

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Waldron v. Dumas*, 2004 YKSC 50

Date: 20040715
Docket No.: S.C. No. 03-B0032
Registry: Whitehorse

Between:

MICHAEL PATRICK JOSEPH CHEKINA WALDRON

Plaintiff

And

ELIZABETH ANNE DUMAS

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Fia J. Jampolsky

Elaine B. Cairns

For the Plaintiff
For the Defendant

MEMORANDUM OF RULING

[1] The defendant mother applies for interim custody of 2 of 3 children of the relationship with the plaintiff father. She also seeks child support for those two children, B. and M., and a restraining order. The plaintiff is the natural father of the youngest child, B., but has also been in the position of a parent to the other two older daughters, K. and M. (The mother already has joint custody of K. by a court order and receives child support from K.'s natural father.) The father does not consent to custody in favour of the

mother, but beyond stating that position, he did not argue the issue. Rather, he says that access and child support are the main issues.

[2] Counsel for the parties previously discussed access terms and, while not far apart, they are unable to settle that issue. It is apparent that they simply wish this Court to resolve the outstanding disagreement in that area.

[3] There was, however, considerable argument about the issue of child support. The mother says the father has been intentionally under-employed or unemployed and that I should impute income to him pursuant to s. 19 (1)(a) of the federal *Child Support Guidelines*. Technically, although worded identically, the applicable provision in this case is s. 17(1)(a) of the *Yukon Child Support Guidelines*, as the couple were never married.

[4] The father's position is that he has not intentionally avoided looking for work. He deposed in his affidavits that he has worked:

- From August 1998 to September 2002 for Security Services Yukon Ltd. earning \$12.60 per hour. He described that as "full-time" employment, which was terminated when the plaintiff lost his driver's licence for one year.
- For one month in 2002 at Wal-Mart, loading heavy products. He injured his back, which aggravated a pre-existing back problem, and had to leave that employment.
- For approximately the month of April 2003 at a grocery store. He says that job did not work out as the only hours he could get were in the middle of the night.

- On a part-time basis from April to June 5, 2003 as a night security guard at the Yukon Inn earning \$11.50 per hour. He says he was sick for approximately one week at beginning of June and, because he was on a probationary period at the time, he was terminated from that employment.
- For approximately 3 months in the summer of 2003 for Turner Contracting as a labourer. He was laid off due to shortage of work.

[5] The father's most recent Affidavit # 2 was sworn May 11, 2004, and states that he is presently on Social Assistance receiving about \$235 per month. It is uncontradicted that he currently resides with his mother. His financial statement dated May 11, 2004, indicates a monthly deficit of \$115. He does not pay rent to his mother. It is interesting to note that he incurs \$90 in expenses each month for playing baseball and \$60 for tobacco.

[6] He filed tax returns for the last three years indicating the following gross incomes:

2000: \$16,635.54

2001: \$16,632.08

2002: \$12,675.45

2003: \$10,775.52

[7] The father is 28 years old. With the exception of the reference to a back injury in 2002, he has provided no current medical information indicating that he is unfit or unable to work. Nor has he provided any explanation why he has been unable to obtain employment since the summer of 2003. Indeed, he gave no evidence that he has even looked for work since then.

[8] The law in this area has evolved in recent years, as discussed in *Schick v. Schick*, [2000] N.W.T.J. No. 12, a decision of the Supreme Court of the Northwest Territories. At paragraph 18, Vertes J. noted that there has been a shift from the requirement to show some type “malfeasance” on the part of the payor parent to simply asking whether the conduct of the payor is reasonable in all of the circumstances:

Recently, however, some cases have noted an evolution of the law in this area as new fact situations arise. In *Montgomery v. Montgomery*, [2000] N.S.J. No. 1, 2000 CarswellNS 1, the Nova Scotia Court of Appeal held that s. 19(1)(a) does not restrict the court to imputing income only in those situations where the payor intended to evade child support or recklessly disregarded the needs of the children. The focus should be rather on whether the conduct of the payor is reasonable in all of the circumstances. That case dealt with a self induced change and, in essence, suggests that if a payor makes any change to his or her circumstances that results in a reduced income then it had better be objectively justifiable. In circumstances where the change is not voluntary, as here, income may still be imputed if there is an ongoing situation of “intentional” under-employment or unemployment. The considerations, however, are always fact-specific.

[9] Vertes J. continued at paragraph 20 by saying a person is expected to take reasonable steps to find work, even if it may only be menial:

In this case I do not find intentional unemployment in the sense of a deliberate plan on the part of the father to be unemployed so as to avoid his support obligations. What I do find is a lack of reasonable effort to take those jobs that would provide him with at least some income even though it may be menial work. The accepted rule is that “a person is expected to take reasonable steps to obtain employment commensurate with such factors as their age, state of health, education, skills and work history”: as per *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.), at p.540. As many cases have said, when considering imputing income, it is not so much the amount the payor actually earns that counts; it is his earning capacity that must be examined.

[10] What is reasonable must be assessed in light of the joint ongoing legal obligations of the parents to maintain their children. The guidelines to be considered when deciding whether to impute income are set out by Dr. Julien D. Payne, *Imputing Income, "Determination of Income, Disclosure of Income"*, Child Support in Canada, Danrab Inc., August 3, 1999. These guidelines were quoted with approval by the Manitoba Court of Appeal in *Donovan v. Donovan*, [2000] M.J. No. 407 at para. 21, and also by the British Columbia Supreme Court in *Hanson v. Hanson*, [1999] B.C.J. No. 2532 at para. 14. I paraphrase them here:

1. There is a duty to seek employment where a parent is healthy and there is no reason why the parent cannot work.
2. The court must consider what is reasonable in the circumstances. The factors to be considered include the availability of work as well as the parent's:
 - age
 - education
 - experience
 - skills
 - health
 - freedom to locate
 - other obligations
3. A parent's limited work experience and job skills do not justify failing to pursue employment which does not require significant skills, or alternatively, employment where the necessary skills can be learned

on the job. This may mean that the parent will have to take employment at the lower end of the wage scale or employment which is not in the parent's desired area.

4. A court may impute income to a parent who persists in obtaining employment which produces little or no income [presumably subject to item 3 above].
5. A parent who pursues unrealistic or unproductive career aspirations will not be excused from their child support obligations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[11] In this case, taking into account such factors as the father's age, his state of health, his skills and work history, I find that he has not made a reasonable effort to find work, even if it would only be low paid or menial. Therefore, I conclude that it is appropriate to impute income to him. The income I impute is the average of his gross annual income for each of the last three years, which is \$13,361.02. That results in child support for the two children, B. and M., in the total amount of \$75 per month. (The child K. already receives \$118 per month as child support from her natural father.)

[12] As for the mother's application for a restraining order, I note the father is currently subject to a conditional sentence order which will expire on August 31, 2004. That order contains a condition that the father must not contact the mother, directly or indirectly, except to arrange access to his children through an approved third party. That order will be immediately followed by a probation order which will expire on May 31, 2005, unless

earlier terminated. It also includes an identical condition not to have contact with the mother. Thus, I agree with the submission of the father's counsel that if there is a violation of those no contact provisions, it is likely the situation will be remedied more quickly in the criminal context than as a result of any order this Court may make. Should the mother require a continuation of the restraining order after the criminal orders expire, she can apply again or address the matter when the access provisions are reviewed, as set out below.

[13] This is my Order:

1. The mother is granted interim custody of the children B. and M.
2. The father shall have reasonable access to the child B. on the following terms:
 - a) On Tuesday evenings of each week from 5:30 p.m. to 8 p.m.
 - b) On alternate weekends, commencing after 1 p.m. on Friday until 5 p.m. on Monday, until the end of the summer school vacation, at which point access will only extend to 5 p.m. on Sunday.
 - c) Because B.'s birthday is on December 30th, every Christmas from 3 p.m. on Christmas Day until 5 p.m. on December 29th, in even years, and until 5 p.m. December 31st in odd years.
 - d) Such other access as may be agreed upon in writing between the parties.

- e) The father may also have access to the older children, K. and M., at the above times, if they should so desire.
 - f) There shall be a review of these access terms in six months with a view to increasing access by the father, providing all has gone well. The father can initiate a review by filing a praecipe accompanied by an affidavit updating the access circumstances, on two clear days notice to the mother.
3. The father shall pay child support for the children B. and M. commencing on the 1st day of August, 2004 and on the 1st day of each month following. All such payments are to be made through the Director of Maintenance Enforcement and this term of my Order may be enforced by the Director.

[14] I did not hear submissions from counsel on the issue of costs. If that matter cannot be resolved, counsel may return to me for further direction.

GOWER J.