SUPREME COURT OF YUKON

Citation: *A.J.M.P. v. C.E.L.M.*, 2010 YKSC 26

Date: 20100602
S.C. No. 09-B0090
Registry: Whitehorse

Between:

A.J.M.P.

Plaintiff

And

C.E.L.M.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Brook Land-Murphy — Counsel for the Plaintiff
Karen Wenckebach — Counsel for the Defendant

REASONS FOR JUDGMENT

1. INTRODUCTION

[1] On this application for retroactive child support, I conclude in favour of the Applicant/Plaintiff mother.

[2] The parties were together in a common-law relationship from October 2001 until they separated on October 27, 2003. There are two children of the relationship, J.P-M., born August 28, 2002, and A.P., born June 8, 2004. Prior to the separation date, the parties made an oral agreement that the father would pay $300 per month in child support (the “oral agreement”). Subsequent to the separation, the children remained in the mother’s care and the Defendant father has had periodic access. The father claims to

have made some payments as child support over the intervening years in the form of cash, clothing, goods and groceries. The mother maintains that these contributions have been limited and sporadic. Further, she argues that the father's failure to abide by the terms of the oral agreement constitutes blameworthy conduct which justifies an order for retroactive child support commencing on the separation date.

2. ISSUES

[3] The global issue is whether I should make an order for retroactive child support and, if so, when that should commence. However, based upon the principles from the leading case in this area, *D.B.S.* v. *S.R.G.*, 2006 SCC 37, which I will discuss in greater detail shortly, the specific issues are as follows:

a) Is there a reasonable excuse for the mother's delay in seeking retroactive child support?

b) Did the father engage in any blameworthy conduct, or in conduct that could militate against a retroactive award?

c) What are the current circumstances of the children and how do they compare with their circumstances prior to the date of separation?

d) Assuming that the father would experience hardship as a result of a retroactive award, to what extent should that be a factor in determining whether retroactive child support should be ordered?

e) Based on the above, should I make a retroactive award?

f) If so, when should it commence?

g) If a retroactive award is warranted, in what amount and on what terms should it be paid?

3. LAW

[4] I begin by observing that s. 38(1)(e) of the *Family Property and Support Act*, R.S.Y. 2002, c. 83, authorizes me to make an order that the payment of child support be made “in respect of any period before the date of the order”; in other words, a retroactive order.

[5] In *D.B.S.*, Bastarache J., for the majority, discussed in some detail the factors involved in determining whether and how retroactive child support should be ordered. I will paraphrase the principles set out by him at paras. 94 through 135 of that decision.

[6] There are four principal factors which must be considered by a court in determining whether a retroactive child support order should be made. None of these factors is decisive. Rather, a court should strive for a holistic view of the matter and decide each case on the basis of its particular facts. The factors are:

(a) *Does the recipient parent have a reasonable excuse for why child support was not sought earlier?* In this regard, the Bastarache J. recognized that there is often a relationship between whether the recipient parent’s delay was reasonable and whether the payor parent’s conduct was blameworthy. Further, the court affirmed that child support is the right of the child and cannot be waived by the recipient parent. Consequently, recipient parents “must act promptly and responsibly in monitoring the amount of child support paid [and] … [a]bsent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of *both* parents to fulfill their

obligations to their children." (para. 103, emphasis already added). Bastarache J. did not suggest that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation, but that such delay is merely a factor to consider in deciding whether to make a retroactive award (para. 104).

(b) *Did the payor parent engage in any blameworthy conduct, or in conduct that could militate against a retroactive award?* Here Bastarache J. stated that courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Moreover, "courts should take an expansive view of what constitutes blameworthy conduct in this context" (para. 106). Bastarache J. stated that he would characterize as blameworthy conduct "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support" (para. 106). Further, although whether a payor parent is engaging in blameworthy conduct is a subjective question, objective indicators remain helpful in determining that question (para. 108). A payor parent who knowingly avoids or diminishes his/her support obligations should not be allowed to profit from such conduct (para. 107).

(c) *What are the current circumstances of the children and how do they compare with their circumstances prior to the date of separation?* Here, the Supreme Court affirmed that it is a core

principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard he or she enjoyed while his or her parents were together (paras. 110 and 111).

(d) *If the payor parent would experience hardship as a result of a retroactive award, to what extent should that be a factor in determining whether retroactive child support should be ordered?* Here Bastarache J. acknowledged that the amount of retroactive awards is usually based on past income rather than present income. Unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can presently afford (para. 115). Consequently, courts should attempt to craft retroactive awards in a way that minimizes such hardship (para. 116). Further, while hardship for the payor parent is a legitimate concern where he or she has not exhibited any blameworthy conduct, it is much less of a concern where this is the case (para. 116).

[7] Further, if a court determines that a retroactive award is justified it must still decide:

(a) when that award should commence; and

(b) in what amount or under what terms it should be paid.

The majority in *D.B.S.* held that the general rule is that the award should commence on the date when the payor parent receives "effective notice" from the recipient parent that

child support should be paid. All that is required is that the topic “be broached”; the recipient parent is not required to take any legal action. Once effective notice has been given, the payor parent can no longer assume that the existing state of affairs regarding child support remains fair (para. 121). However, it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent (para. 123). Having said that, where the payor parent has engaged in blameworthy conduct, the date when retroactivity should commence may be moved back in time to date when increased support should have been paid (para. 124). Once again, the Court stated that a payor parent “should not be permitted to profit from his/her wrongdoing” (para. 125).

[8] As for the issue of the amount and terms of payment of a retroactive award, Bastarche J. stated that “blind adherence” to the amounts prescribed by the *Child Support Guidelines* is neither required nor recommended, and that a court should consider exercising the discretion that the *Guidelines* allow (paras. 128 and 129). A court should also think about how the amount of a retroactive award is affected by the date when the award is deemed to be payable. In summary, unless the applicable statutory scheme clearly directs otherwise, “a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case” (para. 130).

4. ANALYSIS

a) Is there a reasonable excuse for the mother’s delay in seeking retroactive child support?

[9] The mother maintained that her main reason for not commencing court proceedings until now was because she was threatened by the father, who told her that

he would “bring up old dirt” if she applied for custody and child support. However, the father specifically denied ever threatening the mother in that regard. As this is an interim application and there has been no cross-examination on the affidavits filed by the parties, it is difficult, if not impossible, to make any finding of fact when, as here, the evidence is directly contradictory. The father alleged that the mother struggled with drug and alcohol abuse for a period of time after the separation. While it might have been understandable for the mother to have feared that the father would attempt to use that against her if she raised the issue of custody or child support, the mother has made no admission that she suffered from drug or alcohol abuse. She did acknowledge in her second affidavit, at para. 5, that one of the father’s excuses for not paying her child support directly was that he thought the mother would “spend the support money on drugs and alcohol”, but there was no further acknowledgement by her that she had any particular problems in that regard.

[10] Consequently, I am unable to find that the mother had a reasonable excuse for not pursuing child support from the father prior to the commencement of this action in February 2010. As noted in *D.B.S.* (at para. 103), recipient parents must act “promptly and responsibly” in pursuing appropriate child support and any deficiency in that regard on the part of the payor parent, which is known to the recipient parent, represents a failure of both parents to fulfill their obligations to their children. On the other hand, *D.B.S.* recognized that unreasonable delay by the recipient parent does not have the effect of eliminating the payor parent’s obligations. Rather, it is merely a factor to consider in determining the most appropriate course of action on the facts (para. 104).

b) Did the father engage in any blameworthy conduct, or in conduct that could militate against a retroactive award?

[11] The father maintains that he has paid child support to the mother at various times in the form of cash, clothing and goods for the children, and groceries. However, he also deposed that the oral agreement (to pay $300 per month) was conditional on his providing the money to his own mother, S.H., who would in turn forward it to the Plaintiff mother to make purchases for the children. Specifically, the father deposed at para. 19 of his first affidavit:

> "…I told her, and she understood, that I would not be giving her money directly, but that [S.H.] would be giving it to [as written] as she need [as written] for the Children. I did this because I had seen the Plaintiff abuse drugs and alcohol, including when she was five months pregnant. When we were together, the Plaintiff would spend money on alcohol and drugs instead of paying bills. However, over time I ended up giving money and items to the Plaintiff as she required them."

[12] In her second affidavit, the mother generally denied that the oral agreement was conditional in that regard, although she did depose that she offered to vary the terms such that the father could provide her with $300 per month in the form of gift certificates for groceries, which offer was refused by the father. In any event, I agree with the submission of the mother's counsel that when the father deposed "I told her, and she understood", that did not constitute an offer and acceptance in a contractual sense. Rather, it was more like the father imposing a unilateral condition, which was never agreed to by the mother.

[13] The father's counsel argued that the total value of the contributions made by him for the benefit of the children since the date of separation are significant and support the assertion that the father subjectively believed that he was effectively honouring the terms of the oral agreement by doing so. I have difficulty accepting that submission. Even if I

were to accept the father's evidence about his contributions at its best, over the last six and a half years, he paid or provided only the following:

a) $1,400 in cash, comprised of $300 per month for the first three months, for a total of $900 (paid to S.H. to dole out to the mother as needed) and $500 for one of the birthdays of one of the children;
b) the purchase of snowsuits, boots and gloves for the children, every winter, but with no estimate of value;
c) the purchase of various items of other clothing and blankets, on an unspecified number of occasions and with no estimate of value;
d) the purchase of two bicycles for the children with no estimate of value;
e) the purchase of groceries as required, on an unspecified number of occasions and with no estimate of value; and
f) the provision of meat from hunting, on an unspecified number of occasions and with no estimate of value.

While the father also deposed about contributions from his own mother, S.H., for the children's birthdays and for Christmas presents, those contributions cannot be credited to him.

[14] The mother specifically disputes the value of the father's contributions and only acknowledges receiving the following:

a) one payment of $150 to the mother after the conclusion of the oral agreement;
b) on one occasion, S.H. purchased groceries for her with money from the father;

c) $50 worth of groceries in 2005;

d) snowsuits for the children in 2008;

e) two bicycles for the son, J. P-M.; one in 2006 and a second in 2009;

f) a single box of moose meat in September 2009;

g) $40 for the children's school pictures in September 2009;

h) $200 from S.H. for school supplies for the children in September 2009; and

i) snow pants for the children in September 2009.

[15] The father is principally skilled as a cook, although he also periodically earns income as a labourer and landscaper. He has provided the following information about his annual income over the past several years:

2007 - $14,418

2008 - $15,032

2009 - $20,237

2010 - $21,850 (extrapolated from $874 biweekly, over 50 weeks per year)

The father further deposed that his 2009 income was "unusual" in that he earned a considerable amount of overtime. He said that his average income for the past three years is $16,562.

[16] For the sake of analysis, if I were to attribute an annual income to the father of about $14,000 from the separation date of October 27, 2003, to the end of 2006, he would have been required to pay $91 monthly, or $1,092 annually, for each of the years 2004, 2005 and 2006, for a sum of $3,276, plus $182 for November and December 2003, for a total of $3,458 for that time period. Then, from 2007 to date, using the father's own average income for the past three years of $16,562, he would have been required to pay

$189 monthly for the two children, or $2,268 annually for each of the years 2007, 2008 and 2009, for a sum of $6,804, plus $189 monthly for each of January, February, March and April 2010 ($756), for a total of $7,560.

[17] Thus, disregarding the terms of the oral agreement, it is arguable that the father should have paid a grand total of $11,018 in child support to the mother from the date of separation to now.

[18] If I use the amount which the father agreed to pay under the oral agreement, $300 per month for both children, then the father should have paid $3,600 annually for each of the years 2004 through 2009, for a sum of $21,600, plus $600 for November and December 2003, plus $1,200 for January through April 2010, for a grand total of $23,400.

[19] The totals from either approach are, on their face, much greater than the value of the father's cash and in-kind contributions to date. His own evidence is that his contributions to date have been limited to $1,400 in cash, plus goods, clothing and groceries of an unspecified value. Further, if I look to the mother's evidence, the father's contributions were almost insignificant in comparison with what he ought to have paid. It is also trite law that the payor parent does not have the right to chose how the money that should be going to child support is to be spent, nor can he decide that his support obligations can be acquitted by the purchase of specific goods. Finally, while the determination of whether a payor parent is engaging in blameworthy conduct is a subjective question, objective indicators (such as the evidence of the cash and in-kind contributions) remain helpful in determining whether the parent is blameworthy.

[20] In my overall assessment of the evidence provided by both parties, the father cannot maintain that he had an honest subjective belief that he was effectively complying

with the terms of the oral agreement by making the contributions he claims to have made. Further, by knowingly avoiding or diminishing his support obligations to his children, he presumably profited by putting his own interests ahead of theirs. Taking an expansive view of his conduct over the last six and a half years since the separation, I have no difficulty in concluding that it was blameworthy.

c) What are the current circumstances of the children and how do they compare with their circumstances prior to the date of separation?

[21] Although the mother deposed that she is presently on social assistance and needs the financial help of the father in order to properly care for the children, there is no evidence as to what the circumstances of the children were prior to separation. Therefore, I am unable to conclude how the current standard of living for the children compares with the standard of living they experienced while the parties were together. Accordingly, I view this as a neutral factor in deciding whether to make a retroactive award.

d) Assuming that the father would experience hardship as a result of a retroactive award, to what extent should that be a factor in determining whether retroactive child support should be ordered?

[22] The father asks me to find that his average income for the past three years is $16,562. Although he is skilled as a cook, he says that the kind of work he does most often is labourer type work, such as landscaping. To his credit, he has agreed to an order to pay child support prospectively in the amount of $315 per month for both children commencing May 1, 2010. That equates to an income of $20,000 under the *Child Support Guidelines* table. While I accept that it will be a hardship for the father if he is required to pay an additional retroactive award based on his current estimated income, it

is not always possible to avoid such hardship. Indeed, hardship is much less of a concern where it is the product of the payor parent's own blameworthy conduct.

e) Conclusion on whether to make a retroactive award

[23] Pursuant to *D.B.S.*, I am to take a holistic approach to this question and decide the case on the basis of its particular facts. None of the four factors is decisive, and in this case, I have found one of the factors to be simply neutral.

[24] Taking all of the circumstances into account, I conclude that a retroactive child support award should be ordered. I am not satisfied that the mother's delay in pursuing the father for child support is justifiable. Rather, I find that she had a duty to act promptly and responsibly in pursuing child support and her failure to do so militates against a retroactive award. On the other hand, *D.B.S.* holds that unreasonable delay by a recipient parent is "merely a factor to consider" in deciding whether to make a retroactive award, and that I must determine the most appropriate course of action on the facts. I also acknowledge that child support is the right of the children and cannot be waived by the recipient parent. With respect to the remaining two applicable factors, I assess the father's blameworthy conduct together with the likely hardship he will experience if I make a retroactive award. I conclude that his hardship is much less of a concern on these facts because of his own blameworthy conduct and that he should not be permitted to profit from his wrongdoing. Finally, the hardship can be mitigated by allowing the retroactive amount to be repaid over time.

f) Date of retroactivity?

[25] The mother deposed that she asked the father numerous times to pay child support between the spring of 2003 (when the father moved to Alberta prior to the

separation) and the end of 2004. Further, she said that every time he exercised in person access to the children, she reminded him of his support obligations. In any event, there is no doubt the date of effective notice to the father was the date of separation, since the oral agreement was made prior to that date. Therefore, on its face, the retroactive award should commence as of November 1, 2003, being the first day of the month following the date of separation.

g) Amount and terms of payment of retroactive award?

[26] The last question to determine is the amount of the retroactive award and the terms on which it shall be repaid. The mother's counsel urged me to use the father's 2009 income of $20,237 as the basis for a retroactive award, which would result in a total of $24,804 ($318/month x 78 months) due from the separation to date.[1] In the alternative, because the father claimed to have earned substantial overtime income in 2009, the mother's counsel submitted that the average could be based upon the father's average income for 2008 through 2010 of $19,039.67, which would result in a table amount of $278 per month for the two children.

[27] In my view, based on the fact that the father's income has increased incrementally over the years from 2007 to date, it is logical to infer that he earned less over the period from 2003 to 2006 than he did in subsequent years. The father's average income for 2007 and 2008 was $14,725. On that basis, I will impute an income to him of $14,000 annually, from November 1, 2003 to the end of 2006. That results in $91 payable monthly for the two children, or $1,092 for each of the years 2004, 2005 and 2006, for a sum of

[1] The total amount of retroactive child support claimed by the mother in her affidavit #2 was $24,885.00. However, this figure was incorrect mathematically and also included child support for months that were unclaimable.

$3,276, plus $182 for November and December 2003, for a grand total of $3,458 for that time period.

[28] For 2007, I will use the father's actual earned income of $14,418, which results in child support payable for two children of $106 monthly or $1,272 for the year.

[29] Similarly, for 2008, I will use the father's stated income of $15,032, which results in child support payable for two children of $130 monthly or $1,560 for the year.

[30] For 2009, based on the father's stated income of $20,237, I find that he ought to have paid $318 in child support monthly for the two children, or $3,816 for the year.

[31] For the first four months of 2010, I will use the father's estimated annual income of $21,850, which results in monthly child support payable for two children in the amount of $341, or $1,364 for those four months.

[32] Thus, the notional total value of child support payable by the father, based on my calculations, from November 1, 2003 to April 30, 2010, would be $11,470.

[33] *D.B.S.* directs that a court should not order a retroactive award in an amount that it considers unfair, having regard to all of the circumstances of the case. One of the circumstances in this case is that the father has made some contributions for the benefit of the children since the date of separation. While I have found those contributions to be relatively small, in comparison with the amount of child support which he properly should have paid, either under the *Child Support Guidelines* or pursuant to the oral agreement, he nevertheless deserves some credit for them. In addition, I take into account the fact that one of the children resided with S.H. from Mondays to Fridays between January and June 2008. S.H. looked after the child's expenses during those times and the mother made no financial contributions towards those expenses. Finally, I take into account the

fact that the mother had no justifiable excuse for her delay in making a formal application to collect the retroactive child support. Thus, in all of the circumstances, it is my view that the total award of retroactive child support should be reduced from the notional quantum of $11,470 down to $7,500. I will further order that this retroactive award be made payable at the minimum rate of $100 per month.

5. CONCLUSION

[34] The father shall pay retroactive child support in the amount of $7,500, at the rate of $100 per month, with the first payment to commence July 1, 2010, and subsequent payments to be made on the first day of each month following. These payments will be in addition to the $315 per month which the father has already agreed to pay, by way of court order, for the support of the two children prospectively.

[35] As the parties made no submissions on costs, I would prefer to reserve my decision on the point. If they are unable to agree on costs, I will remain seized of the matter, and counsel may return before me to speak to the issue.

Gower J.