look for work in my field anywhere in Canada. At present I am collecting Employment Insurance and have done so since approximately April 5, 2016. Please find attached to this my affidavit and marked as **Exhibit "B"** copies of my Employment Insurance payment statements as printed from the online *My Service Canada Account* from March 19, 2016 through April 30, 2016. (emphasis already added).

[13] Mr. Carrothers may be correct that he had no CRA line 150 income from 2001 to and including 2003 but he did not deny that he was in the United States nor did he deny that he and his wife purchased a property for $262,000 (presumably in US dollars) and sold it for $469,000 for a profit of $207,000. I note that he did not deny that he earned income from 2001 – 2003 but simply that he did not have any line 150 income declared in Canada. I also note that he did not claim any employment insurance between 2001 and 2004. I therefore infer that he earned income in the United States during this period rather than in Canada.

[14] It appears from the documents provided by Mr. Carrothers that he made a without notice application in the Supreme Court of British Columbia on August 30, 2010, pursuant to the B.C. *Interjurisdictional Support Orders Act.* In an oral judgment, McEwan J. directed that a paternity application should first be heard in the Yukon before he proceeded on the without-notice variation application. There is no evidence that the variation application proceeded in British Columbia in 2010. However, Mr. Carrothers filed an application in this court action in 2010 seeking leave to obtain a DNA test to determine the paternity of the child in question. That application did not proceed, he says, “due to the lack of financial resources”.

[15] Mr. Carrothers then applied for this variation in August 2015. It appears that Mr. Carrothers chose to bring his variation application after the child in question turned 18 which would terminate the child support obligation, subject to any dependency, after the child’s 18th birthday. There is no evidence that the child was dependent on Ms. Walker after April 25, 2010. There is some evidence that he was employed in a full or part time capacity at that time.

[16] I note that the arrears of $22,291.94 at June 28, 2016, contain an additional $9,600 (12 x $800) incurred after April 25, 2010. As a result the arrears outstanding as of April 25, 2010, are $12,691.94. I take these figures from the account statement for the Yukon Maintenance Enforcement Program provided to the Court on July 20, 2016.

[17] On April 8, 2011, a letter to Mr. Carrothers from the British Columbia Family Maintenance Enforcement Program confirmed that Ms. Walker did not want to enforce child support beyond April 25, 2011. The letter was clear that Ms. Walker wished to enforce the remaining arrears then outstanding in the amount of $95,652.51.

DISPOSITION

[18] In Mr. Carrothers' affidavit sworn August 21, 2015, in the Manitoba Queen's Bench (Family Division), he makes reference to the *Federal Child Support Guidelines* (the "*Guidelines*") which were made May 1, 1997. According to s. 14 of the *Guidelines*, an order made prior to May 1, 1997 constituted a change of circumstance that gave rise to the making of a variation order. However, Mr. Carrothers and Ms. Walker were residing in a common-law relationship. So the *Divorce Act* and *Federal Child Support Guidelines* do not apply.

[19] The Yukon Child Support Guidelines were promulgated on March 9, 2000, and do not contain an automatic entitlement to variation:

> 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.

[20] In the case at bar, it would mean that Mr. Carrothers would have been entitled to make a variation application in 2000. The case of *D.B.S. v. S.R.G.*, 2006 SCC 37, is the leading case in determining whether there should be a retroactive increase in child support where a court order for child support is already in place. However, the factors set out in *D.B.S*. have now been applied to applications for retroactive credit or reduction in outstanding arrears. See e.g. *Corcious v. Burgos,* 2011 ONSC 3326, *J.C. v. S.A.W.*, 2013 YKSC 1*, G.M.W. v. D.P.W.,* 2015 BCCA 282, and *Gray v. Rizzi,* 2016 ONCA 152. The following four factors may be considered:

1. was there an excuse for not seeking the reduction in child support earlier;
2. the conduct of the payor parent;
3. the present circumstances of the child; or
4. any hardship that may be occasioned by a retroactive order.

[21] Addressing the delay of 15 years for this application, some consideration must be given to the submission of Mr. Carrothers that he was limited financially in his ability to bring the matter to court. However, he has earned considerable income from 2004 to 2011. I infer from his absence from the country from 2001 to 2004 that he had the resources to buy a house and therefore could have brought the matter to court well before 2010. Thus, there is no reasonable explanation for his delay. I also find his conduct to be less than meritorious in not disclosing his American financial situation and with respect to the difficulty experienced by Ms. Walker in receiving the ordered child support. Although the circumstances of the child are no longer relevant today, there is

no doubt that a retroactive credit for Mr. Carrothers would be unfair to Ms. Walker who had to do without needed financial resources in raising the child.

[22] There is also the fact that the order in question is a Consent Order. While I do not suggest that this Consent Order cannot be varied, the case of *Shackleton v. Shackleton*, 1999 BCCA 704, at para. 2, treats consent orders as akin to final judgments and the expression of an agreement of the parties, subject to statutory provisions, in this case, the variation provision of the *Yukon Child Support Guidelines*. In the case at bar, the child support order was intertwined with possession of the family home, payment of the mortgage and the sale of the family home.

[23] In *D.B.S.*, at para. 65, Bastarache J. stated that a court order awarding a certain amount of child support must be considered presumptively valid. He also stated at para. 78 that agreements reached by parents should be given considerable weight on the basis that they reflect a holistic equilibrium. In this case, the amount for child support could reflect the difficulty selling the family home or the fact that there was no spousal support.

[24] However, the most significant factor is that, from 2005 to 2011, Mr. Carrothers was quite capable of earning an income in excess of the table amount required for an $800 a month child support. I also find that Mr. Carrothers was not unable to earn any income from 2001 to, and including 2003, but simply that he did not earn income in Canada as he was in the United States. He gave no explanation of how he and his wife could purchase the house in California. I therefore impute an income of $89,000 for each of those three years which he earned or could have earned based upon his income record.

[25] Significantly, he did not receive employment insurance benefits for those years which he would have, had he been in Canada.

CONCLUSION

[26] In conclusion, I dismiss the application for variation and set aside the registration of the Interim Orders from Manitoba. I order that Mr. Carrothers pay the outstanding arrears of child support in the amount of $12,691.94.

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VEALE J.