IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Burkitt* v. *Burkitt*, 2003 YKSC 45

Date: 20030828
Docket No.: S.C. No.: 02-B0007
Registry: Whitehorse

Between:

JOAN-ANN BURKITT

Petitioner

And:

KEVIN THOMAS BURKITT

Respondent
(Applicant)

Appearances:
Mr. Malcolm Campbell — Counsel for the Respondent
Ms. Lenore Morris — Counsel for the Director of Maintenance Enforcement

Before: Mr. Justice R.E. Hudson

REASONS FOR JUDGMENT

[1] This is an application for a Provisional Order pursuant to s. 17 of the *Divorce Act,* R.S.C. 1985, c. 3, to vary a Child Support Order made in the Supreme Court of British Columbia on February 5, 1988.

[2] That Order provides for child support to be paid by the respondent (the applicant) in the amount of $25 per month per child when the respondent is unemployed and the sum of $175 per month per child when the respondent is employed, commencing January 1, 1988 and payable on the first day of each month and every month thereafter.

[3] The children in question were Krista Ann Margaret Burd, the daughter of the petitioner, Joan-Ann Burkitt, and with respect to whom the applicant stood *in loco parentis,* and Troy William Thomas Burkitt born January 28, 1986, the biological son of both parties to these proceedings. It should be noted therefore that Krista turned 19 on December 18, 1998 and Troy will be 19 on January 28, 2005.

[4] These proceedings are being brought without notice to the petitioner as is provided by the *Act* and the evidence was by Affidavit, also as provided by the *Act*.

[5] Two affidavits were filed, one at the request of the court to provide greater details on the position of the respondent.

[6] The respondent stated that while married, he had been employed as a commercial fisherman and a maintenance man for Campbell River Transit but that at the time of the divorce he was a commercial fisherman only with an annual income which varied but was approximately $40,000 per year.

[7] The respondent swore that he moved to Vancouver shortly after the divorce but in a subsequent affidavit, he indicated that he was mistaken and that he was living in Vancouver at the time of the divorce. He further stated that from approximately September 1987 to September 1989, he enjoyed intermittent employment as an apprentice stuccoer and drywaller. He stated that during that period he started to use drugs and alcohol to excess, to the extent that he lost his job and existed as a street person for five years.

[8] Paragraph 27 of his affidavit filed on April 29, 2002, states “While I was living on the street, I was often in gaol for minor assault charges, or narcotic offences. I also

spent nine months in custody as a result of a sexual assault conviction. In total, I spent about 6 years in custody."

[9] In 1995, he again secured employment as a stuccoer and worked from August 1995 to October 1996 for Mallette Stucco. That employment came to an end in October 1996 and the applicant indicated that he was unemployed from October 1996 to September 1997.

[10] In 1997, he moved to the Yukon taking employment earning $7.25 an hour for a 33-hour week plus receiving free room and board. From July 1998 to June 2002, he lived from hand to mouth doing small jobs and estimates that he earned between $6,000 to $10,000 per year. The rest of his time to the present is covered by paragraphs 4g, h, and i, which I repeat here:

> g) During the summer and early autumn of 2002, I was able to find employment as a stuccoer on a number of large buildings that have been built in Whitehorse, including the new swimming pool, the new Honda dealership, and the new Department of Justice building. During this period of time, I earned $15,413.00.
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> h) From 20 October to 23 December, 2002, I travelled to Edmonton to work for Bay Drywall and Stucco. I was employed by that company to stucco a large retail complex which was being built in Edmonton. My net income for that job was $4,800.00 after expenses.
>
> i) Since I returned to Whitehorse on 23 December, 2002, I have been unable to find work, although I am actively seeking employment.

[11] He asserts that he has made payments of $2,099.83 between December 1989 to the present time and that on March 22, 1999, there was an adjustment in his arrears downwards by $5,032.31. This adjustment is not explained. There has been a statement filed on his behalf showing his obligations and that he has, pursuant to the Order, sought

to vary it with the information of when he was employed and when he was not employed in order to apply the appropriate factors.

[12] By this statement, he asserts that the balance of the arrears presently totals only $5,756. A copy of this statement is annexed to these Reasons for Judgment.

STATUTORY PROVISIONS

[13] The *Divorce Act*, s. 17(1) states:

> A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses;

[14] Section 17 (4) states:

> Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[15] There has been no previous variation order in this matter.

[16] The *Act* further provides that where a variation is ordered and results in a different amount than is in accordance with the applicable guidelines, that reasons for such decisions must be recorded.

[17] Pursuant to s. 18(2) of the *Act*, the court can make a variation order without notice when the respondent to the application resides in a different province and has not accepted the jurisdiction of the court. The order is provisional and not effective until confirmed in the jurisdiction where the respondent to the application resides.

[18] Therefore, it is obvious that the scope of the jurisdiction of the court is broad, but has been the subject of court rulings, which have the effect of guiding the court to a relatively narrow basis for conclusion.

[19] The section mentionned previously indicated that the order may be made retroactive. The provisions of the Child Support Guidelines at s. 14(b) states:

> Any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> …
>
> (b) in the case where 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 spouse or of any child who is entitled to support; and
>
> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

[20] Therefore, there is clearly a change of circumstances and material change of circumstances, including the introduction of the Child Support Guidelines in May 1997. As well, the lifestyle and earning history of the applicant have subsequently altered since the making of the order in 1988 when the applicant would have been making approximately $40,000 per year.

[21] The case of *Razutis v. Garrett,* [1999] B.C.J. No. 1505 (B.C.C.A.) at para 21 – 23 states:

> An application to cancel arrears or to vary a child support order retroactively to reduce the amount payable under it presents a court with significant difficulties. The past must be reviewed, inevitably with the evidence coming only from the side of the parent who failed in his or her responsibility of providing a home, food and clothing for the children, but has somehow survived. A judge, confronted with the problem

> created by the applicant's failure to have come to the court with evidence of changed circumstances when it was fresh, is not only entitled to give close scrutiny to subjective evidence but is obliged to do so in considering whether to exercise the discretion granted the court by the Act to reduce the arrears.
>
> Where a change in circumstances is proven on an application to vary, the norm is to vary the support to take account of that change from the date of the application. To vary the order for the period before the date of the application is exceptional and requires the court to have regard not only to the change of circumstances but also to "weigh the arguments for and against retroactivity and exercise his, or her, discretion accordingly" (per Prowse J.A in T.(E.) v. T.(K.II)(1996), 25 R.F.L. (4th) 98 (B.C.C.A.)). The evidence must be sufficiently persuasive to justify a variation that will deprive the parent who has carried the burden of the care of the children of any hope of collecting what both parents agreed was reasonable support in the circumstances as they existed when the consent order was made.

[22] In considering the application of the statute, the extraordinary features of this matter are as follows:

a) The provision in the order that the sum of $25 be paid per child if he is not working and $175 per child if he is. Without some rules or regulations within the order to call for a review on an annual basis or some other means to ensure that both parties are aware of the employment status of the applicant, it becomes very difficult to work when unforeseen circumstances occurred.

b) The disastrous turn of events for the applicant when acquiring addictions leading to incarceration from time to time, taking him out of the wage earning field for apparently 6 years.

c) Apparent fact that for a period of two years, one child was not being cared for by the petitioner custodial parent but was in the custody or control of the director.

d) The failure of the applicant to make application at an earlier time or to inform the collecting agency that he was not working, even though he was making slight payments from time to time; as a corollary to this is the circumstance where neither the petitioner nor the collecting authority seemed to have made any inquiry of the applicant as to his employment status.

e) Several accounting errors which may or may not have been connected.

[23] Therefore, I am satisfied that I have jurisdiction to vary the original order, that there is a change of circumstances and the question remains whether retroactivity going back before the application date can be ordered. Considering the case of *Razutis v. Garrett, (supra),* is “the evidence sufficiently persuasive to justify a variation that will deprive the parent who has carried the burden of the care of the children of any hope of collecting what both parents agreed was reasonable support in the circumstances as they existed when the consent order was made”? I do not believe the fact that this was not a consent order makes a difference.

[24] In any event, it is clear that the Order, as worded, is a copy of the separation agreement earlier entered into so that it is clearly the equivalent of a consent order.

[25] Bearing in mind that this is an application for a provisional order, I must consider the conflict between making an order that is in the best interests of the child or children in question, but at the same time ensuring that the applicant is treated with fairness, having regard to all the circumstances. The best interests of the child are paramount. However, it is clear that the amount of the arrears is a burden which, without some windfall, the respondent will never be able to remove. His education qualifications, his work history, even when sober and free of drugs, do not indicate an ability to pay this off.

[26] It is also clear that the judge who granted the order was agreeing with the parties that when the respondent was unemployed then the burden upon him should not stay at $150 per month per child. I believe it should be taken as a given that they did not have in mind that the applicant would be fully employed at all times, since his history did not indicate such.

[27] I must also bear in mind that this is a provisional application and I have the discretion to simply state that this is not an appropriate matter for this procedure, the procedure described in s. 17 of the *Divorce Act, supra.* However, the result of this would be further delays, which should be avoided.

[28] It would be easy to simply find the amount of arrears claimed by the Maintenance Enforcement Office is the direct result of the respondent's failure to satisfy the burden upon him to show at an earlier date that there have been material changes in circumstances. A burden also to show that he was unemployed for long periods resulting in an obligation much less than $350 per month for two children which is reflected in the statement of arrears filed.

[29] However, exercising my discretion, I would still find that the situation as it stands constitutes a substantial hardship to the respondent and this is so specifically for three reasons.

[30] Firstly, the arrears are based on a suggested income which is not in accordance with the evidence I have. As a result of this, the quantum of arrears and the prospect of paying it off constitute an impossible goal. The spirit of the judgment requires a downward variation of the arrears.

[31] Secondly, his lack of education provides some explanations of his failure to indicate to the petitioner or the collecting authorities that he was unemployed.

[32] Thirdly, it is a hardship because of the likelihood that his right to drive an automobile would be cancelled, if it has not already been done. This is pursuant to s. 29 of the *Maintenance Enforcement Act*, R.S.Y. 1986, c.108. While this is subject to the right to apply to the Director for a direction to issue a licence, nonetheless, the applicant is caught in a dilemma. He cannot show he needs a licence to work because he cannot get hired unless he has a driver's licence.

[33] In addition to this, the respondent has established a bond with his son which would be made stronger if the arrears became subject to the possibility of payment in the foreseeable future.

[34] I am satisfied that there exists extraordinary circumstances to justify that a retroactive order be made. I am also satisfied that this retroactivity should extend to a time substantially prior to the date of this application.

[35] I have deliberated at length to reach an objective conclusion. Based on a mathematical application of the evidence, I find this impossible to do. Bearing in mind that the burden is on the applicant, I have decided to vary the order in a way that reflects the evidence that I find credible. This is to be in a way that clearly represents my view that the balance of probability favours the applicant to do so.

[36] I also find that I cannot totally cancel the obligations of the applicant, as the evidence does not support such an Order.

[37] In conclusion, I would accept his evidence of lack of employment, but only for 72 months, not 83 months as alleged. This results in a deduction of $21,600 (72 months x $300).

[38] I would also deduct 60 weeks at $175 for the period when the son was under the care of the Director for a reduction of $10,500 (60 weeks x $175), which would cover the period ending June 20, 2002.

[39] For that time I would apply the Child Support Guidelines, which came into effect on May 1, 1997, and find that the applicant's income justifies no award of maintenance. In further conclusion, the following is the variation:

Stated arrears:		$49,302
Deduction 1	$21,600	
Deduction 2	$10,500	
Total deductions		$32,100
Balance		$17,202

I would round this off to $17,000 as an arrears balance.

[40] I believe that the applicant, with his skills, should be soon earning an income to justify making payments of $200 per month against these arrears.

[41] The Order is further varied to provide that the respondent supply to the petitioner a sworn statement as to his six months income every April 1 and October 1. This sworn statement must be supported by independent proof such as pay stubs to cover the previous six-month period. It is the intention of the court that the respondent should not be deprived of his driving privileges, and that if it has been cancelled, it is recommended that a direction be made to the Registrar of Motor Vehicles to issue such a licence to the

respondent (providing that there are no other impediments), this to enhance his earning abilities.

[42] For clarity, the obligations of the applicant to continue making support payments for the child is reduced to zero due to the fact that his income does not bring him into a situation where he is obliged to make payments under the guidelines.

[43] Application to the court can be made of course, to review this matter once the statements of employment of the applicant are received.

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HUDSON J.

Date	Working	Time	# of Children	Amount payable
Feb 88 – Sept 89	2/3 yes	12 months	2	4 200
	1/3 no	7 months	2	350
Oct 89 – Aug 95	No	70 months	2	3 500
Aug 95 – Oct 96	No	13 months	2	4 550
Oct 96 – Sept 97	No	4 months	2	200
		8 months	1	200
Sept 97 – July 98	Yes	3 months	1	525
		8 months	0	0
July 98 - June 02		47 months	0	0
June 02 – Feb 03	Yes	8 months	1	1 400
Mar 03 – Aug 03		5 months	0	0
Sub-Total				14 925
Amt since Stay				1 400
Sub-Total				13 525
Amt paid				7 132
Sub-Total				6 392
Paid to Troy				636
Amt remaining				5 756