

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *C.M.M. v. B.M.M.*, 2005 YKSC 31

Date: 20050201
Docket: S.C. 99-D3180
Registry: Whitehorse

BETWEEN:

C.M.M.

Petitioner

AND:

B.M.M.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

C.M.M.

Appearing on her own behalf

B.M.M.

Appearing on his own behalf

MEMORANDUM OF RULING DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): The parties were married in April of 1979. Two children have been born of the marriage. I believe their ages are 16 and 14, and they both reside with Ms. M. at the present time.

[2] The parties separated in March of 1997 and at that time, I believe, both parties were doing quite well financially in well paying jobs. They separated from a paper perspective with what I would call an amicable arrangement, a separation agreement which set out that they would basically share the custody of the two children. From all appearances, although there is some debate about who paid what and so on, subsequent to March, 1997, it appears that both parties had their share of looking after

the children and shared the expenses of raising the children because the matter was not brought to court until this application in December 2004.

[3] What happened was that Mr. M. moved to Ontario in the fall of 2003. He has been attempting to establish himself in Ontario since that time and he has been having some, but, not complete success in so doing.

[4] There are two issues to be determined; one is the appropriate amount of child support to be ordered and the second issue is whether or not there is an undue hardship established which would lead to a reduction in the amount of child support.

[5] Let me deal firstly with the child support issue. Mr. M. indicates that his employment has been spotty, and I believe the affidavit evidence is that his income for 2004 would be in the neighbourhood of \$14,000. At the same time he candidly admitted that he was hopeful of being able to earn in the neighbourhood of \$24,000 in 2005, but that is not a certainty.

[6] Given that these children are of the ages of 16 and 14, which is probably one of the most expensive times in their lives, my view is that it is appropriate to make a child support order that has some certainty. I appreciate Mr. M.'s view that he is not in a position to commence paying child support in the month February. I am going to impute his income, which means that it is not an income that we can necessarily count on for a fact, but I am confident that he will be able to earn at least this amount. I am going to impute an income of \$24,000 to Mr. M. for 2005, and on that basis I am going to order a child support payment of \$340 per month for the two children commencing on March -- What about a commencement date, Mr. M., is March 1st reasonable?

[7] THE RESPONDENT: The date of first payment?

[8] THE COURT: Yes.

[9] THE RESPONDENT: Not in my view. March 15th would be more reasonable.

[10] THE COURT: Okay. Commencing March 15, 2005.

[11] Now, on the issue of undue hardship; both parents have provided me with their earnings history and it is fairly clear to me that the income of Ms. M. in 2002 is \$10,481 and in 2003 was \$13,815. Mr. M. earned -- well, his earnings were high in 2002 between \$55,000 and \$60,000, but they dropped substantially in 2003 to \$37,484 of which \$28,980 was pension income. So, neither of the parties have a particularly optimistic financial situation at this time, but I am satisfied on the evidence that there is not sufficient evidence to establish that Mr. M. has an undue hardship application. I am therefore unable under s. 10(3) of the *Guidelines* to make an undue hardship finding.

[12] That is my decision. Is it clear to both of you?

[13] THE PETITIONER: Your Honour, I have one question.

[14] THE COURT: Yes

[15] THE PETITIONER: That is, there was also question of custody that --

[16] THE COURT: Did you raise that in this?

[17] THE PETITIONER: In the first affidavit.

[18] THE COURT: Yes. Oh, I see you sought sole custody, yes.

[19] THE PETITIONER: Yes.

[20] THE COURT: Yes, you did and we have not addressed that; are you still seeking that?

[21] THE PETITIONER: I am seeking that. I am assuming, because there was no particular emphasis by the respondent put on that, that he has no issue with that.

[22] THE COURT: Mr. M.?

[23] THE RESPONDENT: I have a serious issue with it. It disturbs me very much to have a -- it's a symbolic thing, I guess. But it involves parents sharing the custody of the kids for so many years, it was really distressing to me to hear that that's what was happening here at Christmas time. If it's necessary to get the payments, then that's fine, but it's not necessary --If there are no critical reasons for doing it, then I would prefer to have or to retain shared custody.

[24] THE COURT: Thank you.

[25] In the circumstances before me I think it is reasonable that the custody remain a joint or shared custody, but I will say that the primary residence should be with Ms. M. because that is the factual situation before me. So, it will remain as, you can call it shared custody in the order that is going to be drafted, but the primary residence of the children will be with Ms. M.

[26] Anything further?

[27] THE RESPONDENT: Perhaps two questions from my end, I guess. I understand that those payments of \$341 a month will be March 15th. I guess there is nothing in this decision that helps me bring the kids here.

[28] THE COURT: There is nothing in that decision except that you did indicate that you had a tax credit you were expecting to receive and, presumably, that can be applied to bringing the children down for the summer or whatever arrangement you wish to make. I should ask, is there any difficulty with access, Ms. M.?

[29] THE PETITIONER: No, there's no difficulty with access.

[30] THE COURT: So, that would be my understanding, Mr. M., that that would probably be, unless, you were able to put in a large number of hours, you would be relying on the tax credit to do that.

[31] THE RESPONDENT: Right. And if that works out, that's great. If it doesn't, it just gives me another serious problem here.

[32] THE COURT: It does give you a problem, but my suggestion would be, and this is not a court order, but the only other way of doing it is for you to come here, which may be a cheaper way of resolving the matter, whether you come standby or whatever arrangements you make and have your access to the children here. That is not as desirable as doing it in Ontario, but it is another option for you to consider if it doesn't work out financially.

[33] THE RESPONDENT: Right. I think I may have forgotten my second question.

[34] THE COURT: Okay, well take a moment to think about it.

[35] THE RESPONDENT: What's the opportunity to re-visit this, when things become more clearer down the road a few months?

[36] THE COURT: I am prepared, if both parties want to have a review, to have a review date set. Sometimes it is not necessary, but I suppose from the perspective of saving a filing fee we could set a date down the road. I really would think that we would reassess it in the month of December or January next year, so either December, 2005, or January, 2006. Probably best to set it as December, 2005, and we can pick a specific date and have the review set. That, of course, assumes that one party or the other is going to file affidavit material, but having done that we would be able to resolve any outstanding issues that might arise at that time.

Would you wish that, Mr. M.?

[37] THE RESPONDENT: Yes.

[38] THE COURT: Okay. I am going to set a review date of December 6, 2005, it will be at 10 o'clock though.

Madam Clerk, you will have to somehow put that into the system so it doesn't end up not happening. It should be put on the list for December 6, 2005. If it turns out that there is not a chambers day on that day, then we would have to advise the parties and change it to the following week.

[39] THE CLERK: My Lord, did you want the notations; assuming that they were going to file an affidavit or just that they were looking at re-visiting?

[40] THE COURT: I have just indicated that it will be a review date. Obviously there can not be much of a review without affidavit information before the judge.

[41] THE CLERK: The re-visit to be before yourself, My Lord?

[42] THE COURT: I think that is probably appropriate. I should be seized of it rather than have another judge jump in at that point and try and determine what has transpired.

Anything further, Mr. M.?

[43] THE RESPONDENT: That would be fine, Your Honour.

[44] THE COURT: Thank you.

[45] THE PETITIONER: I have one other question, Your Honour. I just want to make it clear that the reason I asked for sole custody was to reflect the situation as it is now, and it's my understanding, this may be incorrect, that for me to go for a weekend to Skagway with the children, I have to have permission, written permission, from their father. If we ever had an opportunity to go outside --

[46] THE COURT: Let me put this to you, Mr. M.; it does present a problem when you have a joint custody order or a shared custody order, and you get to the border and they don't allow you to cross. My suggestion is that I put an order that she

be able to apply for a passport for the children, which means that you have to consent. I am having a little difficulty here; either Mr. M. provides a letter, that is one way of doing it, or you are entitled to apply for a passport application with your children on your passport. Unfortunately your children are getting to the age where they are probably going to get their own passports.

[47] THE PETITIONER: Yes.

[48] THE COURT: Probably the best resolution would be for Mr. M. to provide you with that letter consenting to you taking the children to the United States on a visitor basis.

[49] THE PETITIONER: Yes.

[50] THE COURT: Does that sound reasonable, Mr. M.?

[51] THE RESPONDENT: Yes, it does.

[52] THE COURT: Okay, thank you. I am going to make that order then that Mr. M. provide Ms. M. with a letter permitting her to take the children to the United States on a visitor basis.

[53] THE PETITIONER: Thank you, Your Honour.

[54] THE COURT: If there is anything outstanding with respect to that issue, you can ask for a pre-trial conference. I should tell you both, Mr. M., if you are getting along, you can ask the trial coordinator. I will give you her number, her number is 867-667-3442, you can call the trial coordinator and ask that this be set down for what

we call a pre-trial conference, and that is where sometimes issues are thrashed out and discussed without coming in on a formal application. So, if for example, an issue arose over the passport, my suggestion would be that you come back to that rather than go through the affidavit procedure. Do you understand?

[55] THE RESPONDENT: Yes, I do. I have to say from my perspective, I don't even think a pre-trial conference is necessary. I will have a land line, a phone, it will be above ground in the new house by the end of the week. The plaintiff is welcome to give me a call for anything she needs for the kids for travelling or whatever.

[56] THE COURT: Do you have the number yet?

[57] THE RESPONDENT: I don't have it now; I will have it by the weekend.

[58] THE COURT: Okay, well, I really encourage the two of you to open up the lines of communication now that I have given you my view of the situation, and hopefully you will able to work things out as you go.

[59] Thank you very much for your cooperation to both of you. We can adjourn now, Madam Clerk.

VEALE J.