SUPREME COURT OF YUKON

Citation: *D.W.S. v. N.M.J.C.*, 2017 YKSC 60

Date: 20171025
S.C. No. 15-B0079
Registry: Whitehorse

BETWEEN:

D.W.S.

APPLICANT

AND

N.M.J.C.

RESPONDENT

Before: Mr. Justice L.F. Gower

Appearances:

D.W.S.	Appearing on his own behalf
N.M.J.C.	Appearing on her own behalf
Kimberly Sova	Counsel for the Director of Maintenance Enforcement

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Applicant father is seeking a reduction of child support from $308 to $0 a month and either the complete cancellation of arrears or, in the alternative, a credit of $4,249 for past overpayment. If the court finds outstanding arrears, the Applicant requests a reduced payment schedule of $25 per month.

[2] For her part, the Respondent mother seeks retroactive child support in addition to full and timely payment of outstanding arrears.

FACTUAL BACKGROUND

[3] The father and mother began a common law relationship in 1991, which continued in an “on again/off again” manner and finally ended sometime between 2000 and 2001. The exact date of separation is not relevant to this application.

[4] There are two children of the relationship: a son, Z., born in 1992, and a daughter, K., born in 2000.

[5] At the time of separation, the parties resided in Ontario.

[6] The Ontario Court of Justice gave a judgment in 2005, with $15 a month to be paid for both children by the father. This was based on a finding that he had an annual income of $7,000. The court order included an ongoing financial reporting obligation, and stipulated that there would be a finding of contempt if this term was not complied with.

[7] The Ontario Court of Justice gave another judgment in 2009, this time requiring that $308 per month to be paid for both children by the father, based on an imputed income of $20,000.

[8] At some point, the mother relocated to the Yukon with the children. Although the mother does not provide a date for her relocation, presumably this occurred in late 2009 or early 2010, given that a requisition was filed with this Court to register the 2009 Ontario order in Yukon on February 19, 2010. Sometime later, in August of 2015, the father relocated to the Yukon.

[9] From financial records tendered by both parties, it is clear that the father was making child support payments, albeit inconsistently, first to the Family Responsibility

Office (“FRO”) in Ontario, and subsequently to the Maintenance Enforcement Program office (“MEP”) in Yukon.

[10] It is also apparent that the father has not produced complete income information since the 2005 Ontario order. However, for the purposes of this application the father has produced sufficient income documentation in the form of tax assessments and reassessments to paint a relatively accurate picture of his financial history.

POSITIONS OF THE PARTIES

Submissions of the father

[11] The father takes the position that his child support obligations for 2016 should be reduced to reflect his 2015 gross annual income, which he estimates to be approximately $8,800.

[12] He also argues that he overpaid child support between the years 2011 and 2015; by his account paying $17,257 when he ought to have paid $13,008, and accordingly should be credited the difference of $4,249 toward future child support payments.

[13] In the father’s submission, part of this overpayment is attributable to Z. leaving his mother’s house at the age of 17 in 2009 or 2010, disentitling the mother to payments made for two children after Z. left her charge.

[14] In addition, the father says he was making payments to both the FRO and MEP between 2013 and 2014, resulting in “double-payment”.

[15] As a result of his reduced income and overpayments, the father seeks an order of this Court formally reduce the child support arrears owing to $0.

Submissions of the mother

[16] The mother agrees that her son Z. did leave her home at the age of 17, but says this event could not have resulted in excess child support payments, because the arrears owing at that point would have offset by any overpayment by the father.

[17] She also points out that FRO and MEP records clearly show payment forwarding from one office to the other. Consequently, double payments were not occurring as alleged by the father.

[18] She says there are no grounds for a credit against arrears, or towards future support obligations, on account of the father ceasing to make any payments since 2014.

[19] In addition, she points out that the father took advantage of the $15 per month obligation from 2005 to 2010, by treating it as a fixed rate and failing to comply with his ongoing financial disclosure obligations.

[20] Finally, she submits that the children of the marriage are entitled to a retroactive child support award for the period of 2005 to the present consistent with the difference between the father's reported and actual income during this time period.

ISSUES

[21] In addition to establishing how much the father has in fact paid in child support at the relevant times, three subsequent issues must be resolved:

1. What amount of arrears is owed by the father?
2. What is the father's current child support obligation?
3. Should this court make an order for retroactive child support?

LAW

[22] I will first outline the statutory framework applicable to this matter before moving on to an analysis of the facts.

The Family Property and Support Act

[23] As this application concerns an order that was originally made in Ontario and subsequently registered in this jurisdiction, the *Interjurisdictional Support Orders Act,* S.Y. 2001, c. 19 applies ("*ISOA*"). Section 18(2) of that Act provides that the Ontario order may be enforced and varied in Yukon in the same manner as a support order made by this Court. Pursuant to s. 35 of the *ISOA,* and because the parties were in a common-law relationship, the *Family Property and Support Act,* R.S.Y. 2002, c. 83 ("*FPSA*") applies to this application.

[24] The *FPSA* establishes a general responsibility in law for every parent to provide support for their child:

> 32 Every parent has an obligation, to the extent the parent is capable of doing so, to provide support for their child.

[25] The *FPSA* mirrors the definition of "child" under the *Divorce Act,* R.S.C. 1985, c. 3, for the purposes of child support, and provides that:

> 1 In this Act,
>
> "child means" a person who is the child of a parent… and who is either
>
> …
>
> (c) under the age of majority and has not withdrawn from their parent's charge, or
>
> (d) of the age of majority or over and under their parent's charge but unable, because of illness,

> disability, or other cause, to withdraw from their parent's charge or to obtain the necessaries of life;

[26] Section 44 of the *FPSA* sets out the Court's jurisdiction to vary existing support orders. It reads, in part:

> (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 a 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.

[27] Pursuant to the *Yukon Child Support Guidelines*, O.I.C. 2000/63A "change in circumstances" includes a change in parental income (see s. 12).

Retroactive Support

[28] This Court has the authority to "discharge, vary, or suspend a term of the order, prospectively or retroactively" (s. 44(3)(a) *FPSA*). The Supreme Court of Canada has set out the law around making retroactive child support orders in *D.B.S. v. S.R.G.* 2006 SCC 37 ("*D.B.S.*").

[29] In *D.B.S.*, Bastarache J., writing for the majority, clarified that retroactive awards are not, in the strict sense of the term, "retroactive". Instead, "they are "retroactive" in the sense that they are not being made on a go-forward basis: the parents who owe

support (the "payor parents") are being ordered to pay what, in hindsight, should have been paid before." (*D.B.S.* at para. 2)

[30] On all applications for retroactive support, the court must balance the payor parent's right to certainty and their expectation that they are meeting their obligations against the right of the child to support, commensurate with the payor parent's income.

[31] Accordingly, where a court order for child support is already in effect, that order must be considered "presumptively valid" when an application is made for retroactive support additional to the ordered amount. (*D.B.S.,* at para. 65).

[32] Although existing orders are presumptively valid, the appropriateness of an order amount can vary over time, especially where the payor parent's income changes:

> … a payor parent always has the obligation to pay – and the dependent child always has the right to receive – child support in an amount that is commensurate with his/her income. This obligation is independent of any court order that may have been previously been awarded. Accordingly even where a payor parent has made payments consistent with an existing court order, (s)he would not have been fulfilling his/her obligation to his/her children if those payments did not increase when they should have, according to the applicable law at the time. (*D.B.S.* at para. 68, emphasis added)

[33] The Supreme Court in *D.B.S.* set out several factors to be considered in assessing the appropriateness of a retroactive order. Before citing those factors, I note that the existence of arrears will influence how the factors are applied and interpreted. Where arrears have accumulated, "the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction" (at para. 98).

[34] Without getting into the facts of the present case at this point, I believe there is value in setting out and addressing the *D.B.S.* factors, in spite of the potential presence of arrears. While non-payment or partial payment of child support does militate against the payor parent's right to certainty and predictability, some of the *D.B.S.* factors are nevertheless relevant in light of the behaviour exhibited by both the mother and father in this case.

[35] As listed in *D.B.S.*, the factors a court should consider in making a retroactive support analysis are as follows:

- Why the additional support was not requested earlier by the recipient parent, and whether or not this delay is reasonable in the circumstances;
- Whether or not there has been any blameworthy conduct by the payor parent;
- The present circumstances of the child(ren), and;
- Hardship that may be visited on the payor parent as a result of the award.

[36] Where the recipient parent does not make a request for an increase in child support, and provides no "reasonable excuse" for the delay, a retroactive order may be inappropriate. In the same vein, if the payor parent has been diligent in making payments according to an agreement or existing court order, a retroactive order might unjustly interfere with their expectation of certainty and reliance on the terms of the original order. Other common reasons for refusing to make an order for retroactive child support include the current status of the children, including their being beyond the age of majority and out of the care of the custodial parent, and the potential hardship that could be visited upon the payor parent if such an order were imposed.

[37] Conversely, where the recipient parent has in some clear way made it known to the court or to the payor parent directly that they are seeking more child support, a retroactive order can be made to apply from the date of that effective notice. In some circumstances, this date can be set earlier, but the general requirement of effective notice remains (*D.B.S.* at paras. 121 – 124). Where the circumstances justify looking past the date of notice, it will often be unreasonable to go back in time more than three years from the notice in the retroactive support calculation. However, the presence of blameworthy conduct "…will move the presumptive date of retroactivity back to the time when circumstances changed materially" (*D.B.S.* at para. 124).

[38] It is very clear that despite of any blameworthy conduct on the part of the payor parent, where retroactive support orders are made, they are made for the sake of the children who were deprived from a benefit due to them, and not for the sake of punishing wrongful conduct.

[39] In addition to taking into account the specific factors discussed in *DBS*, I must look to all the relevant circumstances of the case in assessing the appropriateness of making a retroactive order. (*D.B.S.* at para. 134).

ANALYSIS

Status of Arrears

[40] The first issue that must be dealt with is the status of the father's payments and the arrears accrued to date. The father submits that he has overpaid arrears by an amount of $4,249 between 2011 and 2015. For her part the mother argues that the father is far behind on payments, having ceased making them altogether in 2014, and is presently in substantial arrears.

[41] The father asserts he has overpaid support because his son Z. left the mother's home at the age of 17, and from that point onward he ought to have only paid support for one child as opposed to two. He also advised the Court that he had been making double-payments of support to both Yukon's MEP office and the FRO during the time period of 2011 to 2015.

"Double-Payment"

[42] This claim is readily dismissible. It is clear to me after looking at the financial FRO and MEP records, that the father was paying into FRO and transfers were being made from FRO to MEP in the time period in question. Prior to November 22, 2013, MEP was recording an accumulation of arrears, but cheques were not recorded as received until May 6, 2013. On November 22, 2013, in what appears to be an internal accounting adjustment, all of the arrears in the account are reduced to zero. From that date, it became a simple enough exercise to track payments received by FRO and see their transfer and arrival in the MEP account a few days later. Between May 6, 2013 and November 22, 2013, MEP recorded receiving cheques on a monthly basis, as did FRO. The MEP receipts of $308 per month appear a few days after FRO receipts totalling the same amount. Presumably, these are transfers. Because of the "resetting" of the MEP account to zero on November 22, 2013, I base my later calculations on the MEP records after that point in time, and the FRO records prior to it. But, it is apparent from the records that transfer payments from FRO to MEP began as early as May, 2013.

[43] After close examination of the financial records I find no evidence of the father having made double-payments to FRO and MEP at the same time, or in an overlapping

time period. Accordingly, I do not find that he overpaid child support as a result of double-payment.

Withdrawing from Parental Charge

[44] The question remains as to whether or not the father overpaid child support by making payments intended for the provision of two children when one, at the age of 17, left the home of the mother.

[45] Section 1(c) of the *FPSA* defines a child for the purposes of support as someone who is "under the age of majority and has not withdrawn from their parent's charge."

[46] Generally speaking, a child under the age of majority will have withdrawn from their parent's charge when they are meeting their own financial needs (see *Chaulk v. Avery*, 2009 NLTD 185).

[47] I have no information from the mother to suggest that she has continued to support her son financially or otherwise after he left home at the age of 17. Two of her affidavits make references to Z. no longer being in her care and leaving home at the age of 17.

[48] Although I do not have evidence before me to establish exactly when exactly Z. withdrew from his mother's charge, there is consensus between the parties that he "left the home" after turning 17.

[49] While merely leaving the home is not enough to establish that a child under the age of majority has left his or her parent's charge (see *Laurie v. Barre*, 2009 MBQB 284), the mother's affidavit evidence leads me to believe that Z. left her "care", as well as her home, at the age of 17. I take this to mean that he ceased relying on her for financial support, and I have no evidence before me to the contrary.

[50] Accordingly, without a detailed account of Z.'s departure from his mother's residence, and for the purposes of reassessing child support arrears and payments, I take January 1, 2010 to be the date of Z.'s withdrawal from parental charge. I do so based on my finding that the mother arrived in the Yukon sometime in late 2009 or early 2010, because by February 2010, she had filed the Ontario support order for enforcement in this jurisdiction. Z. would have been 17 at the time of the move, and I think it is fair to infer that he withdrew from her charge as a result of her relocation from their home province. There is no evidence he resided with her here, and, even if he did, the evidence clearly establishes that he would have continued to be in her care for a period of less than a year.

[51] In light of that finding, it is true that the father has overpaid child support for the period between 2010, when Z. left home, and 2014, when he ceased making payments, as the 2009 Ontario order fixed an amount to be paid for two children. Following Z.'s departure, the mother had a responsibility to make that change in circumstance known to the father, but did not.

[52] For his part, however, the father is far from blameless. Under the presumptive child support regime, ongoing financial disclosure is almost always a requirement. Payor parents are not to take advantage of an order amount as fixed, particularly if their income rises in the years following the order.

[53] Here, the Ontario court ordered the father to provide updated financial information, on an annual basis, in both the 2005 and 2009 orders. It should have been clear to the father that, for as long as he was required to pay child support, he would

have to disclose his income to the mother on an annual basis. No such disclosure has ever occurred.

[54] Instead, the evidence shows that the father kept to a $15 per month payment plan from 2005 to 2009, when the second Ontario order increased that amount to $308 per month. Then, although he made attempts to comply with the second order until ceasing payments altogether in 2014, he again did not provide annual disclosure of his income, as required.

[55] Given the financial record now before this Court, which includes the father's income tax assessments for every year from 2005 to the present - save 2008 and 2016 – it is clear that his lack of financial disclosure resulted in payments that were almost without exception lower than they ought to have been, particularly between 2005 and 2010.

[56] However, the mother had the opportunity to raise the father's underreporting in 2009 before the Ontario courts and seek retroactive support at that point in time. There is no indication that this was addressed. I note as well that clause three of the 2009 Order of Justice Roswell states that "there shall be no variation of the support prior to January 1, 2010". Accordingly, and despite the father's clear underpayment based on the financial documentation filed before me, I decline to consider the period of time before 2010.

[57] The father's blameworthy conduct with respect to compliance with the court-ordered income disclosure and past payment of support forms part of the circumstances relevant to the mother's application for a retroactive award. Accordingly, I will make a determination about arrears owing in the context of the mother's application.

Retroactive Award

[58] The mother has made an application for retroactive child support in response to the father's request for reduction of arrears and support payments.

[59] As stated earlier, the factors I am to take into account in considering the appropriateness of a retroactive award include, but are not limited to:

1. The recipient parent's delay in requesting a retroactive award;
2. Blameworthy conduct on the part of the payor parent;
3. The present circumstances of the children; and
4. Hardship that may be visited on the payor parent as a result of the award.

1. Delay in Requesting a Retroactive Award

[60] As stated in *D.B.S.*, "…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 parent." (at para. 123).

[61] However, in these circumstances the payor parent's right to certainty is derogated from by his persistent conduct in not disclosing what are shown to be substantial increases in income. Where a payor parent fails to disclose "…a material change in circumstances – including an increase in income that one would expect to alter the amount of child support payable…the presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially." (*D.B.S.* at para. 124)

[62] For these reasons, I do not see the late request by the mother as an *unreasonable* delay in seeking out retroactive child support going back to 2011, the year after the year contemplated in the Ontario order.

2. Blameworthy Conduct

[63] Much has already been said about the blameworthy conduct of the father in failing to report his income.

[64] To his credit, the father did make payments commensurate with the court-ordered amounts from 2010 to 2014. Still, to call these "good faith" payments strains the meaning of that expression in this context, given that he did not disclose increases in his income. Although the 2009 Ontario order was premised on an annual income of $20,000, the financial documents submitted indicate that between 2010 and 2014, he made anywhere from $27,759 in 2010 to $37,872 in 2013.

[65] It is beyond question that the father failed to report his true income over an extended period of time.

[66] It is also well established that, "a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments (*D.B.S.* at para. 106 citing *Hess v Hess* (1994), 2 R.F.L (4^{th}) 22 (Ont. Ct. (Gen. Div.)).

[67] However, I also acknowledge fact that the mother did not disclose Z.'s withdrawal from her care in 2009/10.

3. Present Circumstances of the Children

[68] Z. is no longer considered a child for the purposes of child support. He is 24 years of age, and has been living away from home for quite some time. I do not have evidence before me to show that Z. is in any way financially dependent on his mother.

[69] Child support is intended for children of the relationship who remain under the charge and support of the recipient parent, and not adults who "used to have that

status" (*D.B.S.* at para. 89). Accordingly, even if I am wrong in finding that Z. left the mother's care in January 2010, I am not prepared to make a retroactive order for him in any event. As Bastarache J. pointed out:

> … An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status (*D.B.S.,* at para 89).

[70] K. on the other hand is under the age of majority, and living with her mother. She is 16 at the time of writing.

4. Undue Hardship

[71] Under the *D.B.S.* framework, "a broad consideration of hardship" should be applied to the retroactive support assessment (at para. 114). That is to say, I must take into consideration all of the relevant hardship arguments made by the father, and not merely those that would apply under an "undue hardship" analysis. The undue hardship requirement is a stricter test, with a higher threshold, and it applies in the context of prospective awards. Because of the nature of retroactive awards, based as they are on past, as opposed to present, annual income amounts, it is important to take a broader approach to assessing hardship (see *Greenall v. Greenall,* 2010 BCSC 583 at paras. 91 - 94).

[72] In making his application for the reduction or cancellation of arrears, and cutting off future child support payments, the father cites his current dependence on social assistance, mounting debts, and difficulty finding employment as grounds for relief.

[73] I do have 2015 tax assessment information to confirm that the father's reported income dropped significantly. This evidence, combined with the father's relocation to the Yukon, makes his claim that his income is not what it used to be more believable.

[74] I also have a personal line of credit statement tendered by the father, current to January of last year, which shows a balance of $14,003.08. Indicating some level of debt at that point in time.

[75] The father states in his most recent affidavit, filed February 9, 2017, that he is currently unemployed and receives social assistance which, by his account, amounts to $1,435 per month. Based on this amount, the father estimates his prospective annual income in 2017 will be in the neighbourhood of $17,220.

[76] While this is no great amount of money, I believe it necessary to take notice of the fact that in both of the previous Ontario orders for child support, the income amounts adopted by that court were far less than the father's income turned out to be at the time.

[77] It would be unfair to make an inference from past to present circumstances, where I do not have evidence that deception is at play. But, I point out this pattern of past behavior because I have not been given any reason to believe that the father's current financial status will not improve in the future.

[78] There is no evidence before me that indicates the father is less than able-bodied or unable, for some other reason, to find gainful employment.

[79] I accept that the father is suffering from financial hardship at the moment and would suffer more in the future from a retroactive award, but in light of his past conduct and his potential to earn income, a retroactive award is nonetheless justified in my view.

Quantum of the Award

[80] I have the benefit of tax documentation between 2010 and 2015. Tax documentation was not provided for 2016 and is not yet available for 2017. For 2016, the father self-reported income of $12,064, based on $5,440 of employment income and $6,624 in social assistance and the fact that he was in custody for four months. Although I accept that his financial circumstances are reduced from what they were between 2012 and 2014, I do not accept his estimate in light of his past underreporting. Under the *Yukon Child Support Guidelines,* it is open to me to impute income when the parent has failed to provide income information when under a legal obligation to do so. As well, where I am of the opinion that a parent's annual income is not fairly determined in accordance with his T1 documentation, I can have regard to his income over the past three years to fix an amount that is fair and reasonable. Accordingly, I choose to fix Mr. Sykes income at $25,000 for 2016 and at the same level for 2017. In my view this strikes a balance between reflecting Mr. Sykes' past history of underreporting and non-reporting, his income earning potential based on what he was earning in Ontario prior to moving to the Yukon, as well as acknowledging the reality that he earned under $15,000 in 2015.

[81] Accordingly, for the purposes of calculating arrears, I find the father had the following annual income between 2010 and 2017.

YEAR	INCOME
2010	$20,000 (imputed by court) $27,759 (actual)
2011	$32,100

2012	$28,497
2013	$37,872
2014	$30,173
2015	$14,927
2016	$25,000 (imputed)
2017	$25,000 (imputed)

[82] Had the father diligently reported his income over time, my calculation of the table amounts due since the 2010 Ontario order are captured in the table below. This also reflects the fact that Z. left the family home when he was 17, on a date that I fixed at January 1, 2010, as well as the father's move to the Yukon in August 2015.

YEAR	# CHILDREN	TABLE AMOUNT DUE (ON, YT)
2010	1	$172/mo.x 6 mo. = $1,032 (January-June)(ON) $244/mo. x 6 mo. = $1,464 (July-December) (ON)
2011	1	$294/mo. = $3,528/yr (ON)
2012	1	$233/mo. = $2,796/yr (ON)
2013	1	$335/mo. = $4,020/yr (ON)
2014	1	$247/mo. = $2,964/yr (ON)
2015	1	$95/mo. x 7 mo. = $665 (ON) $137/mo. x 5 mo. = $685 (YT)
2016	1	$198/mo. = $2,376/yr (YT)
2017	1	$198/mo. = $1,980 (January-October) (YT)

[83] By my calculations, therefore, between January 1, 2010 and October 31, 2017, and taking into account the 2011 amendments to the tables, the father should have paid a total of $21,510 in child support for the one child, K.

[84] Between January 1, 2010 and November 2, 2015, the MEP records indicate that the father paid a total of $15,865 in child support. I reach this number by calculating the amount the father was required to pay under the Ontario court order, less the arrears owed: i.e. $308 x 70 months = $21,560, minus $5,695 in arrears.

[85] The father has not paid child support since November 2, 2015. Deducting his past payment of $15,865 from the $21,510 he should have paid, I find the father owes arrears of $5,645.

[86] Although there is some suggestion that there were arrears owing prior to the 2009 Ontario order, I decline to consider those on the basis of the intervening 2009 order from the same court.

CONCLUSION

[87] Thus, based on the documentation filed before the court, I find that the father has underpaid child support in the amount of $5,645 since 2010.

[88] Ongoing child support for K. will be payable at the rate of $198 per month, based on the father's imputed income for 2017 of $25,000.

[89] The $5,645 in arrears will be repaid at a minimum rate of $50 per month.

[90] All payments will be made on the 1st day of each month, commencing November 1, 2017. The father shall provide the mother with, at a minimum, his notice of assessment from Canada Revenue Agency, annually, on a date no later than July 1 of the calendar year.

[91] The payments will be enforceable by MEP.

[92] As success was mixed, there will be no order as to court costs.

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GOWER J.