

# SUPREME COURT OF YUKON

Citation: *C.L.M. v. M.D.H.*, 2012 YKSC 50

Date: 20120625  
S.C. No. 03-D3555  
Registry: Whitehorse

Between:

C.L.M.

Petitioner

And

M.D.H.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Joie Quarton  
Shayne Fairman  
Kathleen Kinchen

Counsel for the Petitioner  
Counsel for the Respondent  
Child Advocate

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] The father applies for a variation of the Consent Order dated November 10, 2009 (the "Consent Order"). The father is asking for the return of child support payments to the mother (the "overpayment of child support"). The change in circumstances, which is not in dispute, is that the children's primary residence is with the father and not equally with the father and mother as provided for in the Consent Order.

[2] The mother opposes the return of overpayment of child support in the amount sought by the father. However, on May 6, 2012, the mother was ordered to pay \$5,000

to the father to be credited against any eventual Order made. The parties have agreed upon the financial support for the eldest child starting college in September 2012.

## **BACKGROUND**

[3] The father and mother were married in 1994 and separated in January 2002. There are two children of the marriage R. and C. now 17 and 14, respectively.

[4] The Consent Order provided for the joint custody of the children who would reside equally with the father and mother on a week on week off schedule. The father earned twice as much as the mother and it was agreed that he would pay \$715 per month in child support to the mother calculated on a straight set off basis based upon the equally shared residential arrangement.

[5] The Consent Order also provided that the mother and father would exchange income tax information no later than June 1 of each year to adjust the ongoing child support. This did not occur in 2010 or 2011, and forms part of the father's calculation of overpayment of child support.

[6] As of January 2011, C.'s residence changed from the equal week on week off schedule to primary residence with the father, on the child's initiative. The child's initiative and the child's request to remain in the primary care of the father were confirmed by the Child Advocate.

[7] R. participated in an exchange program from September 9, 2010, to June 21, 2011, and at that time was not residing with the mother or the father. When R. returned home, she lived equally with the father and mother until November 2011, when she began residing primarily with the father. While R. was on the exchange, the father

continued to pay child support for R. to the mother, despite his request to pay it directly to R.

[8] The mother and father each paid one-half of the exchange costs. The mother deposed that there were some complications in the travel plans for R. on the exchange which required the mother to lose time at work and spend \$3,800 for airfare, accommodation, food and transportation to assist R. The father says he paid an additional \$1,500 to R. while on the exchange and the mother says she paid \$1,750 to R. while on the exchange.

[9] In Family Law Case Conference on February 9, 2012, I ordered that the mother disclose her 2009 and 2010 income tax returns and that the monthly child support payment of \$715 in the Consent Order be suspended until further order of the Court.

[10] The mother has raised concerns about C. and made allegations about the father's care and suggested that the father interfered with her relationship with the child.

[11] On May 16, 2012, the Court recommended the appointment of a Child Advocate with a social work background. The Child Advocate did not validate the concerns raised by the mother. The Child Advocate described both children as "great kids" and felt that there was no coaching. C. appeared to the Child Advocate to be a normal child who gave clear instructions about wanting primary residence with the father and weekends with the mother, with flexibility.

[12] The mother had a 2009 income of \$51,145 and a 2010 income of \$63,670. The father had a 2009 income of \$102,123 and a 2010 income of \$116,411. I accept, for purposes of the overpayment of child support, the claim of the father going back to June 1, 2010. The correct figure for the overpayment of child support is \$14,842, not taking

into account the child support paid by the father to the mother during R.'s exchange program. If the child support paid during the exchange program should be repaid, the amount of the overpayment of child support is \$18,591. There is an additional April to August 2012 adjustment of \$1,354 to be paid by the mother.

[13] I find that the correct date for the commencement of the overpayment calculation is June 1, 2010 because that is the date agreed upon in the Consent Order for the annual adjustment of ongoing child support.

[14] Counsel for the mother has indicated that the mother will suffer a financial impact of approximately \$20,000 if she is ordered to repay the overpayment of child support.

### **ANALYSIS**

[15] The first thing that must be said is that this is not a classic case of a variation application seeking retroactive child support where the proposed payor parent has to accommodate a present expenditure for a past obligation. In this case, the mother has already received the majority of these support payments with the full knowledge that the children were no longer in her care on a shared basis. The hardship, if any, in this case is for the father who has been required to pay child support to the mother and fully support the children who were residing with him.

[16] I say this because the Supreme Court of Canada judgment in *D.B.S. v. S.R.G.*, 2006 SCC 37, stated that the following non-exhaustive factors should be taken into consideration in determining whether a retroactive award was appropriate:

1. whether there was a reasonable excuse for the recipient parent failing to make an earlier request for support or variation;
2. the conduct of the payor parent;

3. the circumstances of the children; and
4. any hardship occasioned by a retroactive award.

[17] I conclude that none of these factors militate against the appropriateness of an award that the mother repay the overpayment of child support that was so apparent at the time of the payments by the father to the mother, except for the child support while R. was on the exchange. Child support need not be repaid for that period as the mother maintained a residence and incurred some expenses. However, I order that the sum of \$14,842 plus the April - August 2012 adjustment of \$1,354, for a total of \$16,196, be paid by the mother to the father. I also order that the mother pay child support to the father for C. in the amount of \$609 per month commencing September 1, 2012.

[18] As indicated earlier, the mother and father have reached an agreement on the amount of support each parent will pay for R.'s college education. For the 2012-13 academic year, the father shall contribute \$6,000 and the mother \$3,730. The parties have reached an agreement on the timing of payments which may be included in the Order.

[19] Although it was not an issue before me in this application, I understand that there may be disagreement going forward about whether post-secondary costs are to be shared on an equal basis or in proportion to the respective parental incomes. I offer the following to head off future disputes on this issue. I appreciate that the Consent Order refers to equally sharing the "school fees and expenses" and clearly s. 7 expenses in the guidelines includes post-secondary education expenses. It is not readily apparent that "school fees" is the same thing as "post-secondary education expenses". Nevertheless, where there is a large discrepancy between the respective parental

incomes, proportionate sharing of post-secondary education expenses is not unreasonable.

**SUMMARY**

[20] To summarize, I order the following:

1. The Consent Order shall be varied based upon the change in circumstances in the residence of the children and the annual changes in parental income commencing June 1, 2010;
2. The child support payments of the father in the Consent Order ceased on January 1, 2011 for C. and on November 1, 2011 for R.;
3. The mother shall pay \$16,196 to the father representing the overpayment of child support by the father;
4. The primary residence of C. shall be with the father and the mother shall pay child support for C. to the father in the amount of \$609 per month commencing September 1, 2012.
5. The father shall contribute \$6,000 and the mother \$3,730 to the post-secondary education of R. for the 2012-13 academic year.

[21] Costs may be spoken to.

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VEALE J.