

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Winther v. Winther*, 2003 YKSC 12

Date: 20030203
Docket: S.C. No. 02-B0045
Registry: Whitehorse

BETWEEN:

MARIE MADELAINE WINTHER

Petitioner

AND:

NORMAN RAY WINTHER

Respondent

Appearances:

No appearance

Ms. Christina Sutherland

For the Petitioner
For the Respondent

Before: Mr. Justice R.S. Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Winther seeks an order varying the terms of a child and spousal support order dated April 5, 1988 in the Supreme Court of British Columbia. No one has appeared for Ms. Winther, as she apparently wishes to respond to the provisional order in British Columbia. The procedure of making a provisional order for later confirmation, variation or refusal is a cumbersome and time-consuming procedure that will hopefully be amended soon to provide for a simple procedure where both parties give evidence at the same time and receive one judgment.

ISSUES

[2] The following issues must be addressed:

1. **Is this an appropriate case for cancellation of the arrears owing by Mr. Winther to Mrs. Winther?**
2. **If not, what amount should be paid?**

FACTS

[3] The facts presented by Mr. Winther are as follows:

- (a) The parties were married on October 8, 1977 at Winnipeg, Manitoba. Mrs. Winther is 49 years old and Mr. Winther is 51 years old.
- (b) There are two children of the marriage, namely Tanya Marie Winther, born May 7, 1979 and Kristin Wayne Winther, born November 12, 1981.
- (c) Tanya is now 23 years old and lives and works in Whitehorse, Yukon. Kristin is 20 years old and attends a school for culinary arts in Vancouver, British Columbia.
- (d) The parties separated sometime in May, 1986. Mrs. Winther was granted interim custody of Tanya and Kristin with no access by the *ex parte* order of Judge Skipp dated February 2, 1987.
- (e) A divorce was granted on April 5, 1988, with custody to Mrs. Winther and no access for Mr. Winther. Mr. Winther was ordered to pay child support in the amount of \$400.00 per month per child and spousal support in the amount of \$400.00 per month, all to commence on March 1, 1988.
- (f) In a supporting affidavit of Mrs. Winther sworn March 14, 1988, she stated at paras. 12 and 13:

12. The respondent has not seen the children since the separation of the parties in May 1986.
13. I am not willing for the respondent to have access to the children because he is an alcoholic, has a violent nature, and has physically abused the children, and for all the other reasons that I have set out in my affidavit [sic] which was previously filed on January 27th, 1987.
 - (g) I have not been provided with a copy of the January 27th, 1987 affidavit of Mrs. Winther.
 - (h) Mr. Winther denies that he was violent to the children or that he abused them. He does not deny that he is an alcoholic.
 - (i) Mr. Winther says that he hired a Whitehorse lawyer to get access to his children, but he was not successful.
 - (j) He has had no communication with the children for 16 years, except for some written communication with Tanya. He claims his letters were not given to Tanya.
 - (k) He eventually made contact with the children in the summer of 1999 with the assistance of his brother-in-law.
 - (l) He has had little contact with Mrs. Winther.

- (m) On December 9, 2002, the arrears of support were \$186,526.12. Mr. Winther states that he never made any support payments because he was denied access to his children.
- (n) Mrs. Winther has been supported by social assistance.
- (o) Mr. Winther has attended at Territorial Court some 11 or 12 times as a result of his failure to pay support. He was put in jail in 1989 and 2001 for refusing to pay.
- (p) In his words, "My position for many years was that I would not pay any support until I could see the Children. I know that this was wrong, but I was mad at the world, and was very upset that I could not have any part in the Children growing up."
- (q) This application is part of his change in attitude. He has established a relationship with Tanya and she has encouraged him to deal with the arrears issue.
- (r) Since December 2001, he has made payments of at least \$200.00 a month, totaling \$2,900.00.
- (s) Mr. Winther has not filed income tax returns according to his counsel. He has no records to validate his claim that from 1988 to date, he has earned approximately \$20,000.00 to \$30,000.00 annually. In 1999, he earned \$49,880.00 on construction prior to breaking his back.
- (t) He has recently been employed with Jacobs Industries Ltd. and earned about \$20,000.00 in 2002.

- (u) He is presently employed as an actor for a French film company and expects to earn \$30,000.00 between September 2002 and May 2003.
- (v) He states that he has no property assets and it is my impression that there was no settlement of matrimonial property at the time of divorce. He then owned a property at Tagish Beach, a recreational subdivision within an hour's drive of Whitehorse.
- (w) Mr. Winther's counsel has filed a calculation of what Mr. Winther would have paid according to the child support guidelines on the income he claims to have earned. His guideline amount would be \$40,000.00.

ANALYSIS

Issue 1: Is this an appropriate case for cancellation of the arrears owing by Mr. Winther to Mrs. Winther?

[4] Counsel for Mr. Winther submitted that the principle in *Jones v. Anhorn* (2000), 6.R.F.L. (5th) 258, should be applied. In that case, the mother and child left home and the father was only aware of their whereabouts for short periods. The mother alleged that the father was drinking and misconducting himself during access. However, the court refused to deny access and granted specified access. The mother simply left in 1980 because of threats made by the father. There was brief contact in 1985 but the father showed up in a drunken condition for access.

[5] The father was reunited with his daughter in 1993 and had some access and made payments. The daughter then moved in with her father in 1996 and the mother was ordered to pay \$100.00 per month for support of the child.

[6] The issue in the case was what should be done about the arrears between 1980 and 1993. The trial judge refused to cancel the arrears but the British Columbia Court of

Appeal decided “it would be grossly unfair in such situations to enforce arrears of maintenance that have accumulated over the years when it became impossible for the payor to ascertain the whereabouts of the mother and the infant for whose benefit the order was originally made.” All but \$2,400.00 was cancelled.

[7] I am of the view that *Jones v. Anhorn, supra*, is quite distinguishable from the facts of this case. Firstly, there was a no access order made in this case and Mr. Winther was unsuccessful in changing it. Secondly, Mr. Winther simply refused to pay since he was very angry about the court decision to deny him access. I am not about to review the merits of a decision made in 1988. I conclude that there should be no cancellation of all the arrears.

Issue 2: If not, what amount should be paid?

[8] On the one hand, I have very little sympathy for Mr. Winther. He simply ignored court orders to pay support when he was earning income and left it to the state to support his wife and children on social assistance.

[9] On the other hand, I am impressed that Mr. Winther is making an honest attempt to come clean and stabilize his life. He has re-established a relationship with his daughters and wants to rectify his angry past. That is laudable.

[10] Further, if his recall of his earnings is accurate, he never made enough income to pay support of \$1,200.00 per month.

[11] However, the difficulty for me is that I have had no input from Mrs. Winther to determine whether Mr. Winther’s evidence should be accepted. Given the unsatisfactory nature of provisional orders, I have no alternative but to accept his evidence to the extent I find it credible on his affidavit.

[12] I conclude that given Mr. Winther's age of 51, it is highly unrealistic to saddle him with a debt amounting to \$186,526.12. It appears that the support orders totaling \$1,200.00 per month were somewhat high. However, that problem can be laid at Mr. Winther's feet, as he made no effort to change the order.

[13] I am inclined to accept Mr. Winther's calculation that he would have paid support in the amount of \$40,000.00 between 1988 and December 2001 based on the guideline amount for his evidence of income.

[14] I am therefore making a provisional order that the arrears be cancelled except for \$40,000.00 which shall be paid by monthly payments of \$447.00 (the guideline amount for an income of \$30,000.00) each and every month until it is paid in full. As I see it, in a most difficult situation, this allows Mr. Winther to correct his past obligations without leaving him in an impossible financial situation.

VEALE J.