IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Matthews* v. *Matthews,* 2007 YKSC 11

Date: 20070227
S.C. No. 01427
Registry: Whitehorse

Between:

VIOLET MAY MATTHEWS

Petitioner

And

ALVIN NORMAN MATTHEWS

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Christina Sutherland — Counsel for the Petitioner
Emily Hill — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The father applies for the cancellation of arrears of child support in the amount of $69,317.14. The arrears were accumulated from May 27, 1986 to September 28, 2004, when the father sustained a workplace injury. This case focusses on the test to be applied in determining the present and future capacity of the father to pay his child support arrears.

BACKGROUND

[2] The father and mother married on August 5, 1978. They had two children, Lynn-Marie, born January 14, 1980 and April, born April 23, 1983.

[3] They divorced on May 27, 1986 and the father was ordered to pay child support in the amount of $500.00 per month based on an annual income of $35,000.00. The father did not challenge this income figure until March 7, 2000, when he applied to reduce child support.

[4] On March 7, 2000, the child support was reduced to $472.00 per month based on the father's actual income of $32,240.00.

[5] The Court order of March 7, 2000 adjourned the application to cancel arrears of child support and stayed enforcement of the arrears so long as the father paid $150.00 a month on the arrears.

[6] The arrears of child support as of March 7, 2000 were $81,000.00. They have since been as high as $99,000.00. The father made intermittent payments during the years between March 2000 and the date of his injury on September 28, 2004.

[7] A significant payment was made when the father was entitled to receive a lump sum payment of $49,210.00 from the Workers' Compensation Health and Safety Board (WCHSB). The mother managed to garnishee $28,476.50 and the father was paid $20,734.24 on October 25, 2006. He applied the entire amount to pay debts. The garnisheed amount of $28,476.50 was paid to the mother and reduced the outstanding child support arrears to $69,317.14.

[8] The calculation of the garnisheed amount was based upon the terms of the order of March 7, 2000 and the arrears that had accumulated since that order.

THE FATHER'S PRE-INJURY INCOME

[9] The father claimed that he was unable to find steady employment prior to 2000 because he was depressed and drinking heavily. This claim is supported by income tax returns that he filed from 1993 to 1999. He did not file income tax returns after 1999.

They indicate T4 earnings from a low of $2,081.00 in 1993 to a high of $18,968.00 in 1996, for an average of $9,462.00. They do not include any earnings from his artwork. He does not list his past employment nor does he explain when he worked or why it ended. He claims that he fell into arrears because he was depressed, drinking heavily and in and out of jail.

[10] He states that he has been sober since 1998. He has reported sporadic income since 1998.

[11] He states that he currently resides with his sister while he waits for the assignment of a house from the Carcross Tagish First Nation.

[12] The father is an accomplished artist who does painting and carving. He once claimed to his wife that he has made $1,000,000.00 from selling his artwork. One of his paintings was selected as the cover for a local phonebook.

[13] The mother alleges that the father used to display and sell his artwork at local retail stores. She says that as soon as the Maintenance Enforcement Office made inquiries, he would remove the art from the store. The father denies this allegation but provides no evidence of the income his artwork produced. The father filed receipts for the sale of artwork with the WCHSB to establish his benefits but has not produced those receipts in this application.

[14] After the application in 2000, the father offered the mother a moose antler carving that he said was worth $5,000.00. He offered it to her in lieu of child support. The mother suggested he sell it and make payments on the arrears of child support.

[15] The father claims that between 2000 and 2004, he was only working sporadically. The Court found his income to be $32,240.00 in 1999 based upon his

employment with the Village of Teslin as a water deliverer. He states that this employment ended in February 2000. He provided no documentation to confirm this.

[16] In July and August 2002, he worked for Skookum Asphalt. In 2004, he worked for one month with Carcross Tagish Development Corp. for $825.00. He further claimed that his income was never higher than $30,000.00.

[17] There is also the fact that when the WCHSB tried to determine his average yearly earnings for the 24 month period prior to his injury, they could only come up with an average yearly earning of $4,025.00. The WCHSB would not include receipts for the sale of artwork as they did not come within the policy definition of earnings.

THE FATHER'S INJURY

[18] Unlike his failure to disclose his income, the father provided extensive documentation of his injury and present disability. The father had a history of back injury. On September 28, 2004, he was injured at work and suffered a severe spinal stenosis (abnormal narrowing) at C3-4 and C4-5 with significant disc herniation (protrusion). This aggravated his pre-existing back condition.

[19] In a comprehensive interdisciplinary assessment dated February 24, 2005, the father could tolerate activity at a light functional level. He was still at risk for falls during dynamic activities. Further therapy and exercise were recommended. There was no doubt that he would have some permanent impairment based upon the spinal cord injury.

[20] In a final assessment of impairment dated June 5 and 6, 2006, the father had reached his maximum medical improvement. His current level of functioning permits employment as a service station attendant, gift shop/art museum cashier or ticket agent. However, it is not likely that he will reach his date-of-accident salary of $37,542.86

(which was a projection of the salary he would have earned if his employment had continued). There is no evidence that he cannot continue his artistic career.

THE FATHER'S POST-INJURY INCOME

[21] The father is presently receiving $600.00 per month from the WCHSB. The amount of $150.00 is deducted for payment of arrears of child support as required by the March 7, 2000 order.

[22] The father received a cheque in the amount of $7,925.42 from the WCHSB representing his weekly earnings from October 5, 2004 to January 15, 2005. On June 27, 2005, he received a further $4,025.00 from the Board. He did not apply any of those funds to child support payments. This is not a complete record of his monthly disability payments. In 2006, he received a lump sum payment of $49,210.00 from WCHSB of which $28,476.50 was garnisheed by the mother to pay arrears of child support.

[23] He is now capable of working as an artist and at light or sedentary work. His annual income from the WCHSB is $7,200.00.

THE MOTHER AND THE CHILDREN

[24] At the time of the father's application to rescind arrears in 2000, Lynn-Marie was 20 and April was 16 years old. They are now 27 and 23 respectively.

[25] The father was violent and assaulted the mother during the marriage. As a result, the father was denied access to the children in the 1986 Decree Nisi. The father has not applied to vary that denial of access.

[26] The mother has lived in fear of the father and has been concerned about the safety of the children. Although she has been able to maintain a good job, the children have done without because of their father's failure to pay child support. The mother

stated in 2000 that the payment of arrears would assist both daughters in continuing their education.

[27] At the time of the father's application in 2000, Lynn-Marie was attending Yukon College and working at three part-time jobs to help pay for her schooling. April was in Grade 11.

[28] At the time of this application, Lynn-Marie is employed at the Whitehorse RCMP detachment. She hopes to become an RCMP officer. She is married and financially independent.

[29] April is presently working as an auxiliary nursing home attendant. She would like to return to school and become a registered nurse. She has purchased a condominium with the assistance of her mother.

[30] The mother has not been able to contribute as much as she would have liked to her children's post-secondary education. When she received the payment of $28,872.72, she paid $10,000.00 to each daughter. The balance has been applied to present and past legal bills.

[31] The mother and her daughters do not believe the father is unable to earn income.

ISSUES

[32] The following issues will be addressed:

1) What annual income should be imputed from 1986 to the date of the father's injury on September 28, 2004?
2) What is the date that the child support obligation terminated?
3) What annual income should be imputed after the father's injury on September 28, 2004?
4) Should all or any of the arrears of child support be cancelled or reduced?

Issue 1: What annual income should be imputed from 1986 to the date of the father's injury on September 28, 2004?

[33] The father has failed to provide an evidentiary base to determine his actual earnings, as opposed to his filed T4 earnings from 1993 to 1998. I am unable to conclude that the $35,000.00 annual income accepted in 1986 should be reduced on this evidentiary record. The father has a demonstrated capacity to earn income coupled with a blatant refusal, with a few exceptions, to pay child support except when pursued by Maintenance Enforcement.

[34] I am satisfied that the income of the father in the amount of $32,240 as found in the March 7, 2000 order is the appropriate annual income to be imputed for the father from March 2000 to the date of his injury on September 28, 2004.

[35] Although the father refused to disclose his earnings from his artwork, he still indicated that after 1999 he never earned more than $30,000, implying at the very least that he was capable of earning that amount. That admission also satisfies me of his ability to earn up to $32,240 a year if he applied himself. Further, the amount of $32,240 was not an imputed amount but based upon an actual income from employment with no explanation as to why it could not continue whether at that employment or based on other employment supplemented by his artwork.

[36] I find that there was no change in circumstances to justify a variation of child support up to the date of his injury.

Issue 2: What is the date that the child support obligation terminated?

[37] The Statement of Account from the Yukon Maintenance Enforcement Program indicates that the last entry date for payment of $472.00 per month child support was April 2004. At that date, Lynn-Marie was 24 and April was 19. Counsel did not seriously

challenge the termination date of child support established by the Maintenance Enforcement Program. I am going to accept that date as the appropriate time to terminate on-going child support payments. While it may be argued that April was still a dependent, it appears that Lynn-Marie was independent. This is also just before the father's injury which clearly reduced his income-earning capacity. As a result, I find that there is no continuing obligation for child support after April 2004. That leaves arrears of $69,317.14 to be considered in the father's application to cancel or reduce arrears.

Issue 3: What annual income should be imputed after the father's injury on September 28, 2004?

[38] In the event that I am incorrect in finding no on-going child support obligation, I will address the issue of whether income should be imputed to the father. The father receives a disability allowance of $7,200.00 a year, but is capable of light or sedentary work. He is also capable of continuing to earn income from his artwork. There is no doubt that his injury on September 28, 2004 is a change of circumstance that would give rise to a variation if the child support obligation continued. His injury has reduced his capacity to do physically demanding, higher paying jobs. However, in my view, he remains able to work, particularly as an artist, and it is reasonable to impute his annual income at $20,000.00.

Issue 4: Should all or any of the arrears of child support be cancelled or reduced?

THE LAW

[39] There has been a debate in Canada on whether the court retains any discretion in making a variation of child support once it is determined that there has been a change in circumstances. This is based, in part, on the interpretation of sections 17(1) and 17(6.1) of the *Divorce Act* which state:

> "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;
> >
> > . . .
> >
> > 17(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[40] The Courts of Appeal of Ontario, Saskatchewan and Nova Scotia have concluded that, upon a change of circumstances being shown, "may" means "must" in the context of ensuring consistent treatment of spouses and children, one of the specific objectives of the Guidelines.

[41] The Courts of Appeal of British Columbia, Alberta and New Brunswick have held that courts retain a discretion on whether to grant applications to retroactively vary child support orders upon a change of circumstances being shown.

[42] In this Court, in *Sewell* v. *Grant*, 2005 YKSC 39, Gower J. favoured the "no discretion" reasoning in stating at paragraph 39:

> "It is difficult to reconcile the concept of having a "right" to variation with the prospect of having that right undermined by the exercise of discretion."

[43] The *Sewell* v. *Grant* case did not deal with the issue of rescinding or reducing arrears based upon present inability to pay arrears.

[44] There is a great deal more unanimity in the case law on the subject of the discretion to rescind or reduce arrears that have been validly incurred, notwithstanding that this is a species of retroactive variation under s. 17(1).

[45] The Alberta Court of Appeal in *Haisman* v. *Haisman* (1994), 7. R.F.L. (4th) 1 (Alta C.A.), a pre-Guidelines case, decided as follows:

1) The mere accumulation of arrears, without evidence of a past inability to pay, is neither a change of circumstance under s. 17(4) of the *Divorce Act,* nor a special circumstance (para. 25).
2) A *present* inability to pay *arrears* of child support does not by itself justify a variation order. It may justify a suspension of enforcement in relation to the arrears for a limited time, or an order providing for periodic payments on the arrears (para. 26).
3) In the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay, the arrears (para. 27).

[46] The Ontario Court of Appeal in *DiFrancesco* v. *Couto*, [2001] O.J. No. 4307, at paragraph 22, cited *Haisman* as support for finding that a present incapacity does not foreclose the prospect of ability to pay in the future. In acknowledging the exercise of discretion in the rescission of arrears, the court cited the following factors at paragraph 23:

1) the nature of the obligation, whether contractual, statutory or judicial;
2) the ongoing financial capacity of the respondent spouse;
3) the on-going need of the custodial parent and the dependent child;
4) unreasonable and unexplained delay on the part of the custodial parent in seeking to enforce payment, subject to the child's need;

5) unreasonable and unexplained delay on the part of the respondent spouse in seeking relief from his obligation; and

6) where the payment of arrears will cause undue hardship.

[47] Interestingly, this decision of the Ontario Court of Appeal, in accepting that a court can exercise discretion under section 17 of the *Divorce Act*, did not consider or refer to *Bates* v. *Bates*, [2000] O.J. No. 2269 (Ont.C.A.), which decided a year earlier that there was no discretion.

[48] The British Columbia Court of Appeal in *Wang* v. *Wang* (1998), 58 B.C.L.R. (3d) 159, found that Parliament did not intend to make variation of every existing agreement and order mandatory to comply with the Guidelines. Rather, it is only when a court decides that child support should be varied that the application of the Guidelines becomes mandatory. At paragraph 39, Huddart J. stated:

> "The Guidelines are not to be applied automatically to every application to vary an order, the difficult question becomes how to structure the exercise of the discretion whether to vary the order. Discretion to vary must include discretion not to vary."

[49] In *Bockhold* v. *Bockhold*, 2006 BCCA 472, the British Columbia Court of Appeal confirmed the view in *Wang* that the retention of a threshold discretion flows from the language of section 17(1) of the *Divorce Act*.

[50] In the case at bar, counsel for the father submitted that *Haisman* was decided before the enactment of the Guidelines and the test should no longer be relevant. That does not appear to be the case as *Haisman* was considered post-Guidelines in *DiFrancesco* and the Ontario Court of Appeal found a similar discretion, albeit with a different emphasis on the factors to be considered.

[51] Recently, the Supreme Court of Canada in *Hiemstra* v. *Hiemstra*, 2006 SCC 37, considered when a court should grant an application for retroactive child support.

[52] The *Hiemstra* decision confirms that a court must exercise discretion in cases of retroactive claims. While being careful to distinguish the factors that apply in cases of arrears, Bastarache J. stated at paragraph 71:

> "Parliament has left no doubt on this issue in the *Divorce Act*. Section 17 unambiguously states that an award may be varied "prospectively or retroactively". Whether the reference to retroactivity merely contemplates the situations brought forth in the present appeals, or whether it might even go further and allow courts to make truly retroactive orders (i.e., orders that enforce obligations that payor parents did not have at the relevant time), is not a matter to be settled in these reasons. It suffices to hold that a court hearing a child support dispute pursuant to the *Divorce Act* will be able to exercise its discretion, in appropriate circumstances, and vary the original award retroactively in the sense contemplated in these appeals."

[53] In paragraph 98, Bastarache J. was very clear that the court was deciding whether a recipient parent should be paid greater amounts than they actually received and not the issue of rescinding arrears that had been the subject of a court order:

> "Before canvassing the myriad of factors that a court should consider before ordering a retroactive child support award, I also want to mention that these factors are not meant to apply to circumstances where arrears have accumulated. In such situations, the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction. There is no analogy that can be made to the present cases."

[54] I interpret this paragraph to mean that the factors to be considered in retroactive cases may be applied differently in arrears cases, but in both the court is exercising a discretion in section 17 of the *Divorce Act*.

[55] I conclude that the court has a discretion to exercise in determining whether to rescind arrears that have accumulated from past court orders even after a change of circumstances has occurred.

ANALYSIS

[56] The arrears of $69,317.14 have been validly incurred by the father’s failure to pay child support when he was obligated to do so. He has not been forthcoming in his income disclosure which does not reflect his artistic ability and his ability to earn income from his artwork. He is also capable of doing light or sedentary work, even after his workplace injury on September 28, 2004.

[57] Interestingly, if the decision had been made in 2004 or 2005 after his injury that he was unable to pay arrears, the children would have been denied the benefit of sharing in his lump sum payment from WCHSB. There is no doubt that the mother and children have done without because of their father's failure to pay child support. There is also no doubt that they will benefit from future payments on arrears.

[58] I am not satisfied that the father cannot ever pay the arrears. It may be unlikely that he will ever pay them in full but I see no reason to deprive the wife and children from that potential benefit. To that end, the monthly payment of $150.00 from his disability payments should continue to be made as a minimum payment on arrears of child support. Aside from amounts that can be garnisheed from lump sum payments or other assets, the maximum monthly payment on arrears should be based upon his income, which I impute to be $20,000 annually.

SUMMARY

[59] The father’s application for cancellation of arrears is dismissed. His child support obligation has been terminated but his obligation to pay arrears remains. The order to

pay $150.00 from his monthly disability payment is a minimum payment and he is obligated to pay the full amount of the arrears of child support.

[60] The father shall pay court costs to the mother.

VEALE J.