SUPREME COURT OF YUKON

Citation: *G.W.C. v. Y.D.C.*, 2012 YKSC 52

Date: 20120705
S.C. No. 00-D3300
Registry: Whitehorse

Between:

G.W.C.

Petitioner

And

Y.D.C.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

G.W.C.	Appearing on his own behalf
Y.D.C.	Appearing on her own behalf
Lenore Morris	Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] The mother applies to vary the child support provision of a Consent Order dated October 4, 2007 (the "Consent Order"), pursuant to s. 17(1) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). The father and mother are self-represented. The mother is 42 years old and the father is 82 years old. The parents have been raising their three children under the Consent Order but the relationship remains one of high conflict. The eldest child is now independent. The 17-year-old has been residing with the mother. The 13-year-old resided with the mother from October 4, 2007, pursuant to the Consent Order, but on November 17, 2011, I ordered that the 13-year-old reside with the father.

BACKGROUND

[2] There is a long and hotly contested court history to this child support variation application. The mother describes their separation as “tumultuous” and there is no doubt that the court disputes have been costly to both parents.

[3] The parents were married in 1993 and separated in September 2000. In my first judgment cited as 2001 YKSC 539, the mother was 31 years old and the father was 71 years old.

[4] The mother is currently employed as an assistant in the Yukon Government. She began working for the Yukon Government as an auxiliary on-call employee in November 2004. She became a full-time employee in August 2006. The mother is in a common law relationship.

[5] The father is 82 years old and retired but still buys and sells recreational vehicles. He is married to a 29-year-old woman and they have a son.

[6] The current residency status of the three children is that the eldest is independent. The 17-year-old now resides primarily with the mother, and the 13-year-old resides primarily with the father.

[7] In a Consent Corollary Relief Order dated December 14, 2000, the father assumed custody of the three children while the mother attended college to complete her education. The father was ordered to pay $1,200 per month to the mother while she pursued her studies for a period of up to four years or until such time as she withdrew from or finished her studies. The Consent Corollary Relief Order divided the family property such that the father owned the Whitehorse family assets and the mother owned the Philippines family assets. The Consent Corollary Relief Order was silent on child support as the mother was a student. However, the mother and father signed an

earlier Separation Agreement dated November 19, 2000, containing the following paragraph:

> 6. Financial Support
>
> (a) For so long as the children are living substantially with [the father] then [the father] agrees to pay for all the costs associated with the care of the children until they reach the age of 19 or marry, whichever comes first.

[8] The children were ordered to be in the custody of the mother in February 2002, but in my judgment in *S.W.C. v. Y.D.C.*, 2002 YKSC 53, on October 18, 2002, I granted joint custody of the children to the parents. The primary residence of the eldest child was ordered to be with the mother, and the father was ordered to pay child support in the amount of $404 per month based upon an imputed annual income of $47,285.01. The primary residence of the two younger children was granted to the father and he supported them until October 1, 2007.

[9] On June 26, 2003, I ordered that the eldest child again reside with the father and that his child support obligation to the mother cease. At this time, all three children were residing with the father.

[10] On September 1, 2004, the Court ordered that the primary residence of the eldest child again change to the mother effective June 12, 2004. The Court ordered the father to pay child support to the mother in the amount of $207 per month based on an annual income of $23,474.85.

[11] The issue of spousal support was the subject of numerous applications in 2004. It appears that spousal support was paid by the father to the mother from the time of separation until September 1, 2004.

[12] On February 15, 2005, the Court ordered that the primary residence of the eldest child change back to the father's residence. The father continued to provide the financial support for the children.

[13] The disputes between the father and mother over custody of the children no doubt continued but there was a 2-year respite from court applications. However, a comprehensive Consent Order filed on October 4, 2007, approved by each parent on a self-represented basis, brought some stability to the matter, at least from the Court's perspective. The mother at this time was financially independent.

[14] In the Consent Order, shared parenting principles were adopted for the two younger children who were made the subject of a joint custody regime with both children being in the custody of the mother from September 1 to June 30 and in the custody of the father from July 1 to August 31. The eldest child is independent and currently resides with the mother.

[15] As noted, the mother now seeks to vary the child support provision in the Consent Order, which reads as follows:

> 5. Regarding the support of the Children:
>
> a) each of [the parents] shall be fully responsible for the support of [two younger children] including their normal recreational activities, and educational expenses, while they are residing with her or him, and neither shall be entitled to child support from the other;
>
> b) [the mother] shall ensure that [the children] are covered under her medical, dental, and extended health insurance plans, for so long as such plans are available to her through her employment and such coverage is possible under the terms of the said plans;
>
> c) [the parents] shall share equally and necessary medical or dental expenses for [the two younger children] that are not covered by [the mother's] insurance;

> d) [the parents] shall pay equally for any extraordinary or special expenses in relation to [the two younger children] that they both agree are in the best interests of the child in question; and
>
> e) provided that [the eldest child] chooses to return to college or university full time before year 2010 each of [the parents] shall provide matching amounts of support to [the eldest child] up to a limit of $2,000.00 from each of them for up to 3 years and the amounts shall be determined by [the parents] in consultation with [the eldest child] and shall be based on her financial needs, resources, and her achievements in her chosen educational program.

[16] The background to the October 2007 Consent Order is somewhat complex. It appears that in May 2007, the mother began to raise the issue of the two younger children residing primarily with her. The discussions between the parties took place over a period of several months by e-mail exchanges. The parents initially discussed the middle child and the mother offered to be “wholly responsible” financially for the child if the child’s primary residence was with the mother. The mother at this point had a full-time permanent job and a new house with her partner. Eventually, the father and mother agreed that the youngest child’s primary residence would be with the mother as well.

[17] The mother, with the assistance of her partner, who is a lawyer, prepared the Consent Order in July 2007 for the father’s review. The Consent Order contained para. 5 as set out above. The mother states that her reason for agreeing to the Consent Order is that she did not want to go to court again and it was the only way that the father would agree to allow her to have the primary residence for the children. She also felt that he would be reasonable about sharing some expenses.

[18] The father believes that the Consent Order was drafted entirely by the lawyer-partner of the mother. He says that the specific wording “neither shall be entitled to child

support from the other" was added by the lawyer-partner to protect the wife from the father claiming child support.

[19] A great deal of the evidence filed before me in this application deals with the mother's view that the father has not contributed half the costs of the special and extraordinary expenses of the two younger children.

[20] The mother submits that there has been a change in circumstances in that she had no disclosure of income from the father before entering into the Consent Order Neither the father nor the mother requested financial disclosure before the Consent Order.

[21] The financial disclosure made by the father for this application indicates the following Line 150 income of the father, and I am also including in the table adjustments made to this income by the mother:

	Line 150	Adjusted Line 150 for capital gain
2006	63,168	75,631
2007	44,288	56,782
2008	42,888	55,382
2009	43,366	55,860
2010	43,181	55,675

[22] Apparently, the father sold a business asset which may explain the capital gain adjustment calculated by the mother.

[23] The father says that the mother's claim for a variation is motivated entirely by the father's July 2011 variation application to change the primary residence of their 13-year-old child so that his residence during the school year would be with the father.

[24] The father filed this application to vary the Consent Order on July 18, 2011. The mother contested the application on the grounds that there was no material change of

circumstances. The Court recommended the appointment of a Child Advocate for the 13-year-old. The matter was set for hearing on November 17, 2011.

[25] On August 17, 2011, the mother filed an application to vary the Consent Order to claim retroactive and prospective child support, which, at the hearing, was reduced to a claim for retroactive child support from September 2010 up to and including November 2011. This change in position was presumably based upon the mother's evidence that the issue of child support was raised with the father in July 2010.

[26] On November 17, 2011, upon hearing the submissions of the mother, father and Child Advocate, I found that there had been a change of circumstances based primarily on the 13-year-old's wish to spend more time with the father who resided very close to the child's school, as well as the recommendation of the Child Advocate. See *G.W.C. v. Y.D.C.*, 2012 YKSC 8, where I ordered that the primary residence of the 13-year-old would be with the father from September 1 to June 30 and with the mother from July 1 to August 31.

THE LAW

[27] This application involves two aspects of child support law: the validity of the agreement of the parents and the Consent Order that each parent would be responsible for the support of the two children while residing with him or her, and the question of whether there should be a variation of the Consent Order and an award of retroactive child support.

The Validity of the Consent Order

[28] Section 15.1 of the *Divorce Act* provides that a court may make an order requiring a spouse to pay support for the children of the marriage.

[29] Section 15.3 requires that the child support order shall be in accordance with the applicable guidelines referring to the child support guidelines established under s. 26.1 of the *Divorce Act*. Section 26.1(2) states that the guidelines "shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation."

[30] The Federal Child Support Guidelines (the "Guidelines") begins with a statement of the objectives of the Guidelines:

> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances

[31] The Guidelines establish a table amount based on the income of the payor and the number of children.

[32] Section 15.1(7) of the *Divorce Act* sets out the basis on which a court may award less than the table amount:

> 15.1(7) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

> *Reasonable arrangements*
>
> (8) For the purposes of subsection (7), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

[33] It is a well-accepted principle that child support is the right of the child and that parents cannot waive or bargain away the rights of their children to appropriate child support.

[34] In the case of *Greene v. Greene*, 2010 BCCA 595, the Court addressed a situation where the parents had agreed in a Consent Order drafted in 2000 that the husband would pay $600 in child support for two children, when his income would normally attract a table amount of $1,200. This lower level of child support was justified expressly in the Consent Order based on an increase in the access costs that would be incurred by the father when the mother moved with the children from the Lower Mainland to the Okanagan.

[35] On a variation application by the wife, and based on an increase in the father's income from $99,180 to approximately $158,800 in January 2010 (attracting a table amount of $2,137), the chambers judge, on the basis of factors set out in *D.B.S. v. S.R.G.*, 2006 SCC 37, made an award of child support retroactive to January 1, 2009, payable at $1,000 per month less some extraordinary expenses paid for by the father.

[36] The Court of Appeal in *Greene* set aside the order of the chambers judge and awarded the full table amount of child support for the following reasons:

> [60] In summary, I conclude that the trial judge erred in finding that Mr. Greene had established a basis, either at law

> or on the evidence, which justified a reduction in his child support, either retroactively or prospectively, to take account of his access expenses in these circumstances. Whether a justification for such a reduction could be found in other cases under either ss. 17(6.2) or 16(6) of the *Act* is a question which need not be decided in this case. Although Mr. Greene was entitled to rely on the consent order unless and until it was varied, that right was always subject to the prospect of a retroactive order being made in the future based on a change of circumstances such as that which occurred. Not only did Mr. Greene's income increase substantially after the consent order was made, but the expenses of the children must also be taken to have increased significantly over that ten-year period. (my emphasis)

[37] In *Greene*, at para. 30, the Court noted that there was ‘no doubt’ that there was a change in circumstances, although it did not address that issue in any detail.

[38] At para. 49, the Court wrote that on an application to vary an order, the court must assume that the order was correct at the time it was made (citing *Willick v. Willick*, [1994] 3 S.C.R. 670).

[39] In the case at bar, neither party suggested that the Consent Order did not provide “reasonable arrangements” for the support of the children. Nor does the mother suggest that the Consent Order was gained by any undue influence or unequal bargaining positions or lack of independent legal advice. I conclude that the Consent Order was valid until consideration of the variation application of the mother.

The Variation Application

[40] Section 17 of the *Divorce Act* provides the following power to vary a child support order:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> …
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> …
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[41] Under the heading ‘Variation of Child Support Orders’, the Guidelines provide:

> 14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
>
> …

[42] In the case of *Willick v. Willick*, cited above, and prior to the Child Support Guidelines, the Supreme Court held that a material change of circumstances “means a change, such that, if known at the time, would likely have resulted in different terms”;

the corollary being that “if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied upon as the basis for variation.” (para. 21).

[43] The Supreme Court of Canada has since set out the factors to be taken into consideration in making retroactive child support orders in *D.B.S. v. S.R.G.*, cited above.

[44] In *D.B.S. v. S.R.G.,* Bastarache J. restated the core principles of child support obligations at para. 38:

> … These core principles animate the support obligations that parents have towards their children. They include: child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent.

[45] There are three separate situations identified by Bastarache J. where it may be appropriate for a court to order retroactive child support, and different considerations apply to each:

1. where there has already been a court order for child support;
2. where there has been previous agreement between the parents; and
3. where there has not been a court order to pay child support.

[46] In this application to vary, there is both an agreement between the parties and a Consent Order of the Court.

[47] In the situation where a court has already ordered that child support be paid and there is an application to vary the amount, the Supreme Court states, at para. 74, that the court hearing the application must balance the fact that the court order was meant to provide predictability and certainty for the payor parent against the responsibility of

ensuring that children receive an appropriate amount of support. Clearly, where the payor parent is deficient in his or her support obligation, an existing order can be varied retroactively.

[48] In contrast, with respect to agreements that haven't been endorsed by a court order, at paras. 77 and 78 of *D.B.S. v. S.R.G.,* the Supreme Court stated that while an agreement reached by the parents should be given "considerable weight", it cannot provide the payor parent with the same expectation that he or she is fulfilling his or her legal obligations.

[49] The full text of paras. 77 and 78 indicates that agreements which have been made into court orders will presumably have greater deference because the court has permitted the agreement to depart from the guidelines, i.e. the court is satisfied that reasonable arrangements have been made for the children.

[50] However, regardless of whether a child support order arises from an agreement, a court order, or both, courts have the power to vary child support in appropriate circumstances. The factors to be considered in making a variation order are neither decisive nor exhaustive, but rather, as stated in para. 99, "…a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix." The relevant factors in this case are set out below.

Recipient Parent's Delay in Seeking Child Support

[51] This was a major issue in *D.B.S. v. S.R.G.* and the cases that followed. In some cases, a parent delays because he or she has reasonable fears about vindictive reactions from the other parent. However, it is also important to consider the payor parent's interest in certainty and the need to ensure that parents are not encouraged to

delay seeking child support. Unreasonable delay does not eliminate parental obligation, but it is a factor to consider.

Conduct of Payor Parent

[52] Blameworthy conduct is also a factor in considering when it is appropriate to make a retroactive award of child support. Blameworthy conduct is any conduct that places the payor parent's interest above their child's interest. Examples are hiding income increases or consciously ignoring child support obligations. Alternatively, a payor parent could be supporting the child in other ways that effectively fulfill the child support obligation.

Circumstances of the Child

[53] Courts may consider the present and past circumstances of the child in deciding whether a retroactive award is justified. This involves a consideration of the child's current needs as well as their needs at the time the support should have been paid. Any hardship suffered by a child would militate in favour of a retroactive award.

Hardship Occasioned by a Retroactive Award

[54] Factors that may be considered as hardship are whether the parent's present income makes a retroactive award difficult to pay and whether the payor parent has new family obligations to meet.

ANALYSIS

Change in Circumstances

[55] The threshold question of whether there is a change in circumstances here must take into account the circumstances before the Consent Order was filed. While there was no disclosure sought by either parent at the time of the Consent Order, it is clear that the mother knew the father had an income capable of supporting the children. The

father had an imputed income of $47,285.01 in 2002 requiring child support of $404 per month for one child. His income had diminished to $23,474.85 in 2004 but there was never any doubt that the father earned a sufficient income to pay child support.

[56] The fact that the mother did not even inquire about the father's income at the time of the Consent Order suggests that it was not a matter of concern.

[57] Nevertheless, the threshold is not high for finding a change of circumstances, and the father certainly had an increased income in 2006 to $63,168 or $75,631 as claimed by the mother. Whether the mother was assuming the father's income was in the $40,000 range or less at the time of the Consent Order, there is certainly evidence of an improved or stable income situation for the father from 2006 to 2010 and I find that there is a change of circumstances sufficient to consider whether a retroactive award is merited.

Retroactive Award Factors

[58] This Court is never content to sanction the non-payment of child support by a parent who has both the capacity and obligation to pay. In cases of high conflict, it would be the normal course to make an order for child support to ensure that silence or non-payment of child support do not arise based on fear, refusal to disclose, bullying or sheer litigation weariness. The child support obligation ensures that the children are adequately supported or not suffering hardship.

[59] Section 15.2(7) of the *Divorce Act* does provide the discretion to make a child support award that is different from the applicable table amount of the child support guidelines. That is what occurred in October 2007, when these parents, after years of litigation, agreed that each would be responsible for supporting the children while in their custody. The Consent Order was not made based on unequal bargaining positions

or where one parent was at an economic or social disadvantage. It was made after the father had supported the children from 2000 to 2007 while the mother pursued her education so that she could eventually achieve financial self-sufficiency. The children have moved between the father and the mother with some frequency since the parties separated, and the mother has never paid support. This agreement is not one reached because of the mother's lack of knowledge about the father's income or because of his refusal to pay child support, but rather it was made with knowledge of the father's capacity to support the children. The agreement was not made on the basis of an unequal or unfair bargaining position but on the mother's desire to have the custody of the children during the school year and being prepared to support them as the father supported the children while she pursued her education.

[60] There are certain unique factors in this case to consider in the determination of whether retroactive child support should be awarded. Each parent has had the primary obligation for financially supporting the children for a significant period of time. At this time, both parties are sharing the child support obligations.

[61] The children in this case have never been disadvantaged or suffered a hardship. To award retroactive child support could re-open the litigation between the parents rather than bring it to an end. I am not satisfied that it would benefit the children.

[62] The mother has not delayed the notice to the father of her desire to vary the Consent Order which was given as early as September 2010. I do not find that she has brought the variation application in response to the father's application to vary custody. She stated that her motivation was based on the father's continued refusal to be fair on the sharing of special and extraordinary expenses from her perspective. The father, on the other hand relied on the wording of the Consent Order in that regard.

CONCLUSION

[63] I conclude that the cumulative effect of all the factors in this case do not support an award of retroactive child support. Each parent now has the obligation to substantially support a child in their care and control. There has been no hardship experienced by the children after the Consent Order, and I do not see any going forward. A retroactive award would not benefit the children.

[64] The Consent Order was not based upon any lack of financial ability by either parent and both parents are sharing the child support obligation going forward. While the Consent Order has not always resulted in harmony to say the least, it has brought some peace to the children and their parents and should not be varied now.

[65] Each party shall bear their own costs.

VEALE J.