IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *K.D.J.* v. *M.O.H.,* 2006 YKSC 08

Date: 20060127
Docket No.: S.C. No. 05-B0024
Registry: Whitehorse

Between:

K.D.J.

Applicant

And

M.O.H.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Lenore Morris — For The Director of Maintenance Enforcement
Susan Carr — For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the respondent father to reduce the arrears of child support payable for the child, H.R.J., born September 13, 2001 (the "child"), pursuant to an order of the Court of Queen's Bench of Alberta on February 6, 2003 (the "Alberta order"). At that time, the father was determined to have a gross annual income of $32,000, which under the *Child Support Guidelines* would ordinarily have resulted in an award of child support of $281 monthly. However, without receiving legal advice, the

father consented to the Alberta order which required him to pay child support in the amount of $450 per month. Therefore, the order was not made in accordance with the *Child Support Guidelines* table.

[2] The Alberta order has been registered with this Court pursuant to the *Reciprocal Enforcement of Maintenance Orders Act*, R.S.Y. 2002, c. 191. The father has applied to provisionally vary that order by reducing the amount of the child support arrears. The issue is whether there has been a material change in circumstances to support such a variation.

LAW

[3] Pursuant to s. 44(3) of the *Family Property and Support Act*, R.S.Y. 2002, c. 83, this Court may vary a child support order retroactively, and relieve a party from the payment of any arrears, upon being satisfied that there has been "a change in circumstances within the meaning of the child support guidelines or that evidence not available in the previous hearing has become available."

[4] Pursuant to s. 12(b) of the *Yukon Child Support Guidelines*, if an amount of child support has not been determined in accordance with the guidelines table, "any change in the condition, means, needs, or other circumstances of either parent" constitutes a change of circumstances. This language essentially mirrors the language in s. 14(b) of the *Federal Child Support Guidelines*. In *Sewell* v. *Grant*, 2005 YKSC 39, I held that s. 14(b) of the *Federal Child Support Guidelines* is the only precondition to variation which requires the exercise of discretion (as opposed to ss. 14(a) and 14(c) of those *Guidelines*, which, if applicable, do not involve residual discretion). I also noted in *Sewell*, that a change in circumstances has been held to mean a change that, if it had

been made known to the court at the time of the previous child support order was made, would likely have resulted in a different order.

FACTS

[5] The father filed two affidavits in support of his application to reduce the child support arrears. He deposed in his first affidavit that he has “Fragile X syndrome”, which is a genetic disorder causing a range of developmental disabilities and mental impairment. He provided documentation from Whitehorse Medical Services Ltd. confirming this diagnosis. He also deposed that his organizational skills are not very good, that he has a poor memory and that, although he can read, he does not always understand what he is reading.

[6] The father’s evidence is that he is currently 35 years old and has a Grade 12 education. He states that his work experience is limited to airport baggage handling and general labouring jobs. He is single and has never married, but has a son from a previous relationship, K.M.C., age 9, who lives with his mother, J.C., in Whitehorse. The father has regular access to K.M.C. and has been paying child support for him in the amount of $240 per month since May 1999.

[7] The father lived in Alberta from June 1999 to October 2003, during which time he had a casual relationship with the applicant mother, K.D.J. It was not until August 2002, when the child was one year old, that the mother advised the father about the child. Other than seeing the child once as a baby, the father has had no contact with her. Because his relationship with the mother was brief, the father was also uncertain whether he was indeed the child’s biological parent.

[8] At the time he consented to the Alberta order in 2003, the father was living in Leduc, Alberta, and was working for Air Canada as a baggage handler. In previous years he had earned around $35,000 gross annually. He was living alone and paying child support for his son, K.M.C., in the Yukon. The father was unrepresented and unaware that he agreed to pay an amount greater than that specified by the *Guidelines* table. He did not disclose to the mother's counsel either the fact that he has Fragile X syndrome or the fact that he was paying child support in the Yukon. As his current counsel put it, it appears he simply received the papers and signed them.

[9] The father's employment with Air Canada came to an end in October 2003, because he did not have a valid driver's licence. He was then subject to a five-year driving prohibition as a result of an impaired driving conviction. Prior to the termination of this employment he had been on an unpaid leave of absence for six months for the same reason. He eventually returned to the Yukon but, without his driver's licence, he has only been able to find low paying menial jobs. He filed financial information with this Court confirming that his gross income for 2003 was actually $25,443.40 and not $32,000, as specified in the Alberta order. In 2004 his gross income was $24,492.96.

[10] The father currently lives with his parents in Whitehorse, as he cannot afford his own residence, and pays them $400 per month as rent. At the time of swearing his first affidavit in November 2005, he did not own a motor vehicle and had no savings, investments or significant assets. He is also indebted to Employment Insurance Canada for an overpayment of $3,856.41. He started a new job on November 1, 2005, as a security guard at the Qwanlin Mall in Whitehorse, which should result in a gross annual income of $24,960. His driving prohibition was due to expire on January 16, 2006.

[11] It appears as if the father did not advise his parents or anyone else about the Alberta order in February 2003. His counsel submitted that, although he did make a few sporadic payments totalling $1,286.79, he eventually succumbed to the “ostrich syndrome” by largely trying to forget about the order after it was made. As I said, the father also initially doubted whether he was in fact the biological parent of the child. He did not ask anyone to help him deal with that obligation until he received a letter from the Alberta maintenance enforcement program threatening to take action against his Yukon driver’s licence. He then retained counsel and solicited the assistance of his mother to help him put together sufficient information to deal with the Alberta order. The father’s counsel suggests that all these factors, combined with the father’s cognitive disabilities, amounted more to a negligent failure to live up to his responsibilities, rather than an intentional act of bad faith by ignoring the Alberta order.

[12] Since the hearing of this application, the father has been confirmed as the child’s biological parent. Previously, he deposed that, subject to that confirmation, he did indeed wish to help H.R.J. with child support in an amount commensurate with his income, and also to make the child’s mother aware that H.R.J. may be a carrier of the Fragile X genetic disorder.

[13] I am satisfied that had the father disclosed to the court or the mother’s counsel, at the time the mother sought the Alberta order, that he suffered from Fragile X syndrome and was also paying child support for his son in the Yukon, a different order would likely have resulted. While the father could and should have sought legal advice before consenting to that order, I find that, on a balance of probabilities, his failure to do so was likely due in part or in whole to the fact that he suffers from Fragile X syndrome. Further,

he clearly was not earning an income to justify a monthly child support order of $450. Nor was he even earning $32,000 annually in 2003, as stated in the order. Accordingly, I am satisfied that the father has demonstrated a material change in circumstances since the making of the Alberta order, as the information presented to this Court was not made available to the Alberta Court of Queen's Bench.

[14] The father is not seeking to have the child support arrears entirely cancelled. He his only seeking to have them reduced to amounts commensurate with his annual income from 2003 to date. His counsel filed an exhibit at the hearing detailing his then estimated income in each of those years, the corresponding table amounts, the actual amounts of the accumulated arrears pursuant to the Alberta order and the payments made by the father in the interim. Since then, the father has filed a second affidavit confirming his actual income in each of the years 2003 and 2004. Based upon this new evidence and the information from his counsel, I find that the amount of child support the father should have paid over the period from February 1, 2003 (when the Alberta order commenced) to November 1, 2005 (being the last payment due prior to the hearing) is set out below. That amount is contrasted with the father's accumulated arrears under the Alberta order, which will be reduced accordingly.

Years	**Annual Income**	**Payments Made**	**Guideline Table Amount**	
			Monthly	**Annually**
2003	$25,443.40	$441.02	$227	(x11)= $2,497
2004	$23,492.96	$845.77	$207	(x12)= $2,484
2005	$23,800 (estimated)		$210	(x11)= $2,310
		$1,286.79		$7,291.00
				Less: $1,286.79
			Actual Arrears	$6,004.21

vs. previous accumulated arrears under Alberta order (to and including November 1, 2005)	$13,713.21
Net Reduction of Arrears	$7,709.00

CONCLUSION

[15] Pursuant to s. 7(10) of the *Reciprocal Enforcement of Maintenance Orders Act*, cited above, the order of Mr. Justice Foster of the Court of Queen's Bench of Alberta, made February 6, 2003, in Action No. 212000678 is hereby provisionally varied by reducing the arrears of child support owed by the father to the mother from $13,713.21, inclusive to November 1, 2005, to $6,004.21 for a net reduction of $7,709.

[16] If counsel for the father or the Director of Maintenance Enforcement wish to make further submissions or receive directions on the form of the order to follow these reasons, they may arrange with the Trial Co-ordinator to have this matter brought back before me.

GOWER J.