SUPREME COURT OF YUKON

Citation: *S.L.H. v. A.W.H.*, 2018 YKSC 54

Date: 20181224
S.C. No. 18-D5076
Registry: Whitehorse

BETWEEN

S.L.H.

PLAINTIFF

AND

A.W.H.

DEFENDANT

Before: Madam Justice E.M. Campbell

Appearances:

Shaunagh Stikeman	Counsel for the plaintiff
André W.L. Roothman	Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff and the defendant were married on July 4, 2012. They separated on April 3, 2018. During their marriage, they had three children together: M., born June 29, 2014; and A. and B., who are twins, born August 8, 2016.

[2] The plaintiff filed an application on August 27, 2018, and an amended notice of application on November 19, 2018. The plaintiff's application for: full financial disclosure; interim sole custody and primary residence of the children; interim and retroactive child support; equal sharing of the children's extraordinary and special expenses until full financial disclosure is provided; and written authorization prior to

travelling outside the Yukon with the children, proceeded before me on December 7, 2018.

[3] At the outset of the hearing, counsel for the parties advised that the plaintiff and the defendant had agreed that prior written authorization from the other parent, or an order of the court, was required prior to travelling outside the Yukon with the children. Everything else remained at issue.

[4] The parties' submissions on full financial disclosure and costs, for that specific issue, took the better part of the time originally set aside for the hearing of the plaintiff's application. The matter was adjourned to the afternoon. When court reconvened in the afternoon, I ordered further financial disclosure from the defendant and reserved my decision on costs, on that specific issue, until the end of the hearing of the other aspects of the plaintiff's application. Considering the lack of time to address the other aspects of the plaintiff's application, which had been set to proceed on December 7, the plaintiff suggested that the order made by Justice Mahoney on September 20, 2018, regarding the care and residence of the children, remain in place until the continuation of the hearing at a future date. Under the three-week rotating schedule set by Justice Mahoney, the plaintiff has the three children in her care for 17 out of 21 nights. The plaintiff suggested that the issue of interim and retroactive child support as well as interim sharing of special and extraordinary expenses proceed on that basis. After hearing from counsel for the defendant, I agreed that the plaintiff's suggestion was the appropriate way to move forward considering the limited amount of court time remaining that day.

Child Support

[5] The plaintiff seeks interim child support as well as retroactive child support going back to the date of separation. The plaintiff submits that she has not received any child support from the defendant since they separated. She seeks child support in accordance with the *Federal Child Support Guidelines* (the "*Guidelines*"). From April 3 to June 29, 2018, the parties continued to live in the family home, as it appears they were unable to agree on who should move out of the home or on a residential schedule for the children.

[6] From June 29 to July 5, 2018, the plaintiff resided with the children in the family home. On July 6, 2018, the defendant moved back to the family home. On August 1, 2018, the plaintiff definitively moved out of the family home. From August 1 to September 25, 2018, the parties shared care and residence of the children. The plaintiff has had primary care and residence of the children since September 20, 2018, the date of Justice Mahoney's order.

[7] The determination of the defendant's income for the purpose of calculating interim child support is the main issue between the parties. In 2009, the defendant was injured in a motor vehicle accident. Prior to that accident, the defendant had a successful chiropractic practice in Whitehorse. The defendant ceased working and closed his practice at some point after the accident and remains, to this date, unemployed. In 2016, the defendant received $2,200,000 as a final global settlement for his personal injuries' claim arising from the motor vehicle accident. The plaintiff works full-time as a restorative dental hygienist in a dental office in Whitehorse. The

financial statement she filed in this proceeding discloses, for 2018, an annual income for child support purposes of $78,359.56.

[8] The plaintiff submits that the defendant has knowingly omitted to provide full financial disclosure and underestimated the revenues generated by the substantial financial settlement he received in 2016. The plaintiff submits that the Court should impute to the defendant an income of approximately $145,000 in addition to his declared income based on the fact that:

i) the defendant derives income from his investment in a company that is taxed at a lower rate pursuant to s. 19(i)(h) of the *Guidelines*;

ii) the defendant has failed to provide income information when under a legal obligation pursuant to s. 19(1)(d) of the *Guidelines;*

iii) the defendant could reasonably use the cabin located in Judas Creek to generate rental income pursuant to s. 19(1)(a) of the *Guidelines;* and

iv) the defendant is intentionally unemployed pursuant to s. 19(1)(e) of the *Guidelines.*

[9] Counsel for the defendant acknowledged at the hearing that the portion of the settlement that was intended to compensate the defendant for his loss of future income could be considered income for the purpose of determining child support. Counsel for the defendant also acknowledged that a significant component of the settlement constitutes compensation for the defendant's loss of income for the remainder of his career. Counsel for the defendant indicated that actuarial expert evidence is necessary in order to determine the annual income generated by the settlement. Counsel further submits that the defendant intends to retain an actuary to provide expert evidence in

that regard and that it would be prudent to adjourn this matter until such evidence is available. When questioned about the interim nature of the support sought by the plaintiff, counsel for the defendant submitted that the Court should be conservative in attempting to assess the portion of the settlement that was intended to compensate the defendant for future loss of income, as the global out of court settlement was not broken down by category of damages.

[10] Further the defendant denies having received, to date, any dividends or interests from his investment in a company. He indicates that he unwisely invested in this risky business and that he is only, at this point, trying to save the capital he invested in that company.

[11] I am cognizant of the fact that further documented evidence is required before the Court is in a position to make a final determination of the defendant's annual income. However, based on the following factors a preliminary determination of the defendant's income, on an interim basis, is necessary in order to decide whether child support is payable to the plaintiff: the parties have been separated since April 2018; the plaintiff filed her application in August 2018; the plaintiff has had primary care and residence of the three children since September 20, 2018; the defendant remains in the family home; and no child support has been paid to the plaintiff.

[12] Child support is the right of the children. Their needs cannot be set aside until the defendant provides the necessary information for a court to determine his income. This decision by no means intends to provide a full analysis of what the defendant's income is, or should be set at, considering the lack of evidence presented at the hearing regarding the defendant's financial, physical and medical situation. It is a preliminary

assessment that may be adjusted by the Court, if necessary, once further information is presented.

The settlement

[13] As indicated, in 2016, the defendant settled his personal injuries' claim for $2,200,000. In 2014, the defendant received a first advance payment of $100,000. In 2015, the defendant applied for a second advance payment prior to a scheduled trial. In a reported decision prior to the final out of court settlement, Justice Veale, as he then was, found that the defendant's income rose from $109,932 in 2006 to $194,399 in 2009 and then fell dramatically in 2010 onwards. The defendant closed his practice in August 2013. Justice Veale noted in his decision that causation was admitted for the defendant's shoulder and knee injuries, but was disputed for the back injury. Considering the controversy, Justice Veale awarded a pre-trial advance based on his assessment of the shoulder injury alone. Justice Veale accepted that the defendant's loss of income prior to May 2010 was $91,206. Justice Veale assessed the defendant's non-pecuniary damages for his shoulder injury at $60,000, special damages (medical treatment) in relation to his shoulder injury at $19,131.96, and disbursements for his shoulder injury at $13,601.55. Justice Veale concluded that there was no possibility that the assessment of damages would be less than $184,000 for the loss of past income and the non-pecuniary damages for the shoulder injury alone. Justice Veale then ordered that an advance payment of $84,000 be made to the defendant.

[14] It seems reasonable to assume that Justice Veale's decision was taken into consideration, by the parties to that litigation, in arriving at a settlement. Based on his

decision and on the total settlement amount, I am satisfied that a sum of approximately $300,000 encompasses the defendant's special damages.

[15] The defendant would have also been entitled to non-pecuniary damages for his injuries. Damages for non-pecuniary loss in cases of permanent physical injuries are comprised of pain and suffering, loss of amenities in life, and loss of expectation in life.

[16] In 1978, the Supreme Court of Canada set an upper limit for the award of non-pecuniary damages at $100,000 (*Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229]; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267). In 2016, considering inflation, (*Lindal v. Lindal* [1981], 2 S.C.R. 629 at pg. 641) that limit would have been around $350,000.

[17] There is little evidence before me regarding the extent of the defendant's permanent injuries to his shoulder, back and knee. Considering the fact that in 2015 Justice Veale estimated the defendant's non-pecuniary damages for his shoulder alone at $60,000, I am prepared to find, on an interim basis, that the defendant may have received up to $350,000 for non-pecuniary damages as part of his settlement.

[18] After deducting, from the global settlement amount of $2,200,000, the defendant's legal fees and disbursements, as well as his advances totalling $184,000, the defendant received $1,661,626.77. From that amount, the defendant paid $30,000 to Yukon Health to account for the health care he received as a result of the motor vehicle accident.

[19] After deducting the estimated $350,000 for non-pecuniary damages, $116,000, which represents the remainder of the estimated amount for special damages, and the $184,000 advance the defendant received, the remaining amount is $1,165,626.77.

[20] Considering the different heads of damages the defendant could have expected compensation for, I am prepared to conclude that this amount represents a conservative assessment of the amount the defendant received for his future loss of income. This amount also represents approximately 50% of the defendant's global settlement.

[21] The defendant was 41 years old when he received his settlement. I am prepared to accept the defendant's submissions that the amount he received was meant to replace his loss of future income for the remainder of his career up to the point of retirement or 65 years old. Without taking into account any interest the defendant would be expected to garner over time on the principal amount - as there is no actuarial expert evidence before me - this results in an annual income of $48,567.78 per year.

The Defendant's investments in a company

[22] The defendant invested one million dollars of his settlement into a company that I will refer to as company "ABC". The plaintiff and the defendant have opposing views regarding the nature of the payments he has so far received from that company as a result of his initial investment. The plaintiff qualifies the payments as dividends or interest, whereas the defendant, relying on the Share Purchase Agreement he entered into with ABC on February 22, 2018, submits that the amounts he has so far received from the company are simply repayments of his initial investment. According to the defendant, his investment in ABC has yet to generate any revenue. The defendant

further submits that he may end up incurring a substantial loss considering the financial difficulties the company appears to be in.

[23] Since February 22, 2018, the defendant is no longer a director of ABC. However, he remains a shareholder of that company. On December 7, 2018, I ordered the defendant to disclose to the plaintiff a number of financial documents in relation to ABC. I also ordered that he request from the company a number of financial documents including its financial statements for the past three years. Without those documents, it is difficult to assess the financial situation of ABC. It is also difficult to assess whether the defendant's investment in ABC has generated any revenues. The defendant has described ABC as a risky start-up business. He further indicated in one of his affidavits that he was advised by legal counsel that it is unlikely that the he will ever be repaid his one million dollar investment. Further, the defendant states that he never received any form of payment from ABC prior to negotiating the "buy-out" or Share Purchase Agreement of February 22, 2018. Based solely on that agreement, it appears that the defendant could expect a profit of $300,000 if ABC is in a financial position to redeem his shares in one year. If it takes two years, the profit would amount to $500,000. If reimbursement was received in more than two years, the profit would amount to $800,000. The defendant's evidence is to the effect that he did receive $100,000 in repayment from ABC on March 1, 2018. On April 30, 2018, he received another payment in the amount of $17,836.40. On July 24, 2018, he received $60,000 as per the payment schedule set out in the share purchase agreement. However, as of the date of the hearing, the defendant indicated that he had yet to receive the payment scheduled for the end of October 2018. Considering the uncertainty at this point

surrounding the nature of the defendant's investment in ABC and its possible return, I am not prepared to conclude, as submitted by the plaintiff, that the payments received from ABC and totalling $177,836.40 constitute income. For that reason, I am not prepared, at this point, to impute any income to the defendant pursuant to s. 19(1)(h) of the *Guidelines*.

Failure to provide income information

[24] Pursuant to s. 19(1) (f) of the *Guidelines*, the Court may impute such amount of income as it considers appropriate when the spouse has failed to provide income information when under a legal obligation to do so. The plaintiff submits that additional income should be imputed to the defendant as a result of his failure to disclose relevant financial information as per the *Rules of Court* and Justice Mahoney's Order. Though still incomplete, the defendant has provided substantial financial disclosure since the last case management conference of November 26, 2018. He has also indicated his intention to fully comply with the order for financial disclosure I made on December 7, 2018. I am therefore not prepared, at this stage of the proceedings, to impute additional income to the defendant for failing to provide his income information.

Rental income

[25] The defendant submits that his 2018 rental income totals $25,100. The defendant also submits that his rental expenses amount to $1,300 a month. This includes his monthly line of credit payments of $521 for the property as well as payments for home insurance, property taxes and utilities. I recognize that municipal taxes, home insurance and line of credit are expenses typically incurred by homeowners. However, the defendant did not provide any receipts to support his claim

regarding his expenses. Nonetheless, I find it appropriate to reduce the monthly rental expenses by $300 a month, which results in a rental income of $13,100 a year.

[26] The defendant also submits that only one-half of the rental income should be imputed to him because the plaintiff claims that she is entitled to 50% of that income. As the defendant has retained the entire amount of rental income to date, I find that the full amount should be imputed to him.

[27] I am not prepared to impute any rental income to the defendant for the recreational property located in Judas Creek pursuant to s. 19(1)(a) of the *Guidelines*, as the plaintiff's own evidence reveals that the property is not in renting condition.

Intentional under-employment

[28] The plaintiff submits that the defendant, despite his permanent disability, is intentionally unemployed and that income should be imputed to him pursuant to s. 19(1)(a) of the *Guidelines*.

[29] The defendant acknowledged that he is capable of working, but has decided not to as he wishes to be a stay at home father for his children.

[30] In determining whether to impute income to the defendant, the Court must consider his capacity to earn in light of factors such as his employment history, age, education, skills, health, available employment opportunities and the standard of living enjoyed during the marriage. The Court must consider what is reasonable in the circumstances.

[31] A parent has a duty to seek employment when he or she is able to work. As stated by the British Columbia Court of Appeal in *Van Gool v. Van Gool*, [1998] B.C.J. No. 2513, at para. 30: "it is no answer for a person liable to support a child to say he is

unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor. …"

[32] The defendant is in his forties. He holds a university degree, having been trained as a chiropractor. He had his own successful chiropractic practice in Whitehorse until he was permanently injured in a motor vehicle accident in 2009. He stopped working in 2013 and has not worked since this time.

[33] The evidence regarding the defendant's health is somewhat contradictory. On the one hand there is evidence showing that the defendant suffers from chronic pain, and that, according to a text message he sent to the plaintiff on May 8, 2018,: "his 'functional time' (the time I can be up from laying and minimizing my pain)", is somewhat limited. Further, from July 2017 to mid-February 2018, three applications for childcare subsidies were filled out by the defendant's family doctor. One of the applications states that the defendant has "permanent disability and is unable to care for his children." The defendant also acknowledged at para. 10 of his third affidavit that his health issues prevent him from parenting on a typical full-time basis.

[34] However, the defendant also indicates in his affidavits that his permanent disability does not "prevent him from doing any specific parenting task even though he cannot hop on his left leg or run for long distances". The defendant also acknowledges that his challenges are more about fatigue and tolerance to chronic pain, which affect the duration he is able to perform activities (defendant's Affidavit #3 para. 102).

[35] On the other hand, the defendant has indicated in his third affidavit at paras. 104 to 107, that he is slowly weaning himself of a number of his prescribed medications. He attributes the extreme fatigue he used to feel to one of the medications he gradually

stopped taking. He also indicates that: “his disability and overall function have evolved overtime in a positive way”.

[36] Further, in one of the texts the defendant sent to the plaintiff earlier this year, he indicated that although he is able to care for the children, he cannot do so on his own, in addition to engaging them mornings, evenings and nights. However, the defendant filed a letter from his family physician stating that the defendant could parent safely and effectively on a day on day off schedule.

[37] From the evidence adduced in this proceeding, I find that while the defendant’s health does not appear to allow him to work regular or long hours, he is capable of working on a part-time basis. I also conclude, from the evidence filed by the plaintiff concerning employment opportunities with the Yukon Workers’ Compensation Health and Safety Board, that there is suitable employment available to him.

[38] Considering the defendant’s level of education and his prior employment, the salary range of between $69,000, for a policy analyst hearing officer, to $94,000, for a adjudicator, with the Yukon Workers’ Compensation Health and Safety Board is reasonable. Having concluded that the defendant is capable of working on a part-time basis, but taking into account that he has been out of the employment market for five years, I am prepared to impute to the defendant an additional part-time income at the lower end of the salary range of $30,000 per year.

[39] The imputed income of the defendant for child support purposes is therefore of $91,667.78.

Retroactive child support

[40] Except for a period of about a week (June 29, 2018 to July 6, 2018), the parties, while separated, lived under the same roof from April 3 to August 1, 2018. The evidence is unclear on how the parties shared their daily living expenses during that period of time. The evidence is therefore insufficient for me to conclude that the defendant should pay retroactive child support to the plaintiff for that period of time.

[41] For the period between August 1 to September 30, 2018, I find that based on the defendants' imputed income of $91,667.78, he should pay retroactive child support to the plaintiff in the amount of $ 3,651.24. Based on the plaintiff's income of $78,359.56, I find that the plaintiff should pay retroactive child support to the defendant in the amount of $3,133.82, which results in a set off amount of $517.44 that the defendant shall pay to the plaintiff on or before January 31, 2019.

[42] The plaintiff has had primary care and residence of the children since September 20, 2018. I find that the defendant should pay retroactive child support from October 1, 2018 to November 30, 2018. Based on the defendant's income of $91,667.78, I find that the defendant owes the plaintiff $3,651.24 in retroactive child support for that period of time. That amount should be paid in full to the plaintiff by January 31, 2019.

[43] Starting December 1, 2018, the defendant shall also pay to the plaintiff $1,825.62 per month in interim child support. The child support for December 2018 is payable forthwith. Child support is payable every month thereafter on the first of each month.

Special and extraordinary expenses

[44] The plaintiff seeks equal sharing between the parties of the costs of special and extraordinary expenses of the children, including daycare, as she works full-time as a

dental hygienist in a dental clinic in Whitehorse. She also seeks retroactive payment for half the costs of childcare she incurred from the date of separation, April 3 to August 30, 2018, as well as for the month of December 2018.

[45] The plaintiff solely paid for the daycare fees of $6,083 for the three children for the months of April through December 2018. The defendant paid half of the daycare fees in the amount of $1,425 for the month of September 2018.

[46] On September 20, 2018, Justice Mahoney ordered the defendant to pay one-half of the costs of child care, after the child care subsidy had been applied, for the months of October and November 2018. The defendant paid his half of the childcare fees as ordered by Justice Mahoney.

[47] However, as of December 7, 2018, the defendant had not paid any childcare fees for the month of December 2018.

[48] Paragraph 7(2) of the *Guidelines* provides that special and extraordinary expenses of the children are shared by the parents in proportion of their respective incomes.

[49] I have not been provided with a reason why the defendant should not be required to pay for one-half of the costs of childcare. I have also not been provided with a reason why he should not be ordered to pay for one-half of the costs of childcare incurred by the plaintiff between April and August 2018.

[50] I find that it is appropriate in the circumstances to order on an interim basis that the defendant pay for one-half of the special and extraordinary expenses of the children. This includes payment of one-half of the costs of childcare, after the childcare subsidy has been applied, starting on December 1, 2018, and the first of every month thereafter.

[51] I also order the defendant to pay retroactively to the plaintiff one-half of the costs of childcare she incurred from April to August 2018. This amounts to $3,041.50, which shall be paid in full by the defendant to the plaintiff on or before January 31, 2019.

[52] I reserve my decision on costs until a decision is made with respect to the other issues raised in the plaintiff's application, which has been adjourned to March 8, 2019 for hearing.

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CAMPBELL J.