

IN THE SUPREME COURT OF YUKON

Citation: *L.D.A. v. B.K.B.*, 2008 YKSC 63

Date: 20080909
S.C. No. 08-D4071
Registry: Whitehorse

Between:

L. D. A.

Petitioner

And

B. K. B.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Norah Mooney
B.K.B.

Counsel for the Petitioner
Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an interim application by the petitioner mother seeking a number of forms of relief in relation to the two children of the marriage, T., 11 years old, and M., who turned six on August 29th. The respondent father has agreed to allow the mother to have sole custody of T. He further agrees that he and the mother shall have joint custody of M. The father also agrees with the relief sought in items 7 through 9 of the mother's notice of motion, which I will address at the end of these reasons. The remaining issues are:

1. The amount of the father's annual income;
2. Whether the father's annual income should be "grossed up" to reflect his tax savings;
3. The amount of the mother's annual income;
4. The amount of child support payable by the father;
5. The extent to which each party shall contribute to the payment of s. 7 expenses;
6. The residential schedule for M.; and
7. Costs.

[2] This matter initially came before me on August 13, 2008. At that time, it became apparent that the father had not provided the mother's counsel with all the financial information which she had previously requested, and which was required in any event under s. 21 of the *Child Support Guidelines*. The father had filed an affidavit on August 5, 2008, claiming a number of deductions from his self-employment income for 2007 which differed from his income tax return for that year. Attached to that affidavit were several accounting spreadsheets which detailed these various alleged business expenses and separated them into categories. However, the father had not provided copies of the actual receipts corresponding with each of the line items on the spreadsheets, in order for the mother's counsel to review them and satisfy herself as to their legitimacy. That necessitated an adjournment on the condition that the father provide copies of these receipts to the mother's counsel, along with the other financial information previously requested by her, within one week, following which the hearing would be reconvened.

[3] On August 22, 2008, the hearing continued and I heard further submissions from both parties. I reserved my decision, with the intention of issuing an oral judgment on the application shortly afterwards. However, the father informed me that he had made arrangements to leave Whitehorse first thing the following morning to do some wildlife guiding work, and would not be available to attend for the delivery of my oral reasons until after September 20th. I have therefore decided to issue written reasons now, rather than waiting until after the father's return to Whitehorse. In my view, waiting would delay matters for too long and would be unfair to the mother and the children. However, because of other time commitments, these reasons will be somewhat shorter than I would otherwise provide, and will be cross-referenced fairly extensively to the material filed by the parties.

ANALYSIS

1. The Father's Income

Revised Business Expenses

[4] The father is a journeyman electrician, but in recent years has been developing a tourism business on his farm a few miles north of the City of Whitehorse. According to his income tax returns, his reported gross income in 2005 was \$18,190.72, after accounting for business expenses of \$26,712.29. In 2006, his income was \$26,033.01, after deducting business expenses of \$85,285.88. In 2007 his total income was reported to be \$21,480, with business deductions of \$130,976.19, including a line item for "Salaries, Wages, and Benefits" in the amount of \$63,182.34.

[5] The mother's counsel initially challenged the various specific deductions in the father's 2007 tax return, arguing that a number of the claimed expenses should be

disallowed and added back into the father's income for that year including, most importantly, the deduction for salaries, wages and benefits in the amount of \$63,182.34.

[6] In response, the father pointed to his affidavit in which he swore that his actual business expenses were significantly different from those claimed in his tax returns. Nevertheless, he conceded that his actual income for 2007, after deducting these revised actual expenses was still substantially higher than \$21,479.96. He also conceded that the \$63,182.34 claimed in his 2007 tax return for salaries, wages and benefits was a mistake. Specifically, he claimed the following deductions in his affidavit.

100% of contracting materials/labour	\$69,785.27
100% of tourism supplies	\$2,384.26
100% of repairs/improvements for rental cabins	\$4,843.67
100% of building expenses for tourism	\$5,388.02
100% of guiding expenses	\$2,173.68
100% of contracting tools/equipment rentals	\$6,817.06
50% of total vehicle fuel	\$2,150.00
75% of all utilities	\$5,702.93
Total deductions	\$99,244.89
Gross income	\$152,456.15
Less total deductions	\$99,244.89
Annual Income for child support purposes	\$53,211.26

[7] Following the adjournment and the provision of copies of the receipts and invoices supporting each of the revised business expenses, the mother's counsel filed a document entitled "Petitioner's Submissions on Imputed Income", in which she based her calculations on the information provided by the father in his affidavit, rather than focussing on his 2007 tax return. In summary, the mother's counsel argued that, after close inspection of the claimed deductions, a total of \$23,850.50 should be disallowed, leaving the father with \$75,394.39 in legitimate deductions, which after being subtracted

from the gross income for the father's business of \$152,456.15, would result in an annual income for child support purposes of \$77,061.76. She further argued that this income should be "grossed up" for tax purposes to reflect the tax saving obtained by the father by reporting his 2007 total income as only \$21,480. I will return to the grossing up issue later in these reasons.

Building Expenses

[8] Firstly, the mother's counsel argued that none of the \$5,388.02 claimed by the father as "building expenses for tourism" should be allowed, as these were all actually capital expenditures relating to the construction of tourist cabins, a viewing centre for viewing the *aurora borealis*, and a well on the father's farm. The mother's counsel pointed to the distinction between a capital expenditure and a current expense. The former can lead to the acquisition of an asset, which would benefit the owner for years to come and could eventually be sold. In some cases, the asset may be subject to a "capital cost allowance", which is commonly known as depreciation. Under s. 11 of Schedule III of the *Child Support Guidelines*, in determining the amount of a spouse's annual income, courts are directed to *include* in that income the spouse's deductions for any allowable capital cost allowance with respect to real property. After some discussion about this point, the father seemed to agree that these types of expenditures, which have improved the value of his real property, should not be accounted for as current year business expenses. I accept the submission of the mother's counsel here and disallow the total \$5,388.02 from the father's business expenses.

Contracting material/labour

[9] The mother's counsel next challenged a total of \$13,298.47 of receipts within the category of "Contracting material/labour" as improper for a variety of reasons:

- a) Three in particular were paid to relatives who were not at arms-length from the father;
- b) A number were in relation to capital expenditures;
- c) A number were for items purchased which were subsequently returned and refunded; and
- d) A number were for payments on account and deposits as opposed to actual purchases.

[10] Once again, the father did not seriously contest these submissions, except for the non-arm-length transactions. In that regard, the father filed letters from his sister, R. B., and his father, W.K.B., confirming that they did contract work for the respondent father in constructing a residence for a third party, which project was completely unrelated to the father's farm or tourism business. The father also pointed out that the invoice from his common-law partner, A.B., was for "computer services" regarding some electrical work the father did for the Canadian Tire store in Whitehorse. Finally, the father pointed out that under s. 9 of Schedule III of the *Child Support Guidelines*, if a spouse establishes that the subject payments were "necessary" to earn a self-employment income and were "reasonable" in the circumstances, then those amounts *can* be deducted for the purpose of calculating the spouse's annual income. I am satisfied that these contract payments were legitimate business expenses and should not be included in the father's income. They total \$2,455. The balance of the expenses in this category should be disallowed.

Therefore, after reducing the amount of these expenses (\$13,298.47) by the total of the three non-arms-length transactions (\$2,455), the resulting subtotal for these expenses of \$10,843.47 is disallowed.

Contracting tools/equipment rental

[11] The next category of deductions challenged by the mother's counsel was "contracting tools/ equipment rental". Once again, her reasons were that some of these invoices were either payments on account or payments for capital expenditures, such as the well on the father's farm. The father did not contest these challenges and I agree that a total \$3,841.32 in expenses under this category should be disallowed.

Guiding expenses

[12] Under the category of "Guiding expenses" the mother's counsel suggests that a total of \$1,119.69 should be disallowed, principally because they relate to the veterinary and food expenses for the father's two dogs, one of which was a family pet. The father acknowledged that there were two dogs at the farm, an older dog named Bennett, which the father used as a pack dog during his seasonal guiding employment, and a younger dog named Crozier, which the father was training to be a replacement for Bennett, when Bennett became too old. I gather that both were quite large dogs (the father described one as weighing 105 lbs) and that they consequently consumed a significant amount of dog food annually, totalling more than that shown on the receipts provided by the father. Unfortunately, one of the dogs was subsequently in an accident, had to be euthanized and was cremated. The mother's counsel also says those related costs are illegitimate.

[13] I am prepared to allow the expenses claimed by the father relating to both dogs, subject to an adjustment to reflect the fact that the dogs were only used (or were being

trained for use) by the father for income purposes for a portion of the year when he was actually performing guiding services. Therefore, I will reduce the dog-related expenses of \$1,119.69 by two thirds to \$750.19, which will be disallowed and included in the father's annual income.

Total Vehicle Fuel

[14] This was the last category of business expenses challenged by the mother's counsel. Here she says that there were \$203 in expenses for non-fuel purchases. Again, that is uncontradicted by the father. I agree and disallow \$203 from the father's total fuel expenses of \$4,305.45. Fifty percent of the remainder amounts to an allowable deduction of \$2,051.23.

Possible Imputed Annual Income

[15] In summary on this point, I disallow \$21,026 of the father's business deductions as follows:

Building expenses	\$ 5,388.02
Contracting material/labour	\$10,843.47
Contracting tools/equipment rental	\$ 3,841.32
Guiding expenses	\$ 750.19
Total vehicle fuel	<u>\$ 203.00</u>
	\$21,026.00

Therefore, the total deductions claimed by the father in his affidavit of \$99,244.89 are reduced to \$78,218.89. Subtracting that from the father's gross farm income of \$152,456.15 would result in a possible imputed annual income of \$74,237.26.

[16] Before moving on, I wish to note that, given the admitted inaccuracies in the father's 2007 income tax return and the roughly similar incomes reported for 2006 and

2005, I find that his tax information is not a reliable indicator of his probable income going forward.

2. Grossing Up?

[17] The mother's counsel argued that I have the discretion to gross up the father's annual income to reflect the tax savings he received in 2007 by reporting an income of only \$21,480. She referred me to the case of *Riel v. Holland*, [2003] O.J. No. 3901, a decision of the Ontario Court of Appeal, which observed at paras. 26 – 37, that one of the objectives of the *Child Support Guidelines* is to ensure "consistent treatment" of those who are in "similar circumstances". Accordingly, there are provisions within the *Guidelines* to allow courts to impute income where a parent is exempt from paying tax, or derives income from sources that are taxed at a lower rate. Thus, where a parent arranges his or her affairs to pay substantially less tax on income, that income may be grossed up before applying the *Guidelines* table. For example, if one parent earns a salary of \$100,000 and pays tax of \$38,000 and the other receives business income of \$100,000, but only pays tax of \$5,000, then in order to satisfy the "consistent treatment" objective of the *Guidelines*, s. 18 and 19 of the *Guidelines* should be employed to impute additional income to the parent paying less tax.

[18] Without going into the details of the calculations, were I to gross up the father's income from \$74,237.26, to reflect the tax savings he received from his reported income of \$21,480, an amount of approximately \$22,000 would be added, taking his total imputed annual income to over \$96,000.

[19] I will deal with my discretion on this point in discussing the amount of child support payable by the father, below.

3. The Mother's Income

[20] The mother's most recent pay stub from her new employment with Air North indicates she received a gross amount of \$1,520 for a two week pay period. Therefore, assuming she is fully employed for the next calendar year, she would receive a gross annual income of approximately \$39,520. The mother deposed in her first affidavit that her income at Air North would remain the same as her income in 2007 from her previous employer, the Canadian Imperial Bank of Commerce, which was \$28,380.27. However, it now appears that she will likely receive a significant increase in her gross annual income in 2008. In 2006, her total income was only \$11,007 and in 2005, it was even less at \$9,610.01. In my view, the mother's income over the last three years is less probative of her probable income for 2008 than the Air North statement of earnings. I am satisfied that the mother's current annual income should be set at \$39,500.

4. The Amount of Child Support Payable by the Father

[21] The parties agree that the mother will retain sole custody of the child T. and that they will share joint custody of M. I therefore understand this to be a situation where s. 8 of the *Child Support Guidelines* applies, such that the amount of child support for M. would be the difference between the amount that each parent would otherwise pay if a child support order were sought against each of the parents. Based on the annual income I impute for the mother (\$39,500), she would notionally pay \$361 per month in child support to the father for M. Thus, the eventual amount of child support payable by the father to the mother for M. will be set off by this amount of \$361 monthly.

[22] The father is currently paying a total of \$800 per month in child support for the two children and has been since late 2005. Except for the first four months after the

separation, I understand that he has paid this child support regularly and on time. In his submissions at the hearing, the father indicated that grossing up his income in the manner sought by the mother would put the consequent amount of child support payable totally out of his reach. If I were to do so, the father would have an imputed income of over \$96,000 and would notionally have to pay \$1,395 monthly, subject to the set off of \$361 for M., resulting in a difference payable by the father of \$1,034 monthly. That would be an increase of \$234 monthly from the current amount of \$800 per month, or just over 29%.

[23] Having heard the father's submissions over the course of the hearing, I formed the impression that he is generally attempting to achieve a fair result in terms of the amount of child support he should pay. I was disturbed by the fact that the father admitted that there were significant "mistakes" in his 2007 tax return, in particular the deduction of \$63,182.34 for salaries, wages and benefits, as well as the manner in which he failed to properly account for his various capital expenditures. On the other hand, I credit the father with attempting to clear the record by conceding in his affidavit and in his submissions that his reported taxable income of \$21,479.96 for 2007 is far below what might be considered a fair and defensible income. I also credit the father with ultimately providing the mother's counsel with the bulk of the financial disclosure that she has been seeking, including the specific receipts for the various business expenses at issue.

[24] The father submitted that 2007 was an unusual year for him in that he invested a significant amount of money in improving the infrastructure on his farm in order to develop the tourism business there. He submitted that he expects his expenses will be

significantly lower in 2008 and that he will hopefully begin to reap the benefits of increased profit from that business.

[25] The mother's counsel submitted that the father has made a choice to invest significant sums in the capital expenditures related to his business and that this should not have been done at the expense of paying the proper amount of child support to the two children. I agree in principle with that submission. On the other hand, I do not wish to penalize the father at this time for having made what may well be wise business decisions that could result in an increased income stream for him, and consequently more child support for the children, in the future.

[26] I canvassed the applicability of the "undue hardship" provisions in s. 10 of the *Child Support Guidelines* with the parties. I note that the circumstances which may give rise to undue hardship are not limited to those set out in s. 10(2). While I do not have all the information at hand to perform the recommended comparison of household standards as between the parties, I have sufficient information to impute an annual income to the mother of \$39,500. I also accept the father's submission, as it was uncontradicted by the mother's counsel, that the mother is in a new relationship and residing in a comfortable home in the Porter Creek area of Whitehorse.

[27] It is also worth noting that, at the outset of the hearing, the mother was only asking this Court to impute an annual income of \$71,000 to the father, which would have resulted in notional child support payable of \$1,060 monthly for the two children, subject to the set-off to account for the mother's gross annual income.

[28] I have also noted here the information provided by the mother that if the father worked full-time as a journeyman electrician, he would be capable of earning \$30 - \$35

per hour and could be earning in the vicinity of \$63,000 gross annually. This accords with the Yukon Government pay rates for electricians, which range between \$59,500 and \$68,600 approximately, plus benefits.

[29] If I impute an income of \$74,237.26 to the father, based upon the recalculation of his business expenses above, that would be somewhat higher than the amount initially sought by the mother, as well as being higher than the income which the father could alternatively earn as a full-time journeyman electrician. On the other hand, my review of the father's business expenses does not support any logical reason to reduce his imputed income *below* \$74,237.26. Rounded down, that would notionally require the father to pay monthly child support for two children of \$1,104, which after the set-off of \$361 monthly for M. would result in net child support payable of \$743 per month. While that is a reduction from the current amount of \$800 monthly, it is nevertheless a justifiable amount, given the increase in the mother's income and the fact that the father will also be paying his share of the special or extraordinary expenses for the two children, as discussed below.

[30] In a similar vein, I will refrain from exercising my discretion to gross up the father's income, as that would result in a substantial increase in the child support currently payable (about 29%) by him, *plus* a correspondingly greater share of the special or extraordinary expenses.

[31] In summary, I impute an annual income to the father of \$74,237.26 and, after set-off, order him to pay child support for T. and M. of \$743 monthly, plus his proportionate share of the children's special or extraordinary expenses, as discussed below.

5. Section 7 Expenses

[32] The mother also seeks an order that the father pay his proportionate share of the special or extraordinary expenses for the children pursuant to s. 7 of the *Child Support Guidelines*, and in particular the children's child care expenses. Although the father opposed that request, I pointed out to him that s. 7(1)(a) of the *Guidelines* specifically includes child care expenses among the other forms of identified special or extraordinary expenses. Therefore, it is appropriate for me to make such an order in this case. Based upon the father's imputed income of \$74,237.26 and the income I impute to the mother of \$39,500 annual income, the father should pay 65% of these expenses and the mother should pay 35%.

6. Residential Schedule for M.

[33] The mother seeks an order confirming the residential schedule for M., which I understand has been in place since shortly after the separation on August 1, 2005. The current arrangement is that the child, who just turned six, resides with the mother from Sunday at approximately 5 p.m. until Wednesday after school, or approximately 5 p.m. when school is not in session. She then resides with the father until Friday after school, or until approximately 5 p.m. when school is not in session. The following week, M. resides with the mother from Friday until Wednesday after school, or until approximately 5 p.m. when school is not in session. She then resides with the father until Sunday at approximately 5 p.m. Under this schedule M. spends two nights with the father one week and four nights with the father the following week.

[34] The other child of the marriage, T. was adopted by the father on July 12, 2004. This child has special needs and has been assessed as having a Chromosome Deletion,

with a diagnosis that she is borderline autistic. Practically, this means that her fine motor skills are weak. For instance, she cannot ride a bike, undo or do up buttons, or zipper her clothing. The mother informs me that although she is 11 years old, she is closer to being at a six or seven year old level in terms of her overall development. She can read, but is at a grade two level. She has had an educational assistant working with her since she began school.

[35] The mother stated in her first affidavit that she feels it is in the interests of both children that they not be separated anymore than they already are and that is why she does not want to alter the current schedule. In her submissions, the mother's counsel indicated that T. misses M. when the latter is gone from the mother's home.

[36] The father claims that he agreed to adopt T. primarily because of his fear that the child's biological father was potentially violent and suffered from drug and alcohol abuse. The respondent father and the mother were worried that if something happened to the mother, T. would be placed into the custody of her biological father. Thus, the respondent father agreed to adopt the child to resolve that concern. However, since the separation, while the father has exercised access with both of the children, his interest in having access with T. has diminished over time. Since May 2007, T. has resided with the mother full-time. Nevertheless, the father stated in his affidavit that he is not contesting paying child support for T. and views her as being "a wonderful child", who he believes to be doing much better with the stability of one home "especially considering her special needs."

[37] The father's position on this issue is that M. should reside with him and the mother alternately on a one week on, one week off schedule. He stated in his affidavit that this

would cut down on transition times and allow for a longer, more stable day-to-day schedule and routine. He further says that the children would still be able to see each other daily at school for ten months out of the year.

[38] The mother responded in her second affidavit by noting that the children will be in separate wings of the school which they attend, because of the difference in their ages, such that they would seldom see each other at school. She again affirmed her belief that it would be in the best interests of both children to maintain the current schedule to minimize the length of time that they are apart.

[39] Although there is precious little evidence from either party on this issue, I am ultimately persuaded that there is insufficient reason for changing M.'s present residential schedule, which I gather has been in place for approximately the last three years. The father only raised his concerns in this regard after having been served with the mother's notice of motion. According to the material which was filed on this hearing, there is no indication the father took any previous steps to change the schedule. Finally, I believe I can reasonably infer that in the absence of more compelling circumstances, it would probably be disproportionately disruptive for the older child, T., who is borderline autistic with clearly identified special needs, to reduce the amount of time that she and M. currently spend together. Thus, I grant the order sought by the mother in item 6 of her notice of motion.

7. Costs

[40] The mother seeks costs for this application in a lump sum of \$1,500, which I am authorized to order pursuant to Rule 57(13.1) of the *Rules of Court*. I note here that the father failed to provide complete financial disclosure to the mother as specifically

requested by her and in accordance with the *Child Support Guidelines*. The father claims that his financial information was difficult to put together, largely because of his transition from being more or less a full-time employed electrician to a self-employed owner of a tourism business over the last three years. He says that he provided what information he could, and invited the mother to get back to him if she required any further clarification or additional information. In fact, the mother's counsel did exactly that in requesting, among other things, further particulars from the father on the amount of \$63,182.34 claimed as a tax deduction for salaries, wages and benefits for 2007. She received no such information, with the exception of the father's affidavit which contradicted the information in his own tax return for 2007. Indeed, the father did not concede that the claimed deduction of \$63,182.34 was a mistake until the commencement of this hearing on August 13th. In addition, the father failed to provide copies of the supporting receipts for the various spreadsheets detailing the nature and categories of his alleged business expenses. This necessitated an order for the production of that and other information and required an adjournment of the hearing. Upon receipt of that information, the mother spent hours reviewing the receipts to satisfy herself as to their legitimacy. In addition, was she effectively forced to change her approach to the imputation issue by abandoning any attempt at referring to the father's 2007 income tax return, as that was conceded by the father to be inaccurate.

[41] All of this has no doubt put the mother's counsel to considerable time and expense in preparing for both the first and second part of the hearing. In addition, she provided helpful memoranda to me on the issue of grossing up the father's income. Further, the written submissions of the mother's counsel on imputed income were of significant

assistance in resolving the outstanding issues on this application. Therefore, I have no hesitation in granting the mother her costs for this application in the lump sum of \$1,500, payable within six months of the date of these reasons.

CONCLUSION

[42] The father's annual income is imputed to be \$74,237.26.

[43] I am refraining from exercising my discretion to gross up the father's income to reflect his tax savings.

[44] I impute the mother's annual income to be \$39,500.

[45] The amount of child support payable by the father will be \$743 per month for both children, which takes into account the set off under s. 8 of the *Child Support Guidelines* for M.

[46] The father shall contribute 65% toward the payment of s. 7 expenses and the mother shall contribute 35%.

[47] The father was served with the petition for divorce and the current notice of motion on July 17, 2008. I therefore make the orders for child support and s. 7 expenses retroactive to August 1, 2008.

[48] The residential schedule for M. will remain unchanged.

[49] Items 7, 8 and 9 of the notice of motion are all agreed to by the father and are additionally ordered. Those items read as follows:

- "7. If either parent is going to be away during the time that [M.] is to reside at their residence, the other parent shall be asked if they wish to care for [M.] during the time.
8. Neither parent shall discuss the residential arrangements with the children and any proposed

changes to the schedule will be discussed between the parties and shall not be discussed with the children until after changes have been agreed to in writing.

9. The Petitioner and Respondent shall be obligated to continue to provide income information to the other party as required by Section 25 of the Federal Child Support Guidelines each year by June 30th.”

[50] The father shall pay lump sum costs for this application in the amount of \$1,500 within 6 months of the date of these reasons.

Gower J.