Molloy v. Molloy , 2001 YKSC 548

Date: 20011220
Docket: S.C. No. 95-D2654
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

SHARON DIANE MOLLOY

PETITIONER

AND:

PATRICK MICHAEL MOLLOY

RESPONDENT

REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON

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[1] The petitioner and respondent in this matter were married on September 15, 1979, separated on about March 1, 1995, and were divorced on May 3, 1996, at which time a corollary relief order by consent was signed.

[2] That order provided for the two children of the marriage, namely Bonnie Lynne Molloy, born March 9, 1979 and Charly Marie Molloy, born July 13, 1981, to be in the sole custody of the petitioner. It provided further that the respondent should have reasonable access and the specific details of access and holidays were provided.

[3] Child support was ordered in the amount of $550.00 per month per child, making a total of $1,100.00. These payments were to carry on until December 1, 1995,

following which, starting January 1, 1996, the child support of $800.00 per month, be payable on the 1st and 15th of the month.

[4] The child Bonnie became 19 years of age on March 9, 1998 and Charly became 19 years of age on July 13, 2000.

[5] The child Charly completed high school in 1999 and thereafter, in 2001, completed a two-year aviation diploma at Mount Royal College. She has obtained a commercial pilots license. Charly has attempted to gain employment as a pilot or in the aviation industry without success.

[6] Charly asserts that having failed to find employment in the Yukon, she became aware of a possibility of employment in Thompson, Manitoba. She traveled there, but her application was unsuccessful. She went to Winnipeg, Manitoba from Thompson, where she has taken employment as a waitress earning $6.00 per hour, working 30-40 hours per week. She is also in receipt of gratuities in the approximate amount of $20.00 per day. Charly has decided that in order to achieve gainful employment that it would be necessary to expand her career possibilities. To that end, she is intending to attend Mount Royal College to pursue a Business Administration Degree, feeling that this would increase the likelihood of employment as a pilot or in the aviation business generally. However, at the present time, she is not attending a university or college or any institution of learning, but is employed as a waitress, as stated above.

[7] In Winnipeg, Charly lives with her boyfriend’s parents, who are making the $304.00 per month payment on her car. There is no information provided as to the nature of the relationship between Charly and her boyfriend and whether or not it is

regarded by either or both of them as a long-term commitment or whether, in fact, Charly has become a member of the boyfriend's family in one way or another. Respondent's counsel did not raise this in his submissions and provided no evidence in that regard.

CHARLY'S FINANCES

[8] While attending school, at Mount Royal College, Charly incurred the following indebtedness:

a) $15,000.00 TD Line of Credit;

b) Student loans totaling $11,220.00;

c) Car Loan at a balance of $10,720.00, upon which payments of $304.00 per month are required.

[9] Charly has made an estimate of her anticipated expenses should she attend Mount Royal College (Affidavit dated October 25, 2001). These include payments on her indebtedness and are in the approximate amount of $2,000.00 per month.

16. My current expenses are as follows:

Rent	$260.00 per month
Food	$200.00 per month
Health and toiletries	$50.00 per month
Phone	$50.00 per month
Gas	$120.00 per month
Car insurance	$100.00 per month (my mother has paid this expense)
Loan expenses – car loan	$304.00 per month (recently being paid by my boyfriend's parents)
Personal Line of Credit	$450.00 per month as of November, 2001
Student Loan – approximately $186.00 per month to commence November, 2001	

Part-time Canada Student Loan Bank of Nova Scotia	$186.00 per month (presently being paid by my mother)

[10] There is contradictory evidence with regard to the relationship between Charly and her father, the respondent. This relationship is probably made more difficult by reason of this application.

[11] The question is, therefore, whether Charly is a “child of the marriage” and, if she is, whether under the circumstances, where she is not attending an educational institution, is living with her boyfriend’s parents, and has secured employment at close to minimum wage, she is entitled to support under the *Divorce Act* and the Child Support Guidelines.

[12] Charly is seeking a lump-sum award so that she may relieve the strain from the indebtedness she incurred in attending school to secure her pilot’s license and aviation diploma. She argues that the student loans are not to be deducted from any award to be made providing for her support or maintenance because student loans are merely a deferral of the expense and must ultimately be repaid and therefore should not be considered as income.

[13] Bonnie, after completing high school in 1997, and summer employment, went traveling for 10 months, from October 1997 to 1998. She secured some money from her father for her travels and the expenses incurred, but upon her return she was required by him to cash in Canada Savings Bonds and return the money to him immediately.

[14] Bonnie, from September 1998 to December 1999, was employed and living with her mother in Whitehorse. In September 1999 she enrolled at Yukon College for a full-

time program of general studies to upgrade herself, so as to enable her to pursue a career in nursing. She was attending Yukon College from September 1999 to May 2000 and the respondent paid child support directly to her during this time. No payments were made for the period May 2000 until September 2000 as Bonnie was not at school and had secured summer employment. In September 2000, Bonnie attended Red Deer College in a general studies full-time program, attaining an A-B average. At the end of April 2001, her schooling at Red Deer College came to an end. The respondent immediately suspended child support payments.

[15] Bonnie is enrolled in a four-year university transfer program at Grant MacEwan College. She expects to complete two years at Grant MacEwan College and then transfer to the University of Alberta to complete the last two years. Bonnie estimates her expenses, including tuition, books, rent and living expenses at Grant MacEwan College to be $15,678.00. She anticipates being able to provide from her savings $1,500.00 as against these expenses. Bonnie can also expect to receive or take out a student loan in the amount of $5,000.00, as well as be in receipt of Yukon grants and the proceeds from cashing in bonds. Her anticipated revenues therefore are:

Cashing in of bonds	$1,800.00
Savings	1,500.00
Yukon Grant	4,900.00
Student Loan	5,000.00 (approx.)
	$13,300.00

This leaves an approximate balance of $2,400.00.

CHILD OF THE MARRIAGE – THE LAW

[16] Section 2 of the *Divorce Act, 1985* provides that:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

[17] The relevant portion is s. 2(1) of the *Divorce Act*:

> "age of majority", in respect of a child, means the age of majority as determined by the laws of the provide where the child ordinarily resides …

The age of majority in the Yukon is 19, and there is no issue that both of the subjects in this application are over the age of majority. With respect to each child, the questions to be answered are:

1. Is she under their charge? If not, she is not considered a "child of the marriage".

2. If so, is she unable by reason of illness, disability or other cause, unable to withdraw from their charge or to obtain the necessaries of life?

[18] The burden of proving that a person is a "child of the marriage" is on the applicant for such an order. Madam Justice Johnstone in *Wahl v. Wahl*, 2000 ABQB 10, stated as follows at para. 29:

> The onus to prove that a child is a "child of the marriage" rests on the one seeking maintenance for a child who is over the age of 16 years (now the age of majority).

[19] Master Joyce in *Farden v. Farden*, [1993] B.C.J. No. 1315 stated the following:

> Under the *Divorce Act, 1985* there is no absolute duty nor is there any prima facie legal obligation upon a parent to support a child who is over the age of 16. Once a child reaches age 16 the onus is on the spouse seeking an order for support under s. 15 (*sic*) to satisfy the court that the child is unable to withdraw from the parent's charge or to obtain the necessaries of life [see *Law* v. *Law* (1986), 2 R.F.L. (3d) 458 at 462 (Ont. S.C.)].

CHILD OF THE MARRIAGE

[20] With respect to Bonnie, the decision is clear. She is in residence for the purposes of her training. The respondent, in fact, does not seriously contest the issue and it remains only to decide the appropriate quantum of support under the Federal Child Support Guidelines.

[21] The status of Charly is not such an easy decision.

[22] In the case of *Farden v. Farden, supra* the following statements have been made and have been widely followed:

> Whether or not attendance in a post-secondary institution will be sufficient cause for a finding that the child is still a "child of the marriage" requires examination of all of the circumstances. It is not a conclusion that follows automatically from proof of attendance at the institution [*McNulty v. McNulty* (1976), 25 R.F.L. 29 (B.C.S.C.)]. In my view the relevant circumstances include:
>
> (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
>
> (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
>
> (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;

(4) the ability of the child to contribute to his own support through part-time employment;

(5) the age of the child;

(6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;

(7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;

(8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

[23] Charly is not presently attending an educational institution, but she has substantial debts, which she says arose from her attendance at college. With respect to these debts, petitioner's counsel seeks a lump-sum payment by an assumption of a portion of the debts, arguing that this falls clearly within the category of "other cause".

[24] The question of whether there would be double recovery in view of the apparent fact that the respondent paid Charly support for the year she was at school and was over 19 must also be considered, but was not addressed by counsel.

[25] The significant circumstances in Charly's case are:

(a) she is not presently at any educational institution;

(b) the question as to whether the debts in question and the need to repay them arise from her seeking an education and thereby constitutes an appropriate "other cause".

[26] To repeat, the debts are

1. A $15,000.00 line of credit with payments of $150.00 to $200.00 per month. This amount will increase to $450.00 as of the present time.

2. Two years of student loans at $5,610.00 each, totaling $11,220.00.

3. A car loan in the amount of $10,760.00, with payments of $304.00 per month.

4. Bank of Nova Scotia Loan from her high school days in the balance of $2,000.00, to offset the costs of obtaining a private pilot's license.

[27] In the two years at Mount Royal College, Charly obtained part-time employment, but the income there from is not in evidence. As well, the income earned during summer and high school is not disclosed.

[28] The actual cost for two years at Mount Royal College, where Charly intends to seek a business degree, are not specified. Her current living expenses amount to approximately $780.00, exclusive of any debt repayment.

[29] Her employment as a waitress in a dessert restaurant indicates questionable judgment for a high school graduate with post-secondary success. The possibility of her achieving greater income is hard to dismiss.

[30] Charly graduated in June 2001 with a commercial pilot's license. She made a limited search for employment, and by September 2001, was living with a boyfriend in his parent's home near Winnipeg. The boyfriend's parents are paying her car payments. This situation gives rise to the question (all other things being set aside) of whether she has withdrawn from her parent's charge or if she has established by evidence, on a

balance of probability, that she is still under her parent's charge. Charly's choice to accept menial employment at less than subsistence wages gives further rise to this question.

[31] Certain other things are to be considered. Why a two-year old car at a cost of $13,000.00? For transportation to and from class, a mechanic certified older car in the range of $2,000 - $2,500 could have provided reliable transport at much less cost, particularly the interest to be paid.

[32] The $36,000.00 in debt over the two years, having regard to the costs of books and tuition as sworn to, leaves little room for room and board costs. It is presumed that the petitioner provided the necessary funds. One thing presents itself, clearly. The petitioner and Charly proceeded on the path to a qualification to engage in an occupation (flying), which course of training is extremely expensive.

[33] The presumption has been that it was necessary that it be done in successive months and years. This, to me, fails to recognize if the training is as expensive as this is, then the concept of intermittency, leaving time available to earn a large part of the cost makes sense. In this case, achieving commercial pilot standing at the age of 20 cannot be expected to receive a welcoming reception by potential employers who no doubt would seek pilots of more advanced years and more experience. These are all matters of judgment. But, if judgment would choose a less expensive more sensible approach, the paying parent should have been given the opportunity to participate in that decision.

[34] On the other hand, the respondent's apparently miserly approach to the provision of funds to his daughters, may have made the need to go into debt more immediate.

[35] After considering all of the above, I have reached the conclusion that because Charly is not now in attendance at an institution of learning, she is not a "child of the marriage". She is also living apart with a boyfriend in his parents' home, which parents are paying her car payments, and she is employed working at virtual minimum wage, rather than the much higher wage she could earn in Yukon as a working student. I find that Charly has, in fact, removed herself from her parent's charge and has not proven on a balance of probabilities that she is now a "child of the marriage".

[36] I have also considered that if I were not to have found, as I have, in the above paragraph, that I would nevertheless have found that she has not shown herself to be unable to withdraw from her parent's charge. For that reason as well, Charly is no longer, on the evidence, to be considered a "child of the marriage". Charly is living independently. She has no contact with her father and she has not shown on a balance of probabilities that she is unable to withdraw from her parent's charge or to obtain the necessaries of life or that the heavy indebtedness that exists here, for the reasons it exists, constitutes "other cause" as the words are found in s. 2 under the definition of "child of the marriage".

BONNIE

[37] With respect to Bonnie, the law as found at s. 3.(2) in the Federal Child Support Guidelines reads as follows:

> 3.(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
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> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[38] At the hearing it appeared to be the opinion of both counsel that the Guideline amount would be inappropriate, although counsel for the petitioner retains it as an alternative to his principle submission.

[39] Bonnie will have expenses, on the evidence, of $15,678.00 for the coming school year. From her summer employment she estimates that she will contribute $1,500.00 from savings to total revenues of approximately $13,300.00. Student loans will be available, as well as some proceeds from the cashing of savings bonds, leaving a shortfall of approximately $2,400.00 on the figures used here or $7,385.00 using the petitioner's figures.

PETITIONER'S FINANCES

[40] The petitioner has, while in the Yukon, been employed at a rate of pay of approximately $50,000.00 per annum. She has recently chosen to move to Victoria, British Columbia, where she has only been able to secure part-time work. Respondent's counsel criticizes this and suggests that this decision on her part derogates from her argument that she is not in a position to help. But, this is not spousal support that we

are talking about. I question that the duty of a spouse to maintain a source of income is particularly significant to her ability to contribute to the support of a mature child over the age of majority. The petitioner does forecast a higher income for herself.

[41] The respondent is in the employ of the Territorial Government and his income, pursuant to his sworn statement dated October 12, 2001, is $72,960.00. His expenses, after eliminating $1,600.00 for child support, which is shown in his statement, would then show a net monthly surplus of over $1,400.00. Some of his estimated expenses, such as $200.00 per month for entertainment, and $100.00 per month for alcohol and tobacco, show some flexibility. The respondent has a new spouse who is employed.

[42] The petitioner's position is that with respect to Bonnie's attendance at school, there was a shortfall of $7,385.00. Employing a ratio between the parents of 75/25, the appropriate amount under Guideline 3.(2)(b) would be a payment by the respondent father of $553.87, with credit being given for $1,600.00 already paid.

[43] I find the petitioner's submissions, considering all the matters outlined in Guidelines 3.(2)(b) is most reasonable, and order that effective September 1, 2001, child support be paid by the respondent in the amount of $560.00, with credit being given for the $1,600.00 already paid. I have rounded the figure upwards.

[44] The issue of whether or not student loans should be deducted from student expenses before assessing the quantum of support is before the court. The petitioner's arguments were that student loans were a mere deferral of these costs and should be treated as such in that the student will bear the burden of them later in life. The petitioner's position is so that if expenses are $20,000.00 and $6,000.00 is received

through student loans, the need is still $20,000.00 for the purposes of calculating quantum of support. The matter of student loans and how they are to be dealt with has been discussed in several cases. I am persuaded that they should be deducted before arriving at an expense figure.

[45] On this point, I have read and considered: *Farden v. Farden, supra*; *Weseman v. Weseman,* (19 May 1999), New Westminster, D18139 (B.C.S.C.); *Anderson v. Anderson*, (26 February 1997), New Westminster, D020221 (B.C.S.C.); *Whitley v. Whitley*, (09 October 1997), Rossland, 4741 (B.C.S.C.); *Klotz v. Klotz,* (27 January 1999), Vancouver, D49089 (B.C.S.C.); *Sherlock v. Sherlock*, (10 August 1999), Vancouver, D092345 (B.C.S.C.); *Wahl v. Wahl*, 2000 ABQB 10; *Kusnir v. Kusnir*, [2001] O.J. No. 3491 (Ont. Court of Justice); *Risen v. Risen*, [1998] O.J. No. 3184 (Ont. Court of Justice); and *Louise v. Scheuer*, [1995] B.C.JK. No. 2510 (B.C.S.C.).

[46] Accordingly, the application to pay child support to the child Charly Marie Molloy is dismissed, as I declare that the petitioner has failed to satisfy the burden of proof herein. The application to have the respondent pay child support to Bonnie Lynne Molloy is allowed at the sum of $560.00 per month, commencing as of September 1, 2001, with credit being given for $1,600.00 already paid.

[47] Had I found that Charly had proven herself a “child of the marriage”, I would have ordered a lump sum of $10,000.00 to be applied against the debts, subject to determination of the question of double recovery and whether it is a disentitling factor.

[48] Under the circumstances, in that most of the time was spent with respect to Bonnie's claim, and having regard to the abilities to pay, the respondent is ordered to pay to the petitioner, two-thirds of her taxable costs with no deductions.

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Hudson J.

Counsel for the Petitioner	Shayne Fairman
Counsel for the Respondent	J. Robert Dick