SUPREME COURT OF YUKON

Citation: *NDH v HNKB*, 2025 YKSC 4

Date: 20250110
S.C. No.14-B0100
Registry: Whitehorse

BETWEEN:

N.D.H

PLAINTIFF

AND

H.N.K.B.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff	Malcolm E.J. Campbell
Counsel for the Defendant	Peter B. Ewanchuk
Child Lawyer	Kathleen M. Kinchen

REASONS FOR DECISION

Overview

[1] The plaintiff, N.D.H., and the defendant, H.N.K.B., were in a common law relationship. They have one child of the relationship, H.J.B. ("J."), who is 12 years old.

[2] The parties separated in April 2014 and entered into a consent order in May 2015. It provided that N.D.H. would have primary care and residence of J.; and H.N.K.B. would have regular access. The parties ended up, however, in a shared parenting

arrangement. Then, in 2016, H.N.K.B. moved to Alberta. After his move, H.N.K.B. had frequent access with J.

[3] The May 2015 order also addressed child support. Based on H.N.K.B.'s 2014 income of $120,606.04, he was ordered to pay $1,076 per month in child support. Between 2014 and 2024, H.N.K.B.'s income increased significantly. In 2018, he earned $234, 616. By 2020, his income had decreased- though he still earned more than he had in 2014- to $154,615. H.N.K.B.'s income then increased again: in 2021, he earned $438,016; in 2022, he earned $443,365; and in 2023 he earned $421,601. Although H.N.K.B.'s income increased, he did not increase the amount of child support he paid.

[4] In early 2023, J. went to stay with H.N.K.B. At the end of the visit, when N.D.H. asked H.N.K.B. to return J., he refused. He told her he believed J. should live with him in Alberta. H.N.K.B.'s actions sparked off court applications. After N.D.H. brought a court application, J. returned to the Yukon. H.N.K.B. sought to have primary care and residence of J. in Alberta. N.D.H. also sought primary care and residence of J., as well as a retroactive increase in child support.

[5] The question of J.'s residency was decided this past summer. In August 2024, J. moved in with H.N.K.B. in Alberta. The last outstanding matter to be resolved now is child support. N.D.H. seeks a retroactive increase in child support. H.N.K.B. does not seek on-going child support from N.D.H.

[6] For the reasons below, I conclude that child support should be retroactively increased to February 2020. The amount owing will be as calculated by N.D.H. in her affidavit #5, but with some adjustments.

Issues

[7] In this matter, there are some issues that are not in dispute, or which may be summarily decided.

[8] First is whether there is a material change in circumstances. A party seeking a retroactive increase to an order for child support must demonstrate that there has been a material change in circumstances since the order was made. In this case, there is no real issue that there has been a material change in circumstances, as H.N.K.B.'s income increased from $120,606.04 in 2014 to $154,615 in 2020 and $438,016 in 2021.

[9] Second is the presumptive date of retroactivity. If there has been a material change in circumstances, there is a presumption that the order will be retroactive to the date the payee gave the payor effective notice that they were seeking a change to child support. Effective notice is met when the payee broaches the subject of a change to child support with the payor.

[10] If the payee did not give effective notice, the presumptive date of retroactivity is the date of formal notice, that is, when the payee filed proceedings to change the order. (*Colucci v Colucci*, 2021 SCC 24 ("*Colucci*") at para. 114). It is uncontroverted that N.D.H. did not provide any notice to H.N.K.B. that she was seeking an increase in child support until she filed her variation application. The presumptive date of retroactivity is, therefore, February 13, 2023, the date upon which N.D.H. filed her application to vary child support.

[11] Finally, one potential issue here is whether, pursuant to s. 4 of the *Yukon Child Support Guidelines*, O.I.C. 2000/63, the amount of child support should be adjusted from the table amount. Section 4 provides that, where the payor earns over $150,000,

the court may order child support different than the table amount if it would be appropriate to do so. The presumption is, however, that the table amount is appropriate. The onus is on the payor to provide clear and compelling evidence that the child support payable should be different than the table amount (*Francis v Baker*, [1999] 3 SCR 250 at paras. 42-43).

[12] Here, H.N.K.B. earns more than $150,000. H.N.K.B.'s counsel, in oral submissions, suggested that s. 4 may apply, but provided no submissions on it. I can see no basis to depart from the table amount and will not consider the application of s. 4 further.

[13] Given the above, the issues here are:

A. Should the date of retroactivity be earlier than the presumptive date of February 2023?

B. How much child support does H.N.K.B. owe?

Analysis

A. Should the date of retroactivity be earlier than the presumptive date of February 2023?

[14] N.D.H. is seeking that the increase in child support be retroactive to February 2020. H.N.K.B. submits that the increase should be retroactive to the presumptive date.

[15] I conclude that child support should take effect as of February 2020, with some adjustments to the amount owing based on concessions the parties made to each other in their applications.

Law

[16] The court has the discretion to depart from the presumptive date of retroactivity if it would be unjust to impose the presumptive date. Once the court determines the date of retroactivity, it quantifies the increase (*Colucci* at para. 114). The factors the court may consider are: the payee's delay in seeking an increase; the payor's conduct; the circumstances of the child; and hardship to the payor. Examination of the payor's conduct includes determining whether and when a payor disclosed a material increase in income. If the payor failed to disclose the increase in income, the court will generally set the date of retroactivity to the date the payor's income increased (at para. 114).

[17] It is also useful to recall that retroactive child support orders are not truly retroactive. The payor's obligation to increase child support occurs when their income increases. The award simply holds the payor to a legal obligation they should have already fulfilled (*DBS v SRG*, 2006 SCC 37 at paras. 67-68).

Application to the Facts

[18] In my analysis, I will address whether N.D.H. delayed in bringing her application, H.N.K.B.'s conduct, J.'s circumstances and whether H.N.K.B. would suffer undue hardship if retroactive child support were ordered. In addition, there is an additional factor to consider. Neither party has sought relief that would most benefit them. In this application, they have each taken positions that would ease the financial consequences of various orders on the other party. I will, therefore, consider how these concessions impact my determination of the date of retroactivity.

N.D.H.'s Delay

[19] In addressing the factors established in the case law, delay is only at issue if it is unreasonable (at para. 101). Here, N.D.H. does not explain her delay in seeking a variation in the order. However, N.D.H.'s delay is explainable at least in part because H.N.K.B. did not inform N.D.H. of his increase in pay. He attests that N.D.H. must have known he was earning well. She and J. visited H.N.K.B. in Alberta; and she saw that he had a good standard of living. The implication of this evidence is that, if N.D.H. wanted an increase in child support, she should have sought it earlier. In saying this, however, H.N.K.B. seeks to shift the responsibility for recognizing when child support needed to increase from him to N.D.H. N.D.H. could only guess whether H.N.K.B.'s salary had increased sufficiently to warrant a change to child support. H.N.K.B. knew that it had.

H.N.K.B.'s Conduct

[20] That H.N.K.B. failed to disclose his increase in income is a factor I take into consideration. It is unclear when H.N.K.B. had a material increase in his salary. In 2014 he had a different job than he has now. He got his current position in 2016; and in 2018 his income was $234,616. It is reasonable to conclude that his pay increased in 2016 when he changed jobs. Thus, H.N.K.B. did not tell N.D.H. of the change in his salary for approximately seven years. This is significant.

[21] H.N.K.B.'s counsel submits that H.N.K.B. did not know he was required to provide his income information to N.D.H. Intent, however, is rarely relevant; rather, the court's focus is on "whether the payor's conduct had the *effect* of privileging [their] interests over the child's right to support" (*Michel v Graydon* 2020 SCC 24 ("*Michel*") at

para. 118, citing *Goulding v Keck*, 2014 ABCA 138 at para. 44 [emphasis in the original].

[22] H.N.K.B. also increased his child support voluntarily by $1,000 to $2,076 in June 2023, approximately four months after N.D.H. brought her variation application. However, his income for 2022 was $438,016. Child support for that income would be $3,670. Thus, while H.N.K.B. increased the support he paid, he was still not meeting his legal obligations.

[23] H.N.K.B. has not completely evaded his responsibilities in paying child support. At the same time, he has not provided the extent of child support that J. was entitled to, and which was owed.

J.'s Circumstances

[24] H.N.K.B.'s counsel also argues that H.N.K.B. regularly paid for J.'s care. He bought J. school clothes and supplies, electronics, and paid for extra-curricular activities and health needs, for instance. I agree that H.N.K.B.'s contributions had a positive impact on J.'s circumstances.

[25] There is also some evidence from N.D.H. about what J.'s circumstances were while he was in his mother's care. N.D.H. earns a modest income. Her evidence also reveals some of the ways her finances have affected J. and her. For instance, N.D.H. explains that she did not move out of the home she shared with her then-partner after they broke up, due in part to the difficulty in finding affordable housing. I also take from the evidence that N.D.H.'s financial circumstances make it difficult for her to take time off from work, for instance, when J. is ill. I can, therefore, conclude that financial difficulties have had an impact on both N.D.H. and J.

[26] Moreover, there is a contrast between J.'s lifestyle when he is with H.N.K.B. and when he is with N.D.H. H.N.K.B. is able to take J. on trips, buy him expensive toys and spend summers doing fun activities. I find that, based on her income and her evidence, N.D.H. was not able to do that.

[27] H.N.K.B.'s purchases for J. are thus a double-edged sword. On the one hand, J. did benefit. On the other hand, it created a contrast between the life J. experiences with his father and the life he experiences with his mother. Had H.N.K.B. paid the amount he owed in child support, N.D.H. would herself have been able to make many of the purchases H.N.K.B. made. She also would have had the autonomy to decide how she was going to spend the money on J.

[28] H.N.K.B.'s counsel also argues that J. will not now benefit if H.N.K.B. is required to pay retroactive child support. J. lives primarily with H.N.K.B. Providing N.D.H. with the retroactive child support she seeks would be a wealth transfer to her. H.N.K.B. therefore seeks that the amount of the award be reduced, or that it be payable into a Registered Education Savings Plan or trust, to be used purely for J.'s benefit.

[29] I am not persuaded by this submission. In *Michel*, the Supreme Court of Canada considered an analogous situation. In that case, the payee applied for retroactive child support three years after the parties' daughter had ceased to qualify for child support. The Supreme Court determined that, despite the fact the daughter was no longer a child of the relationship, the court had the jurisdiction to order retroactive child support. If the court did not have jurisdiction, then it would be prevented from enforcing the payor's unfulfilled legal obligation even if it were appropriate to do so.

[30] It also, at para. 17, cited with approval the decision at the Ontario Court of Appeal, wherein the court stated:

> …. [A] regime that gave payor parents immunity after the children ceased to be children of the marriage would create a perverse incentive. If the payor parent is to be absolved from responsibility once the children cease to be "children of the marriage", the payor whose income increases might be encouraged not to respond to his or her increased obligations in the hope that the reciprocal spouse will delay making an application for a variation increasing support until the children lose their status to avoid opening the door to an increased obligation…. [*Colucci v Colucci*, 2017 ONCA 892 at para. 26].

[31] Similarly, a court should not refuse to grant an award of child support or select a retroactive date more favourable to the payor only because a child is no longer living with the payee. Doing so could encourage payors to postpone increasing the amount of child support owed in hopes that the child's living situation may change.

[32] In the case at bar, N.D.H. brought her application when J. was still living with her. H.N.K.B. had not disclosed the change in his income for seven years. It would send the wrong message to decrease the amount of child support payable on the basis that J. no longer resides primarily with N.D.H.

[33] I also reject the submission that the child support award should not be paid to N.D.H. but should be put into a form of trust for J. There is no reason to believe that N.D.H. will not spend the money on J. She continues to have access with him, including, potentially, in Whitehorse. The money can go to his needs in the home. She may want to save the money on her own for his education. She may also want to spend money on him in ways she could not before.

Hardship

[34] H.N.K.B.'s counsel reasonably did not argue that H.N.K.B. would suffer undue hardship if an award of retroactive child support were made. I will therefore not consider this factor.

Parties' Concessions

[35] In litigating this application and the residency application, both parties made concessions. This is to their credit and should be taken into consideration in determining the award.

[36] For H.N.K.B.'s part, when seeking that J. live with him, he stated that he would help pay for N.D.H.'s access visits. This will provide N.D.H. not only with an increased ability to visit J., but also will give her economic relief. In addition, H.N.K.B. is not seeking child support from N.D.H. Based on her 2023 income, N.D.H. would pay roughly $340 per month in child support. It seems to me that this should factor into my decision about the amount of child support to award. In translating this into numbers, however, I must also be aware that J.'s living arrangements and access requirements may change as he gets older.

[37] For N.D.H.'s part, she sought an increase of child support retroactive three years, rather than back to the date that H.N.K.B.'s income increased. Had she sought and been awarded child support retroactive to the date H.N.K.B.'s income increased, the child support owing could have increased substantially. In 2018 alone, when H.N.K.B. earned $234,616, the difference in child support owing would have been approximately $1,000 per month. N.D.H.'s decision to limit the extent of child support she is seeking brings the eventual award down.

[38] Similarly, N.D.H.'s calculations of the amount of child support owing credits H.N.K.B. for the time he had J. with him. H.N.K.B. states that he had J. for 40% of the time and therefore is eligible for a set-off in child support payable, though he is not seeking it. On H.N.K.B.'s evidence, however, he had J. with him for 413 days between March 2020 and March 2023. Even if the entire time should be considered together, rather than each year calculated separately, this equals about 38% of the time. Subtracting the month he kept J. without N.D.H.'s consent, the amount of time with J. is reduced to about 35%. Other than perhaps in 2024, therefore, a set-off would not be an option. Despite this, N.D.H., in calculating the child support award she is seeking, still takes the time H.N.K.B. spent with J. into account.

Consideration of the Factors Together

[39] Because H.N.K.B. did not inform N.D.H. that his income had increased and because his failure to do so had an impact on J.'s circumstances, the variation to the child support order should be retroactive to February 2020. The more difficult question is how to take the concessions each party made into account. Because N.D.H.'s calculations are retroactive to February 2020 and credit H.N.K.B. for the time he spent with J., the solution that seems most equitable is to take the calculations provided by N.D.H. as a starting point and then decrease the ultimate award to take into account H.N.K.B.'s concessions. However, in *Colucci* the Supreme Court made clear that the court's discretion lies in determining the date of retroactivity. The amount of the increase to child support, on the other hand, must be calculated pursuant to the *Guidelines* (at para. 114). As *Colucci* limited or eliminated the court's discretion in quantifying child

support, the best solution here, then, seems inconsistent with the legal principles laid out in *Colucci*.

[40] Even considering *Colucci*, I conclude that starting with N.D.H.'s calculations and then reducing the amount owed is not inconsistent with legal principles or the legislative scheme. The other option, which would be to change the date of retroactivity to account for H.N.K.B.'s concessions, is artificial. Moreover, another principle in family law is that parties should be encouraged to focus on solutions, rather than maximizing their own gains, while still ensuring the child's needs and rights are not sacrificed. The positions taken by both H.N.K.B. and N.D.H. reflect this approach. The solution, is, therefore, consistent with the *Family Property and Support Act*, RSY 2002, c. 83.

B. How much child support does H.N.K.B owe?

[41] The table provided by N.D.H. states that, using H.N.K.B.'s actual income, the child support payable, since February 2020, is as follows:

Year	Number of Months	2015 Order Amount	Line 150 Income	CSG Amount	Yearly Income	Yearly Total (Actually Paid)
2020	11	$1,076.00	$154,615.00	$1,349.23	$14,841.53	$11,836.00
2021	12	$1,076.00	$438,016.00	$3,758.14	$45,097.68	$12,912.00
2022	12	$1,076.00	$443,365.00	$3,803.60	$45,643.20	$12,912.00
2023	12	$1,076.00	$421,601.00	$3,618.61	$43,423.32	$19,912.00
2024	5	$1,076.00	$421,601.00	$3,618.61	$18,093.05	$10,380.00
Total					**$167,098.78**	**$67,952.00**

[42] N.D.H. used H.N.K.B.'s 2023 income to calculate child support 2024 because H.N.K.B.'s 2024 income was not known at the time N.D.H. filed her affidavit.

[43] N.D.H. then credits H.N.K.B. with the time he spent with J. and subtracts $45,715.12 from the total owed. This leaves H.N.K.B. with $53,431.66 owing in child support.

[44] H.N.K.B. submits that his actual 2024 income should be used to calculate the child support payable for 2024, rather than using his 2023 income, as N.D.H. has done. He attests that his income includes discretionary bonuses. H.N.K.B. predicts that, if he receives a bonus for 2024, it will be less than it has been in previous years. His 2023 income will thus likely not be an accurate prediction of his 2024 income.

[45] Considering the variation between H.N.K.B.'s base salary and his salary including bonus, it is most accurate to base child support for 2024 on his actual 2024 income. I therefore accept N.D.H.'s calculations as set out above, except for those of 2024, which will be based on H.N.K.B.'s actual 2024 income. H.N.K.B. shall provide N.D.H.'s counsel with proof of his 2024 income upon receipt. At that point, child support for 2024 will be calculated.

[46] Taking into account concessions H.N.K.B. has made but also noting the difficulty in making a calculation about the amount N.D.H. will benefit in the long run because of those concessions, I will reduce the award owed by H.N.K.B. by $10,000.

[47] H.N.K.B. also paid child support for July and August 2024, after I ordered that H.N.K.B. have primary care and custody of J. If N.D.H. retained that amount, it should be deducted from the amounts owed by H.N.K.B.

[48] Because J. is now living with H.N.K.B., it is important that H.N.K.B.'s finances not be strained unnecessarily. I encourage the parties to discuss a periodic payment schedule of the amount owing if H.N.K.B. seeks it.

Conclusion

[49] The child support owing by H.N.K.B. to N.D.H. shall be retroactive to February 2020. H.N.K.B. owes N.D.H. the amounts as set out in the table contained at para. 41, except that child support for 2024 will be based on his actual 2024 income, then reduced by $10,000 and adjusted for any overpayment in the months of July and August 2024.

[50] Costs may be spoken to in case management if the parties are unable to agree. A case management conference may also be used to set child support for 2024, and a periodic payment schedule if the parties are unable to agree on those matters.

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WENCKEBACH J.