SUPREME COURT OF YUKON

Citation: *NS v JSDR*, 2025 YKSC 5

Date: 20250106
S.C. No. 22-B0003
Registry: Whitehorse

BETWEEN

N.S.

PLAINTIFF

AND

J.S.D.R.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — Kelly Labine

Counsel for the Defendant — Malcolm E.J. Campbell

This decision was delivered in the form of Oral Reasons on January 6, 2025. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): This is a decision on two applications: one brought by the plaintiff mother; and the other by the defendant father. Other than the mother's request for sole custody and primary residence of the three children, the applications focus on child support, both arrears and ongoing. Related issues are imputation of income of the defendant father due to alleged intentional unemployment or underemployment and the treatment of a payment of $110,000 he received from his First Nation.

[2] The plaintiff mother and defendant father were in a common-law relationship from December 2005 to October 31, 2021. There are three children of the relationship: D.C.L.R., born [redacted]; S.M.R., born [redacted]; and R.J.J.R., born [redacted].

[3] The mother currently works as a receptionist in a respiratory clinic. Before this job, which she started in the second half of 2024, she received, commencing January 1, 2022, long-term disability benefits as a result of medical issues. Before this, she worked for the Yukon government in continuing care at the Whistle Bend facility.

[4] There is no dispute that the mother has been the primary caregiver to the children throughout their lives. They currently reside with her and have done so since the separation. While there was some sharing between the parents of the children's residence from April to October 2023, since then the children have resided full-time with their mother.

[5] The father worked at Triple J's Canna Space in 2019. The family was in Ontario for family and medical reasons through part of 2020 and 2021, and, on their return to the Yukon, he began working as a manager of The Herbary in Whitehorse. He was terminated without cause from that position in January 2023 and since then he has not had full-time employment.

[6] The mother received confirmation from the defendant's mother in January 2024 that the defendant had received $110,000 in January 2023, a further $10,000 in October 2023, and is expecting another $10,000 in late 2024 from his First Nation. These are payments from an amount the First Nation received as a result of the settlement of a treaty land entitlement boundary dispute.

[7] The father says his attempts to find and maintain other employment have been thwarted because of a medical condition. In 2023, he says he worked briefly for Career Industries, Bridges Cafe, and the Raven Inn but, because his wrists do not function properly, he could not sustain these positions. He was unsuccessful at obtaining employment through Service Canada and Fire & Flower in Whitehorse.

[8] He provided a Vancouver rheumatologist's letter, dated April 26, 2024, saying that she was currently following him. She describes his diagnosis of Rowell syndrome, an autoimmune disorder, with an onset of July 2021, manifesting with rashes and inflammatory joint pain and treated with prednisone and hydroxychloroquine. She was awaiting an MRI of his hands to assess the degree of inflammation of the joints. These symptoms, according to the rheumatologist, limit him from performing prolonged manual work. She noted that he also suffers from fatigue affecting his cognition and memory. Her prognosis is that she hopes with longer-term treatment of immunosuppressants the symptoms may improve but the timeline was uncertain.

[9] The defendant relocated to Ontario in May 2024, because he said he could no longer afford to live in the Yukon and that he had family supports in Ontario. He initially lived with his grandmother and, after her passing, with his mother or friends in Killarney, Ontario, where he still lives.

[10] The plaintiff said that she learned of his relocation just before he left and that no parenting plan or access arrangements were put in place. The father has had telephone communication with the two younger children since his relocation.

[11] The father deposed that he has looked for employment in Ontario at various places, such as kitchen work at several inns or taverns, such as the Sportsman's Inn,

Beef 'N Bird Tavern, and Killarney Mountain Lodge. The latter job fell through because summer staff decided to stay on for the fall and winter. It is not clear what happened with the other jobs. He also applied to be a dock worker, an industrial pressure washing technician, and a labourer, all of which were apparently unsuccessful.

[12] Most recently, he deposed that he is getting assistance from Alpha En Partage, an employment training agency that provides trade certificate courses and job postings.

[13] He further deposed he worked as a labourer during the seasonal shutdown of Point Grondine Park in October 2024 and earned $1,900.

[14] Finally, he deposed that he has taken three of four certification courses allowing him to become an insurance agent in Ontario once he passes the exams. In the meantime, he has been receiving social assistance of $733 a month.

[15] In June 2022, the father was ordered to pay child support in the amount of $773 a month based on his 2021 income of $37,000. He made monthly payments more or less based on this amount, with some small discrepancies, until May 2024. He also accumulated arrears between the separation date of October 31, 2021, and April 2022.

[16] On July 1, 2023, the parties entered into an agreement that he would pay $221 a month until April 2024 to satisfy the arrears of $5,331.30. The parties agree that the father made 11 payments of $221, leaving a debt of $2,888 of the arrears. The mother says he owes additional amounts based on some shortfalls in the months between April and October 2023 and based on the $110,000 settlement monies from the First Nation litigation with the government, which the plaintiff says should be considered part of his income.

[17] The mother further states that his income should be imputed to the minimum wage in Ontario of $17.20 per hour. She does not accept his reasons for unemployment, which she says have varied from medical reasons, to failures to get callbacks, to needing to care for the children (in the past), and she says that he is deliberately under- or unemployed. The mother also seeks ongoing contribution toward s. 7 expenses for the children.

[18] The defendant does not dispute the arrears he owes. However, he says they must be struck and his obligations revised because he has overpaid child support based on his actual levels of income in 2023 and 2024. He says the $110,000 settlement monies are not income — he used them for his living expenses due to his unemployment — and the calculation of any child support payments should not be based on them. His income in 2023, he says, was $6,700; and his income in 2024 is unknown, although he says it is less than $12,000. The arrears owing under the July 2023 agreement, he says, have been satisfied by the support already paid. Future child support payments should be based on his actual income and the *Federal Child Support Guidelines*, SOR/97-175 ("*Child Support Guidelines*"). He says he has not been intentionally unemployed and that his medical issues are real and supported by expert rheumatologist evidence, and that he moved to Ontario for financial reasons.

[19] Both applications seek to change the June 2022 court order based on a material change in circumstances, namely, the father's relocation to Ontario.

Analysis.

[20] I agree that there has been a material change in circumstances in this family's life since the June 2022 court order, based on the father's relocation to Ontario in May 2024. Until May 2024, the previous court order of June 2022 remains in effect.

[21] Paragraph 7 of that order provides that:

> The Plaintiff and the Defendant shall exchange income information annually by March 31st each year, commencing March 31, 2023, … and base child support and proportional sharing of special or extraordinary expenses will be adjusted based on the previous year's income effective April 1st of each year, commencing April 1, 2023.

[22] The father failed to disclose his 2022 income as required by March 31, 2023, and did not do so until January 2024. In 2022, he earned $57,691, making child support amounts $1,162 a month beginning April 1, 2023. As noted, the father paid throughout 2023 and until May 2024, $773 a month based on his 2021 income of $37,000. According to the June 2022 court order, he should have been paying $1,162 a month beginning April 1, 2023, until March 31, 2024.

[23] I will order that this adjustment be made and child support payments be recalculated.

[24] The father advised he earned $6,700 in 2023. This was the year that he received the $110,000 settlement monies from his First Nation, which he says prevented him from claiming social assistance but did not stop him from looking for work, which was unsuccessful.

[25] I agree with the father's counsel that these monies cannot be considered income for the purpose of calculating child support. The settlement amount received by the Wahnapitae First Nation was for the cost of acquiring reservation lands protected by the

Robinson Huron Treaty that should have been surveyed and included as part of their reservation. Chief and Council decided to pay out $110,000 to each eligible First Nation member with an additional $10,000 in each of the following two years for a total of $130,000 over three years. The monies are compensation for a wrong related to the First Nations reservation land, a collective capital asset of Wahnapitae First Nation and not belonging to or owned by any individual members. The majority of the monies will be invested for the benefit of the First Nation members as a whole so that all members, present and future, can benefit equally from the asset.

[26] I do not accept the plaintiff's argument that these monies are income. Income for the purposes of the *Child Support Guidelines*, is defined in s. 16 as the sources of income set out under "Total Income" in the T1 General issued by CRA. This kind of compensation payment is not included in the T1 form. In situations where courts have exercised their broad discretion to find that non-taxable funds, such as this, received by a payor are income under the *Child Support Guidelines*, those funds bear some relationship to "work done or through investments, or [they are] paid as compensation to which the payor is legally entitled when deprived of such work or investments" (*Rivard v Hankiewicz*, 2007 ONCJ 180 at para. 41).

[27] For example, workers' compensation benefits, damages for copyright infringement representing royalties on the payor's original music compositions (*Mobin v Stephens*, 2013 ONCJ 53), Canada Pension Plan disability payments, and damages from a personal injury settlement for loss of earning capacity have all been considered income for the purpose of *Child Support Guideline* calculations. Conversely, child tax credit, GST rebate, childcare subsidy, repayment of a shareholder loan, and

damages from a personal injury settlement providing for non-pecuniary loss and cost of future care have been found not to constitute income under the *Child Support Guidelines*.

[28] In this case, there is no connection between work or employment and the settlement monies. Compensation from a legal settlement for a wrong done to a collective asset and a decision by Chief and Council to do a *per capita* distribution of some of it does not fit the definition of income either under the T1 General or the *Child Support Guidelines*. The majority of the compensation will be used to acquire more lands in Ontario through the additions to reserve process and to build infrastructure, which will have significant costs. A fair portion of the compensation will be placed in trust to be invested for the benefit of the Wahnapitae First Nation as a whole so that future generations may benefit from the settlement.

[29] The plaintiff relies on s. 68 of the *Indian Act*, RSC, 1985, c I-5, which provides that the Minister may order payments of any annuity or interest monies to which an Indian is entitled to the support of the spouse or family of that Indian if the Minister is satisfied; i) that an Indian has deserted his spouse or family without sufficient cause, ii) has conducted himself in such a way as to justify the refusal of his spouse or family to live with him, or iii) has been separated by imprisonment from his spouse and family.

[30] I do not agree that this section applies here.

[31] First, the application of this section is done by the Minister, not by the Court.

[32] Second, the plaintiff has provided no evidence or information about the contexts in which s. 68 may be relevant and implemented.

[33] Third, without deciding whether the Wahnapitae First Nation Per Capita Distribution is an annuity or interest monies, as no definition of these terms from the *Indian Act* was provided, I find, in any event, that none of the three criteria applies.

[34] The father's move to Ontario, although abrupt, was not entirely unexpected and was for the justifiable reason of avoiding the high cost of living in Whitehorse. There is no evidence of conduct that would justify his spouse and children refusing to live with him. The separation was a mutually agreed upon split. He was not imprisoned.

[35] The plaintiff also relies on the order of September 24, 2013, in the case of *Linklater v Davis,* declaring royalties from the Blueberry First Nation of $40,000 a year as income. This order on its own is of no assistance here. An order referencing royalties without more information about their source and why they were treated as income is an insufficient basis to support the plaintiff's position.

[36] Counsel for the father, who was involved in the *Linklater* case, submitted that the royalties were from oil and gas revenues and were like dividends from a corporation, an item included in the definition of income on the T1 CRA form and therefore distinguishable from the compensation monies in this case. However, without more evidence or more verifiable information, I am unable to place any weight on this order on its own.

[37] Finally, the plaintiff relies on *Washie v Washie*, 2012 NWTSC 51 ("*Washie*"). This is distinguishable. The Court in *Washie* made an interim interim *ex parte* order for payment into court by the payor, of the remaining amount of settlement monies he received from the Indian Residential School Settlement process, until a full argument could ensue about how the money should be characterized and treated for the purpose

of child support. It was urgent because the rapid depletion of the settlement monies by the recipient meant that any argument would soon be moot. The Court made no finding on whether the settlement monies were income.

[38] The next question to consider is whether income should be imputed to the father for 2023 and 2024 because he is or was intentionally under- or unemployed.

[39] Section 19(1)(a) of the *Child Support Guidelines* allows for the imputation of such amount of income to a parent or spouse as the Court considers appropriate when the parent or spouse is intentionally under-employed or unemployed, other than where the under or un-employment is required by the needs of any child or by the reasonable educational or health needs of the parent or spouse.

[40] A leading case on imputation of income is *Drygala v Pauli* (2002), 61 OR (3d) 71; 2002 CanLII 41868 (ONCA), where the Court of Appeal described the imputation of income as:

> [32] … one method by which the court gives effect to the joint and ongoing obligation of parents to support their children. In order to meet this … obligation, a parent must earn what he or she is capable of earning.

[41] It is not necessary to establish bad faith or intentional avoidance of child support obligations.

[42] Another Ontario case, *Szitas v Szitas*, 2012 ONSC 1548, following *Drygala v Pauli* and reviewing other cases, helpfully set out seven principles applicable to imputing income to a support payor.

> [57] …
>
> 1. There is a duty on the part of the payor to actively seek out reasonable employment opportunities that will maximize

> their income potential so as to meet the needs of their children.
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> 2. Underemployment must be measured against what is reasonable to expect of the payor having regard for their background, education, training and experience.
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> 3. The court will not excuse a party from their child support obligations or reduce these obligations where the party has persisted in un-remunerative employment, or where they have pursued unrealistic or unproductive career aspirations. A self-induced reduction of income is not a basis upon which to avoid or reduce child support payments.
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> 4. If a party chooses to pursue self employment, the court will examine whether this choice was a reasonable one in all of the circumstances, and may impute an income if it determines that the decision was not appropriate having regard for the parent's child support obligations.
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> 5. When a parent experiences a change in their income, they may be given a "grace period" to adjust to the change and seek out employment in their field at a comparable remuneration before income will be imputed to them. However, if they have been unable to secure comparable employment within a reasonable time frame, they will be required to accept other less remunerative opportunities or options outside of the area of their expertise in order to satisfy their obligation to contribute to the support of their children.
>
> 6. Where a party fails to provide full financial disclosure relating to their income, the court is entitled to draw an adverse inference and to impute income to them.
>
> 7. The amount of income that the court imputes to a parent is a matter of discretion. The only limitation on the discretion of the court in this regard is that there must be some basis in the evidence for the amount that the court has chosen to impute.

[43] Here, the father says that no imputation of income should be made because his health issues have reduced his earning capacity and choice of employment. Further, he

argues he has provided evidence of ongoing attempts to find employment, including taking courses to become an insurance agent.

[44] While I do not doubt that the findings set out in the letter from the Vancouver rheumatologist from April 26, 2024, the diagnosis and treatment are not sufficient in my view to protect the father from imputation of income. The doctor wrote that his symptoms began in 2021 while he was working at The Herbary. He cannot do prolonged manual labour because of his joint pain and weakness according to the doctor. The doctor was vague about the future prognosis, was hopeful for improvement, but not clear about the timeframe. There was no follow-up medical report and no evidence of him being followed by a family physician or specialist since April 2024.

[45] I recognize the difficulties in much of rural Canada in obtaining family physicians and referrals to specialists, but the absence of any further information on his medical condition suggests by inference that he is stable, not at a crisis point, and not requiring regular medical attention. The seriousness of his medical condition, or the seriousness of his job searches are in question. He has applied for several manual labour jobs while in Ontario, despite the doctor's letter. He also worked as a labourer for the month of October 2024. Either his condition does not prevent him from this kind of work, suggesting it is not as serious as he claims and is not a reason to impute income, or his job applications, particularly in the summer of 2024, were not serious and, if offered, he would not have accepted them.

[46] I note with respect to the applications he did submit in the summer of 2024, that most of them were dated August 26, 2024, approximately two weeks before the court

date of September 10, 2024. There was also no evidence provided of what happened after these applications were made.

[47] In any event, there is no evidence that the father is prevented from doing non-manual labour work. While fatigue is another symptom noted by the rheumatologist, she did not say it prevented him from working, and it has not prevented him from working through the month of October, from taking courses to become an insurance agent, and from receiving assistance from the employment training agency.

[48] I note that no details of these latter two activities were provided, that is, the types of work, the strategies employed to find such work, the timing of his insurance courses, the timing of his exam, whether he will be self-employed or not, and what his income might be.

[49] There were also few details provided about his attempts to look for work in 2023 and the first five months of 2024 when he was still in the Yukon, other than unsuccessful attempts at Service Canada and Fire & Flower. He stated that he worked at Career Industries, Bridges Café, and the Raven Inn (presumably in kitchens but this is not specified) but also deposed that due to my medical condition, my wrists do not function properly which impedes my ability to work.

He does not fully explain how and why he could not continue work in some capacity. This partial explanation also contradicts his applications for presumable kitchen jobs in Ontario (Killarney Lodge, Sportsman’s Inn, and Beef 'n Bird Tavern).

[50] The father has a duty to seek out reasonable employment opportunities to maximize his income potential to meet the needs of the children. The father’s attempts at least since moving to Ontario have either been unrealistic, because they contradict

his medical condition on which he relies as a reason not to impute income, or they are realistic by virtue of his background and experience working in kitchens; uninhibited by any medical condition; and he has provided insufficient explanations as to why he was unsuccessful in obtaining these jobs or finding other work.

[51] He has now been in Ontario since May 2024. While I acknowledge his attempts to requalify as an insurance agent, again, he has provided insufficient details of this to allow me to determine the reasonableness of the opportunity or the timeframe. He is entitled to a grace period and, in fact, obtained an interim interim order not to pay child support between September 10, 2024, and December 9, 2024. But now, in my view, he is required to accept other job opportunities to satisfy his obligation to support the children. This obligation also applies to 2023 when he was in the Yukon living off the settlement monies and providing very little information about his work history or attempts to find alternate employment.

[52] The amount of income to be imputed is a matter of discretion. Recognizing the realities of limited opportunities to become the equivalent of a manager of a retail cannabis store in the Yukon and also recognizing the realities of wages of kitchen help, I will impute income to the father of minimum wage during his time in the Yukon during 2023 and 2024 and of minimum wage in Ontario starting in September 2024. This allows for a grace period of the summer months for him to adjust.

[53] I have not done the math as to whether the amounts he has paid to date will result in an overpayment. If there is an overpayment, those overpayment amounts shall go to the outstanding arrears based on the July 2023 agreement between the parties. If

there is no overpayment, then I order that those arrears remain due and payable at $221 a month beginning January 1, 2025.

[54] I also order that s. 7 expenses be payable proportionate to the parties' respective incomes in 2023 and 2024.

[55] To be clear, the child support amounts based on his actual income in 2022 of $57,000 are owing and his income for 2023 and 2024 shall be imputed at the minimum wage in the various jurisdictions.

[56] I wish to add a point with respect to this decision to impute income.

[57] The father has not been forthcoming with disclosure on many of the details related to his employment and his financial status. This has resulted in me drawing an adverse inference.

[58] For example, he did not disclose his income or tax returns and information due March 2023 until January 2024. There does not appear to have been any disclosure in March — or anytime during 2024 — of his 2023 income, only verbally. He did not disclose the settlement monies he received. And even though I found these not to be income, it still should have been disclosed to show good faith. And information about his attempts to find employment in Ontario, his actual employment as a labourer in the Point Grondine Park shutdown, or his attempts to requalify as an insurance agent were provided only in response to the plaintiff's affidavits and not provided voluntarily by the father.

[59] Going forward, the income of the father will continue to be imputed at minimum wage in Ontario but if his income information, which I will order is required to be provided annually, for the previous year is higher than the minimum wage then he must

pay any difference in the support amounts resulting, according to the *Child Support Guidelines*. So, income information of the plaintiff and the defendant shall be exchanged annually by March 31st and the child support and proportional sharing of s. 7 expenses shall be calculated on the basis of that information and adjusted if necessary.

[60] Turning to custody and access.

[61] The plaintiff seeks sole custody of the three children. There was no mention of access by her. The children have resided primarily with the plaintiff since separation at the end of October 2021 except for a few months in 2023, where the residence of the two younger children was shared.

[62] The mother says that she and the father continue to have difficulty communicating which impedes the decision-making process about the children. She says the father left the Yukon to relocate to Ontario without notice or any kind of parenting plan in place. She says there has been telephone access between the two younger children and the father, which seems to increase before any scheduled court date.

[63] The father is opposed to the plaintiff's request for custody. While the friction between the parties is real, he says it is not so bad that they cannot communicate in the best interests of the children. He also would like more certainty in the telephone access. No specific suggestion was made by him or by the plaintiff about specific access arrangements.

[64] I will order that the mother shall have sole custody and primary residence of the three children. This is because of the father's decision to relocate and his actual relocation to Ontario without discussing with the plaintiff how any ongoing parenting

responsibilities would be affected; and because the primary residence of the children with the mother in the Yukon make joint decision-making, between parents who have difficulty in communicating rationally and civilly, impractical. Their communication challenges are clear from the many text messages submitted with the affidavit evidence in these applications.

[65] Access by the children to the father by telephone, FaceTime, and/or WhatsApp, shall be facilitated by the mother. Access shall be reasonable, and details shall be worked out between counsel with a return to court only if necessary.

To summarize:

1. The arrears of child support shall be $2,888 from October 31, 2021, to June 2022 and due and payable by the defendant. Any overpayment resulting from this order may be used to pay this amount. If there is no overpayment, this amount of arrears is payable on the basis of the July 2023 agreement commencing January 1, 2025.
2. The defendant's income for 2023 and from January to May 2024 shall be imputed at the minimum wage applicable in the Yukon during that time period. The defendant's child support payments and proportion of s. 7 expenses shall be recalculated on that basis for that time period. If any overpayments result, they shall be applied to arrears or future support payments.
3. The defendant is not required to pay child support from May 1, 2024, to September 1, 2024.

4. From September 1, 2024, and ongoing, the defendant's income shall be imputed at the minimum wage in Ontario. Any child support shall be calculated on the basis of the *Child Support Guidelines* and payable on the first day of each month.
5. The plaintiff and the defendant shall exchange income information annually by March 31st each year commencing March 31, 2025. The information from 2024 must be provided if it has not been done.
6. With the exchange of annual income information, base child support and proportional sharing of special or extraordinary expenses will be adjusted based on the previous year's income effective April 1st of each year commencing April 1, 2025.
7. The plaintiff has sole custody and primary residence of the three children.
8. The children may have reasonable access to the defendant. The plaintiff shall facilitate this by way of telephone, FaceTime, WhatsApp, or other electronic media communication. Access arrangements are to be worked out between counsel with return to court if necessary.

[66] I also want to reiterate that the recalculation of the child support based on the $57,000 income earned in 2022 is part of this Order.

[DISCUSSIONS]

[67] For 2023 and the months in 2024 when he was in the Yukon, the minimum wage in the Yukon should be used — multiplied by 35 (hours per week) multiplied by 50 (for 50 weeks in the year) for an annual amount.

[DISCUSSIONS]

[68] MR. CAMPBELL: Just with respect to the months. For 2024, is it the months of January, February, March, and April —

[69] THE COURT: Right.

[70] MR. CAMPBELL: — and then he gets no child support obligation for May, June, July, August, September, or …?

[71] THE COURT: No, it starts in September — May, June, July, August; correct. That is the grace period.

[72] MR. CAMPBELL: Okay. So, May through August is the grace period.

[73] THE COURT: May through August, no child support payments required; and then starting again in September based on the minimum wage in Ontario.

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DUNCAN C.J.