

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Ford v. Hombert*, 2004 YKSC 21

Date: 20040316
Docket No.: S.C. No. 96-B0072
Registry: Whitehorse

Between:

DAVID ROBERT FORD

Plaintiff

And

PENNY JEAN HOMBERT

Defendant

Appearances:

Fia J. Jampolsky
Elaine B. Cairns

For the Plaintiff
For the Defendant

Before: Mr. Justice R.S. Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Mr. Ford seeking to vary the amount of child support and to have the arrears rescinded or, alternatively suspended pursuant to s. 44(3) of the *Family Property and Support Act*, R.S.Y. 2002 c. 83 (the Act).

[2] This application has been triggered by the commencement of student loan repayment by Mr. Ford in the amount of \$395.46 on May 1, 2004.

ISSUES

[3] There are three issues to address:

1. Has there been a material change in circumstances for Mr. Ford?

2. Should there be a variation of child support?
3. Should the arrears of child support in the amount of \$13,391.71 be cancelled or suspended?

THE FACTS

[4] The facts are as follows:

1. Mr. Ford and Ms. Hombert commenced their relationship in 1993 and separated in 1996. They were not married.
2. There is one child of their relationship, S.L.F., born September 26, 1995. She is now eight years old.
3. Both parents are presently single. When the court action was commenced on December 13, 1996, Mr. Ford was 20 years of age and Ms. Hombert was 19. Both are now 27 years old.
4. They entered into a separation agreement on October 25, 1996, granting Ms. Hombert the custody of S.L.F. Mr. Ford agreed to pay \$312.00 per month child support when employed full time.
5. On December 17, 1996, a consent order in this court granted Mr. Ford specified access to S.L.F.
6. On March 27, 1997, the court ordered that the parents have interim joint custody of S.L.F., whose primary residence was with Ms. Hombert.
7. On April 1, 1997, Mr. Ford applied to this court to set aside the child support agreement of the \$312.00 per month and to replace it with child support in the amount of \$175.00 per month. That application was dismissed with costs to Ms. Hombert.

8. Ms. Hombert moved to Calgary, Alberta, with her daughter and obtained a Provisional Order from the Court of Queen's Bench on November 18, 1999 ordering Mr. Hombert to pay child support in the amount of \$447.00 per month based on an annual income of \$34,000.00 for Mr. Ford. Arrears were declared to be \$11,544.00 based on \$312.00 per month from November 1, 1996 to November 30, 1999.
9. Mr. Ford was attending school in Victoria, British Columbia. A Confirmation Order was made in the Provincial Court of British Columbia on May 31, 2001, ordering Mr. Ford to pay child support in the amount of \$312.00 per month and fixing arrears at \$10,729.00.
10. Mr. Ford appealed the Confirmation Order. His appeal was dismissed on May 15, 2003.
11. At the time of the May 31, 2001 Confirmation Order, Mr. Ford was a student and was incurring student loans.
12. Mr. Ford remained a student until Christmas 2001 when he returned to work in the Yukon.
13. He was involved in a relationship with N.S. from January 1997 to May 2003. He has one child from that relationship who is now three years old. He has been paying \$200.00 a month for the support of that child since November 2003. N.S. has filed an action in this court claiming child support in the amount of \$392.00 per month.
14. Mr. Ford has been attending school off and on since 1995. He has studied accounting, psychology and computer science. His last year of school was

at the Career Development Institute (CDI) in Victoria from September 2002 to the summer 2003 where he received a computer-networking diploma. It is the only certification he has received in nine years of off-and-on study.

15. His studies at CDI required him to complete a co-op placement for two months in September and October 2003.
16. In 2001, Mr. Ford earned \$2,978.00. In 2002, he earned \$36,496.00, which included a grant of \$14,100.00 as student funding received from the Employment Insurance program.
17. He estimates his 2003 earnings to be \$19,830.00. He spent at least one half of 2003 attending school.
18. Since November 6, 2003, he has been employed as a casual worker with the Government of Yukon. He works as a computer support technician with the Department of Energy, Mines and Resources for 37.5 hours per week at \$22.71 per hour. This contract expires on May 6, 2004, although there are prospects for continued employment.
19. Since commencing his employment as a computer support technician, Ms. Hombert advised that his hourly rate has increased to \$23.75. This provides a monthly gross income of \$3,872.44 and a salary of \$46,469.00 on an annual basis. A recently approved collective agreement will increase this salary.
20. In Mr. Ford's Financial Statement filed January 12, 2004, he reports a monthly gross income of \$3,406.50 and monthly expenses of \$2,317.00, which includes a monthly child support payment of \$612.00. The \$612.00

monthly payment consists of \$312.00 for S.L.F., \$100.00 in arrears of S.L.F. child support and \$200.00 for his three year old child. This leaves an excess of net income over expenses of \$205.20 based on his previous hourly rate of \$22.71. Thus, his net income over expenses has increased based upon information filed by Ms. Hombert.

21. Mr. Ford has one student loan of \$14,644.28, which requires monthly payments of \$182.46 commencing April 30, 2004. He has another student loan of \$17,239.59, which requires a monthly payment of \$213.00 commencing May 1, 2004. Thus as of May 1, 2004, he will be paying a monthly payment of \$395.46 for 114 months.
22. Of Mr. Ford's total student loan debt of approximately \$31,883.87, the amount of \$26,273.87 was incurred before and \$5,610.00 was incurred after the Confirmation Order of May 31, 2001.
23. As of March 3, 2004, Mr. Ford's arrears of child support for S.L.F. were \$13,391.71. This is considerably reduced from \$18,217.00 in arrears at December 2001. It is not in dispute that the bulk of Mr. Ford's child support payments have not been voluntary but rather by enforcement.
24. Ms. Hombert's income and expenses were not provided. She has completed her secondary school education with a Grade 12 equivalency. She received very little child support until 2001 when she registered her Order with the Maintenance Enforcement Program in the Yukon. She declared bankruptcy in 1998, in part due to the lack of child support. She is

now employed in the Department of Human Resources for the Government of Yukon.

THE LAW

[5] A good summary of the basic principles has been set out by Martinson J., in *Earle v. Earle*, [1999] B.C.J. No. 383 (B.C.S.C.) at para. 46:

1. Maintenance Generally
 - a. Parents have a joint and ongoing legal obligation to support their children.
 - b. It is the child, not the other parent, who has the right to maintenance.
 - c. The payment of maintenance is based on not just what a parent does earn but what a parent can earn.
2. Variation
 - a. There has to be a material change of circumstances, a change that is significant and long lasting.
 - b. A change to the Guideline amount is not automatic.
3. Arrears

Basic Principles

 - a. There is a heavy duty on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so.
 - b. If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away.

Examples

- a. Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future.
- b. A reduction or a cancellation requires detailed and full financial disclosure, under oath (usually in the form of an affidavit) that at the time the payments were to be made:
 - i. the change was significant and long lasting and
 - ii. the change was real and not of choice and
 - iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.
- c. Responsibility for a second family cannot relieve the parent of his or her legal obligation to support the first family.
- d. Delay in enforcement is generally not a legal basis to cancel or reduce child support arrears.
- e. Judges will not cancel arrears because the other party gets a lot of money at once. Otherwise, people would be encouraged to not pay maintenance and rewarded for not paying maintenance.
- f. Judges will not cancel arrears because the children were looked after in spite of the non payment.
- g. Nor will judges cancel arrears because children no longer need the money. The children should be compensated for what they missed.
- h. An agreement between parents that the maintenance for the children does not have to be paid will not be considered.

- i. Lack of access between a parent and child is not a legal reason to reduce or cancel arrears.
- j. Judges will not reduce or cancel arrears because other money has been spent to buy things for the children.
- k. The fact that a person did not have legal advice when the order was made or during the time when the arrears added up, is not, by itself, a reason to reduce or cancel arrears.

[6] As these parents are not married, the variation application is brought pursuant to ss. 44(3) and (4) of the Act which state as follows:

44(3) In the case of an order for support of a child, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines or that evidence not available on the previous hearing has become available, the court may

- (a) discharge, vary, or suspend a term of the order, prospectively or retroactively;
- (b) relieve the respondent from the payment of all or part of the arrears or any interest due on them; and
- (c) make any other order for the support of a child that the court could make on an application under section 34.

(4) A court making an order under subsection (3) shall do so in accordance with the child support guidelines.

[7] The following provisions of the Yukon Child Support Guidelines are applicable:

Circumstances for variation

12 For the purposes of subsection 42(2.1) of the Act any one of the following constitutes a change of circumstances:

- (a) if the amount of child support includes a determination made in accordance with the table, any change in circumstances that would result in a different order for the support of the child; and

- (b) if 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 parent or of any child who is entitled to child support.

...

Imputing income

17(1) The court may impute such amounts of income to a parent as it considers appropriate in the circumstances. The circumstances to be considered include

- (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent;
- (b) the parent is exempt from paying federal or provincial income tax;
- (c) the parent lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the parent's property is not reasonably utilised to generate income;
- (f) the parent has failed to provide income information when under a legal obligation to do so;
- (g) the parent unreasonably deducts expenses from income;
- (h) the parent derives a significant portion of income from dividends, capital gains, or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

- (i) the parent is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

...

[8] I note that subsection 42(2.1) of the Act referred to in the Yukon Child Support Guidelines is now s. 44(3) of the Act.

[9] It is also important to note that s. 26.1(2) of the *Divorce Act*, R.S. 1985, c. 3 (2nd Supp.) states:

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.

[10] Thus, in *Van Gool v. Van Gool*, [1998] B.C.J. No. 2513 (B.C.C.A.) at para. 28, the court has stated, “the courts considered not only the amount of income a spouse was actually earning, but the amount of income a spouse could earn if working to capacity”.

[11] The question of whether a parent with a child support obligation can return to school and reduce their child support obligation appears to have been settled in the case of *English v. English*, [1995] S.J. No. 417 (Sask. Q.B.). The following principles can be summarized from paras. 18 – 20:

1. A child’s entitlement to child support will not be extinguished because of a parent’s current or prospective inability to pay.
2. It is no answer to child support obligations for a parent to say there is insufficient income. It is the parent’s duty to seek employment that will earn the income necessary to maintain the child
3. A parent may not escape their child support obligation by ceasing their employment to continue their education.
4. A parent is entitled to pursue their education, so long as their financial affairs are organized so as to provide the required support for their children.

ANALYSIS

Issue 1: Has there been a material change in circumstances for Mr. Ford?

[12] The question of whether Mr. Ford has suffered a material change in circumstances has both a positive and negative aspect. His counsel submits that there has been a negative change in circumstances because Mr. Ford has a second child that he is supporting and he faces an increase in expenses of \$395.46 on May 1, 2004. She submits that his present ability to pay for S.L.F. arises from his education loans and his arrears of child support should be rescinded or suspended.

[13] I cannot accept this submission. In my view, the starting point to consider whether a change in circumstances has occurred is May 31, 2001, when the Confirmation Order was made. It is not appropriate for this court to review the facts before that decision.

[14] Mr. Ford must be presumed to have known that his student loan debt would have to be repaid once he completed his education. That is not a change in circumstances but an event he should have planned for. It was certainly an event that he would have contemplated in May 2001 when the Confirmation Order was made. I find that there has not been a negative change in circumstances for Mr. Ford.

[15] I should also add that I have found Mr. Ford's gross monthly income is \$3,872.44 rather than the \$3,406.50 as indicated in his Financial Statement filed January 12, 2004. It seems clear that his positive balance of \$205.50 (after deducting his monthly expenses from his net monthly income) set out in his Financial Statement has increased. As a result, he may have sufficient funds to pay the student loan payment of \$305.46 a month without incurring a negative monthly balance when his monthly expenses are deducted from his net monthly income.

[16] I find that there has been a positive change in Mr. Ford's circumstances. He earned \$2,978.00 in 2001, \$36,496.00 in 2002 (which includes a grant of \$14,100.00) and \$19,830.00 in 2003 which represented the part of the year he was not in school. He is presently earning a salary equivalent to \$46,469.00 per annum.

This is clearly an improvement or positive change in circumstances. Whether this change will be negatively affected when his contract expires on May 6, 2004, I do not know. However, there is no need to speculate at this time, except to say that there are indications that this positive change in circumstances will continue after May 6, 2004.

Issue 2: Should there be a variation of child support?

[17] Based upon Mr. Ford's annualized income of \$46,469.00, counsel for Ms. Hombert submits that Mr. Ford should be paying child support in the table amount of \$398.00 per month, as opposed to the \$312.00 per month he is presently paying.

[18] In my view this is entirely appropriate. I impute Mr. Ford's income to be \$46,490.00 per annum as it is an amount that he is earning and is certainly capable of earning.

[19] Based upon the requirement under s. 2(2) of the Yukon Child Support Guidelines that the most current information be used, I order that Mr. Ford pay child support in the amount of \$398.00 per month for the support of S.L.F. commencing April 1, 2004.

Issue 3: Should the arrears of child support in the amount of \$13,391.71 be cancelled or suspended?

[20] I can find no evidence to support the proposition that Mr. Ford is unable to pay a monthly amount of \$100.00 on arrears of child support or, more particularly, that he will be unable to pay in the immediate future. The evidence before me indicates that Mr. Ford's position is better than he portrayed at the commencement of his application

owing to recent collective agreement increases. Cancellation of arrears of child support would require a long lasting negative change in circumstances.

[21] Alternatively, counsel for Mr. Ford submits that a suspension of the arrears of child support be considered on the basis that Mr. Ford faces known increased expenses in the form of student loan repayment. However, I am not satisfied that Mr. Ford is unable to meet these expenses given his recent hourly wage increases. If the claim for child support for his second child creates a shortfall, the child support or arrears for his first child should not suffer. In that event, efforts must be made to trim his budget or earn more money to make up the shortfall.

[22] In fairness to Mr. Ford, he has presented a reasonable budget for expenses and he should not take on additional financial obligations while he is coping with child support obligations and repayment of student debt.

CONCLUSION

[23] I find that Mr. Ford has an imputed annual income of \$46,490.00. I order that Mr. Ford increase his monthly child support for S.L.F. to \$398.00 commencing April 1, 2004, and that he continue to pay \$100.00 per month on arrears of child support.

[24] Costs may be spoken to, if necessary.

VEALE J.