IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Whitcher* v. *Nichols,* 2004 YKSC 35

Date: 20040525
Docket No.: 00-D3248
Registry: Whitehorse

Between:

CATHERINE MAY WHITCHER

Petitioner

And

GERALD WAYNE NICHOLS

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
Debbie P. Hoffman — For the Petitioner
Elaine B. Cairns — For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The respondent father has essentially applied for a declaration that his son Ian, who is over the age of majority, is no longer “a child of the marriage”. He also seeks cancellation of arrears of child support and repayment of the child support he paid for the benefit of his son after he dropped out of school. The petitioner mother relies upon a written Separation Agreement and the *Divorce Act*, R.S., 1985, c. 3 (2nd Supp.) and says that her son was unable to withdraw himself from her charge for over two years after he left school. Therefore, the mother says the respondent was obliged to pay child support for their son until then (subject to an accounting to reflect the father’s reduced

income) and no repayment of support is required. These reasons will only deal with this point of disagreement. There are a number of ancillary matters which the parties have resolved.

[2] The Separation Agreement between the parties was made on May 4, 2000. Ian turned 19 years old on September 16, 2001 and stopped attending high school in February 2002. The respondent brought his application by a Notice of Motion filed February 24, 2004.

[3] Clause 5.01 of the Separation Agreement specifies that the father shall pay child support until each child reaches the full age of 19 years or dies or marries, subject to the following exception:

> … if the child is 19 years of age or over and under the Wife's care but unable by reason of illness, disability, full time attendance at an educational institution or other cause to withdraw from his … mother's charge or provide him[self] … with necessities of life, in which case the payments shall continue until the child is able to provide him[self] … with the necessaries of life.

[4] That clause essentially mirrors the definition of "child of the marriage" in s. 2(1) of the *Divorce Act*, cited above, which means under paragraph (b) "a child of two spouses or former spouses who, at the material time, 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".

ISSUE

[5] The issue is when Ian was able to withdraw from his mother's charge or obtain the necessaries of life, after he stopped attending high school. The father says that as of

March 1, 2002, Ian was able to find work, and indeed did find fairly regular work, and paid rent from time to time to his mother. The mother says Ian continued to be financially dependent upon her until he left her home on March 15, 2004.

EVIDENCE

[6] The mother's evidence is that prior to Ian leaving high school in February 2002, he was taking a number of non-mainstream courses such as career planning, construction, communications, accounting, metalwork and mechanics. He did not take core curriculum courses such as english and french, social studies and science. It appears he dropped out of school part way through the grade 11 year.

[7] Ian obtained a part-time job delivering pizza in December 2001. He required his own vehicle for that job and borrowed $1,200.00 from his mother to make his vehicle roadworthy. In mid-April 2002, Ian was involved in a fairly serious motor vehicle accident. He chose not to drive for a period of time afterwards and consequently was not employed from April to June 2002. During that time, he was fully supported by his mother. Although Ian was looking for work, he did not find another job until July 2002, when he started working part-time at a gas station. As he wanted to save enough money to fix his old vehicle or purchase another vehicle, his mother agreed not to charge him room and board.

[8] He began working for a drywall contractor in September 2002 on a part-time basis, although the job was originally expected to be full-time. The father deposed that his job was "almost full-time for around one year and then [Ian] quit." This is contrary to the mother's evidence that the job was part-time and "ended" some time prior to June 2003, which is less than one year. The mother also deposed that after this job ended,

Ian was unable to claim Employment Insurance because the drywalling was considered to be “on contract”.

[9] Between June and November 2003, Ian worked full-time at McDonald’s for minimum wage. During this period he was still saving to get a vehicle back on the road and his mother again agreed not to charge him room and board. In November 2003, Ian began working for the drywall contractor again. He was finally able to get his vehicle fixed in December 2003, when he returned to work part-time at McDonald’s. Eventually this turned into a full-time job and Ian moved out of his mother’s house on or about March 15, 2004.

[10] The mother also says that she currently pays approximately $2,000.00 per year into a registered education savings plan for her daughter, Rebecca, also a child of the marriage. Rebecca will be turning 19 years old on July 17, 2005 and plans to attend post-secondary education. An older daughter, Amy, continues to live in the mother’s home from time to time and receives periodic financial assistance from her.

[11] The father’s evidence is that his current financial situation is very bad. He was employed for approximately 3 ½ years as a mechanic at Yukon Honda, until he was laid off in October 2003. Before, during and after this last stretch of consistent employment at Yukon Honda, the father operated a small business as a small engine mechanic. He has been pursuing this business full-time since he was laid off. As I understood the submissions of the parties, they agreed that his current income is approximately $16,224.00 per year. The father is dyslexic and has difficulty with reading comprehension. He has a Grade 8 formal education, but is a licensed automotive

mechanic. His small engine repair business is not yet up to full speed and he recently suffered losses from the theft of a generator and damage to his mobile repair shop. The replacement cost of the generator was stated to be $2,700.00, not including taxes. The loss was uninsured.

ANALYSIS

[12] The mother was presumably in contact with Ian on a daily basis and gave detailed information about his work history. In comparison, the father's evidence about Ian's work history was relatively vague and tended towards generalization. On balance, I find the mother's evidence more persuasive.

[13] The mother's counsel says the court can vary the terms of the Separation Agreement if there has been a change in the father's circumstances or if Ian is no longer considered a child of the marriage. Clearly there has been a change in the father's circumstances. At the time he entered into the Separation Agreement, his income was approximately $28,676.77 per annum. However, as I understand it, that is not the essential issue here. The mother has already agreed that any maintenance payable for the benefit the children should reflect the father's current financial means. Rather, what is at issue is when Ian ceased to be a child of the marriage. Here, the mother's counsel submitted that there is a competing onus. Initially, the father must demonstrate that there has been a material change in circumstances by virtue of the fact that Ian ceased to be a child of the marriage. Once the father presents sufficient evidence to initially make that case, then the onus shifts to the mother to establish on a balance of probabilities that Ian remained a child of the marriage during the relevant period.

[14] Counsel for the father relied on *Olson* v. *Olson*, [2003] A.J. No. 230, a decision of the Alberta Court of Appeal, for the proposition that the onus to prove that a child is a child of the marriage rests on the party who seeks maintenance for a child over the age of majority. In this case, not much turns on the question of the onus. The father did initially establish that Ian was no longer a child of the marriage. The question is whether the mother has met her onus in reply.

[15] The *Olson* case, cited above, recognized at paragraph 15 that in determining whether a child is a child of the marriage, “the line is to be drawn” at such point as the court thinks fit and just “in all the circumstances of the particular case at issue, having due regard to the conduct of the parties and the condition, means and other circumstances of each of them”.

[16] Counsel for the mother relied upon *Clattenburg* v. *Clattenburg*, [2002] N.S.J. No. 357. There, the Supreme Court of Nova Scotia dealt with two relevant propositions. First, a parent applying for a declaration that a child no longer qualifies as a child of the marriage must do so in a “timely manner”. In that case, the applicant waited several months after the point that he contended one of his children ceased to qualify for support, when he knew or ought to have known of the child’s circumstances at the time. That delay created a potential financial difficulty for the respondent, because the applicant was seeking a retroactive repayment of child support. The court recognized that the respondent mother presumably assumed she was entitled to the income she received from the child’s maintenance payments and spent it accordingly. Thus, an order for repayment would have placed an unreasonable burden upon her.

[17] The second proposition recognized by the court was that, in cases where the child attends and completes post-secondary education, the transition from child to self-sustaining adult is not automatic upon graduation. At paragraph 13, the court said as follows:

> A child does not necessarily cease to come within the definition immediately upon the happening of an event, such as completing his or her formal education. A period of adjustment may be necessary to enable the child to become established in the work force or otherwise become self-supporting. During this period one parent or the other should not be saddled with the full burden of supporting the child. Someone had to provide support for [the child] and, in my view, it should be a shared expense.

[18] On the other hand, the court recognized that children over the age of majority have an obligation to contribute to their own support and education expenses insofar as they are capable of doing so. Having said that, the court noted at paragraph 19:

> Children do not always perform according to the wishes of their parents or follow the schedule parents set for them, but parents, to some extent, must take the circumstances of the children as they find them. This is not to say that a “child of the marriage” may incur expenses for education or otherwise and embark on a course of conduct that delays his or her becoming financially independent of the parents and expect the parents to “pick up the tab”. The expenses must be reasonable in the circumstances of the child and the parents.

[19] In that case, the court terminated the obligation of the father to pay maintenance for the older daughter approximately one year after she completed her college training. The younger daughter was expected to complete her course of education and training in December 2002 and receive her degree in May 2003. The father’s obligation to pay maintenance for her was terminated as of March 31, 2003.

[20] In the case before me, counsel for the father focused on the issue of prejudice. She said the father would suffer a significant financial setback, unless this court relieves him of his obligation to pay maintenance for Ian on or shortly after he dropped out of high school. She emphasized the father's learning disability, his low level of education and his current level of self-employment.

[21] On the other hand, counsel for the mother emphasized that she has had to bear the burden of raising all three children over the years and meeting their needs, even when the father fell into arrears in child support payments from time to time. She is continuing to meet their needs, as exemplified by her periodic financial assistance for the older daughter Amy and the education savings plan for Rebecca. With respect to Ian, the mother accommodated Ian's needs by allowing him to stay in her home for approximately two years after he dropped out of high school. For only twelve months of that period was Ian required to pay room and board. For the remaining twelve months, Ian was allowed to put his additional savings toward the repair or purchase of a motor vehicle. As well, the mother initially loaned Ian $1,200.00 specifically for that purpose. Given Ian's relatively low level of skills and formal education, a motor vehicle was understandably thought to be an important asset for finding employment. Shortly after he got his vehicle on the road, he moved out.

CONCLUSION

[22] Ultimately, I am persuaded by the mother's position. I find that Ian was not fully able to withdraw himself from his mother's charge until he moved out of her home in March 2004. Nor was he fully able to provide himself with the necessaries of life until

that time. I conclude that the mother was apparently making her best efforts to assist Ian and was gradually trying to “nudge him out of the nest”. However, as was recognized in the *Clattenburg* case, children don’t always perform according to the wishes or expectations of their parents. This resulted in what was perhaps a longer than normal transition period from the time that Ian ceased attending high school until moving out. However, it is not excessively long in comparison with that allowed for one of the adult children in the *Clattenburg* case, who was generally better equipped for self-sufficient adulthood than Ian. The motor vehicle accident also contributed to the delay in Ian’s departure.

[23] I sympathize with the father’s unfortunate circumstances, but this application is not so much about the father as it is about Ian’s best interests. In any event, to the extent the father’s income has been reduced, the parties have agreed to retroactively adjust the amount of the child support payable. Also, the father has yet to receive his income tax refund for the 2003 tax year, which is likely to be in the neighbourhood of $1,500.00 or more. And his finances were apparently adequate enough to allow him to purchase the generator (unfortunately, now stolen) worth approximately $2,700.00 plus tax.

[24] Incidentally, should this matter continue in litigation, I agree with the position of the mother’s counsel that the father has not complied with the requirement in s. 21 of the Child Support Guidelines to provide the specified financial information, as he is self-employed.

[25] I also find that the father did not pursue his application in a timely fashion. His counsel was unable to explain why he did not pursue legal advice, even on an informal basis, on or after Ian left high school, about two years ago. He received independent legal advice prior to signing the Separation Agreement and is deemed to know its content (Clause 5.01). His counsel suggested that he might have been impaired by his problem with reading comprehension, but ultimately that doesn't explain his delay. It would have been a simple matter for him to pick up the phone and have an initial chat with his former counsel, as he eventually did shortly before bringing this application (deposed to at paragraph 33 of his first affidavit). Even if I had found that Ian ceased to be a child of the marriage prior to March 15, 2004, for the reasons in *Clattenburg*, cited above, I would have had significant difficulty in ordering the mother to repay Ian's child support in the face of this lengthy delay.

[26] Accordingly, I grant the father's application for a declaration that Ian ceased to be a child of the marriage, but not until March 15, 2004. As I said at the outset, the parties have agreed upon a number of other issues and I expect that they will be tendering an order with terms reflecting the details of that resolution, as well as this judgment. Should either party wish to speak to the issue of costs, they should approach the trial coordinator to schedule a further hearing before me.

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GOWER J.