

SUPREME COURT OF YUKON

Citation: *G.T.F. v. K.L.F.*, 2009 YKSC 72

Date: 20091119
S.C. No. 98-D3027
Registry: Whitehorse

Between:

G.T.F.

Petitioner

And

K.L.F.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Kathleen M. Kinchen
Norah E. Mooney

Counsel for the Petitioner
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The father and mother disagree on the child support that they should pay for their two children, both of whom are pursuing post-secondary education. The father has applied for custody of the youngest daughter and retroactive child support. The mother has applied for retroactive child support of the eldest child and retroactive extraordinary expenses for both children. The issues to be determined are child support before reaching the age of majority, including extracurricular expenses, child support after reaching the age of majority, and the respective parental incomes. To respect their privacy, I will refer to the children as the eldest and the youngest. Pursuant to a Consent

Interim Order dated March 26, 2001, both children resided with their mother until November 2007 and the father paid child support. The father was ordered to pay a maximum of \$800 per year for extracurricular activities. He paid this amount for two years but stopped paying in 2003. The mother and father disagree on the reason for the non-payment. There is unfortunately some animosity between the parents and they are not able to communicate to resolve their financial obligations to the children.

The Eldest Child

[2] The eldest child began post-secondary education in September 2007. It is expected that the post-secondary education will require five years of undergraduate study.

[3] The father paid child support for the eldest child until the age of 19, in November 2007, when he unilaterally stopped paying child support and began to deal directly with the eldest child. The mother expected to receive child support and to contribute \$5,000 from those payments as well as \$5,000 from her and her new spouse to support the eldest child at university.

[4] The total university fee for the 2007 – 2008 year was \$16,802.06, which I believe included dormitory fees.

1. The mother travelled to the university to assist the eldest child in settling in and incurred expenses typical for a first year university student. The mother paid the \$3,046 down payment for university fees.
2. The mother assisted the eldest child in arranging for an apartment for the following year, as well as providing furniture.
3. The mother, in total, paid the following:

- a. \$3,046.00 tuition;
- b. \$1,560.68 Christmas flight;
- c. \$500.00 estimate for books and bus pass;
- d. \$600.00 summer credit course.

Total: \$5,706.68

[5] The eldest child contributed the following:

- 1. \$5,000 Yukon Grant;
- 2. \$5,000 Scholarships, bursaries;
- 3. \$4,000 summer employment;
- 4. \$12,000 from earnings at university.

[6] It appears from this listing of expenses and revenues that the eldest child could essentially meet her post-secondary education costs because of her work during the school year.

[7] The father consulted with his eldest child and was advised that he did not need to make a financial contribution for 2007 – 2008.

[8] For the academic year 2008 – 2009, the father provided ten cheques of \$400 each, two of which bounced as the father put the wrong year on the cheques. The father therefore contributed \$3,200 and offered to assist with airfare. The mother paid for the eldest child's flight to school and back at Christmas for a cost of \$1,564.85 plus a \$105 change fee. She also paid for the flight back to school. In March 2009, the mother assisted the eldest child vacate her apartment and move furniture out as well as buying food for a total cost of \$532.12. The eldest child returned to Whitehorse for the four months summer break and lived with the mother.

[9] For the academic year 2009 – 2010, the eldest child will supervise a dormitory and receive room and board valued at \$8,000. The mother paid for a required first aid course in the amount of \$140. The father wishes to deal directly with the eldest child to determine his financial contribution. The mother objects to this as it puts the eldest child in the difficult situation of determining parental contributions where the parents are in disagreement. The eldest child will also receive a \$5,232 Yukon Grant for this academic year.

The Youngest Child

[10] The youngest child lived with her mother until November 2007 when they parted ways over discipline issues. The youngest child began to live with the father and continues to do so. There does not appear to be any reconciliation between the mother and the youngest child, although such an outcome would be most desirable for all concerned.

[11] The mother has not paid child support to the father for the youngest child. The mother paid approximately \$2,000 for dance fees for 2007 – 2008 and the father paid \$1,946 for 2008 – 2009 dance fees. The youngest child is now pursuing post-secondary education with a first year budget of approximately \$23,720. The youngest child will return home each summer to live with the father.

Parental Income

[12] The father and mother have both been reluctant to disclose their annual income to each other. As a result of the present applications, that disclosure has now been made. I should indicate to the parents that if disclosure is not completed annually as set

out in paragraph 10 of the March 2001 Consent Interim Order, the offending party may face an application for contempt of court and special costs.

[13] The father's income is as follows:

2006:	\$79,184.
2007:	\$79,049.86
2008:	\$97,896.

[14] The father submits that his 2008 income should be reduced to reflect the fact that there was an unusual retroactive wage payment. I do not find that submission compelling, as it is clearly income regardless of when it was paid.

[15] The mother's income is complicated by the fact that she is in a partnership with her spouse and receives income from the business, where the usual business deductions such as depreciation are made. Her declared income is as follows:

2006:	\$41,474
2007:	\$38,975
2008:	\$37,078

[16] Depreciation has been deducted each year for leasehold improvements and machinery and equipment which I understand to be for freezers used in the business. The amortization has been expensed at \$36,516 and \$31,745 for the years 2006 and 2007.

[17] In each year, her partner did not take income and that is reflected in retained earnings of \$28,796 and \$25,276 in 2006 and 2007 respectively.

[18] The applicable law to be applied under the Child Support Guidelines is that the court is entitled to assess the reasonableness of the deductions to determine the

appropriate income of the parent with a business income. In this case, the amortization is for legitimate equipment used in the business and there is no evidence before me to suggest that the amortization is unreasonable or that the retained earnings are not appropriate.

Child Support Before Age of Majority

[19] In this section, I am going to determine the child support and extraordinary expenses up to the age of majority.

[20] The father unilaterally declared his income each year without disclosing the T4's and Notices of Assessment required by the March 2001 Consent Interim Order. He also decided not to continue the extraordinary expense contribution of a maximum of \$800 each year in 2003. There is a dispute as to whether the mother and father agreed that the extraordinary expense was no longer required. Given the lack of communication and animosity characterizing the relationship of the parents, I find it difficult to accept that the parents would agree, as the father suggests, particularly as the daughters had an active extracurricular lifestyle. I am therefore ordering the father to pay the maximum extraordinary expense of \$800 for 2003 to 2006 inclusive which totals \$3,200. I will address below the issue of child support for the eldest child who is over the age of majority.

[21] The youngest daughter, who moved from the mother's residence to the father's residence in November 2007, has not reached the age of majority. The mother did not disclose her income or pay child support presumably because the father stopped paying child support for the eldest child at the same time. I order the mother to pay the father child support for the youngest child from December 2007 to and including November

2009. The payment for December 2007 is \$379, \$4,272 for the 2008 year (at \$356 per month) and \$3,740 to November 2009 (at \$340 per month). The total outstanding arrears owed by the mother are \$8,391. The mother will be required to pay child support for the youngest child to her age of majority, which is 19 years.

Child Support After Age of Majority

[22] The applicable section of the Child Support Guidelines is as follows:

“3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

(a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

(b) the amount, if any, determined under section 7.

(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.”

[23] As stated above, the youngest child has not reached the age of majority.

Pursuant to s. 3(1), the mother is required to pay the table amount to the father as stated above. The father is required to pay \$3,200 for the extraordinary expenses of both children from 2003 to 2006.

[24] The determination of the child support to be paid by the father for the eldest child, who is over the age of majority, requires a different analysis. In *N.(W.P.) v. N.(B.J.)*, 2005 BCCA 7, at paras. 35 and 42, the court concluded that it is generally inappropriate to use s. 3(1) for determining child support for an adult child who is living away from home and attending university. The court stated that "... in principle, support for an adult child who is entitled to child support because of his or her attendance at a post-secondary institution generally should be determined under s. 3(2)(b)."

[25] In the *Divorce Act*, a child of the marriage is defined as follows:

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life."

[26] The current analytical framework for determining child support for an adult child is set out in *Rebenchuk v. Rebenchuk*, 2007 MBCA 22, and *Matwichuk v. Stephenson*, 2007 BCSC 1589, as follows:

1. is the eldest child a "child of the marriage"?
2. is the table amount in the Guidelines "inappropriate"? If not, then the Guidelines table amount should be awarded.
3. if the Guideline table amount is not appropriate, what level of support is "appropriate"?

Is the Eldest Child a “Child of the Marriage”?

[27] Some of the factors to be considered, taken from *Farden v. Farden* (1993), 48

R.F.L. (3d) 60, and approved in *N.(W.P.)* are:

- “(1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;
- (5) the age of the child;
- (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.”

[28] It is also useful to consider the general principle set out in *Rebenchuk* at para.

30:

“... The usual *Guidelines* approach is based on factors that normally apply to a child under the age of majority; that is the child resides with one or both parents, is not earning an income and is dependent on his or her parents. It is also based on the understanding that, though only the income of the person paying is used to calculate the amount payable, the other parent makes a significant contribution to the costs

of that child's care because the child is residing with him or her. The closer the circumstances of the child are to those upon which the usual *Guidelines* approach is based, the less likely it is that the usual *Guidelines* calculation will be inappropriate. The opposite is also true. Children over the age of majority may reside away from home and earn a significant income. If a child is not residing at home, the nature of the contribution towards the child's expenses may be quite different. ..." [emphasis already added]

[29] It is useful at this point to consider some typical student/parent situations in Yukon.

[30] If the child attends Yukon College and lives at home, the situation may be close to the usual *Guidelines* approach and the non-custodial parent would be required to pay the respective table amount. However, a significant factor will be the child's ability to earn income during the year (if desirable) or during the summer break. The more financially independent the child may be, the less the requirement for the child support.

[31] Another typical situation is where the child attends college or university out of Yukon and therefore only lives at home during the summer (unless the child has a summer job elsewhere). In this situation, co-operating but separated parents will often take responsibility for various aspects of the child's expenses such as tuition and airfare. The latter can become expensive if the student returns home at Christmas holidays or more frequently and in the summer depending on the location of the college or university. The expense should be compensated at the lowest economy airfare, when possible, and calculated at the lowest economy airfare if one parent chooses to use bonus points. In this situation, where the child goes out of Yukon for post-secondary education, many will require the continuing assistance of their parents. A useful guideline for separated or divorced parents is to calculate the cost of post-secondary

education and living expenses for the student and then deduct the Yukon Grant (which may be in excess of \$5,000), scholarships, bursaries and other grants, as well as summer earnings (or a percentage of summer earnings). The outstanding balance would then be shared by the parents proportionally according to their respective incomes. I add that it is not unusual for parents to require their children to earn a certain percentage of their total educational expenditure. Some courts indicate 30 – 35% of reasonable education expenses is an appropriate amount for the student to contribute. Some parents may require more from the student. There may also be situations where the parental incomes are such that student loans are required. The point is that there may be many variations, but where a student is not financially independent from earnings in the summer or during the school year, the parents will be required to make up the shortfall and the formula suggested above is appropriate in general.

[32] In the case before me, the eldest child is over the age of majority, but not completely able to withdraw entirely from the charge of the parents. This is evidenced by the role of both the mother and the father in continuing to support the eldest child in the academic years 2007 – 2008 and 2008 - 2009. The eldest child has made significant steps towards being independent, but she clearly requires continued support; her parents, to their credit, have both indicated a willingness to provide it. Although it was not expressed, it is my impression that the parents did not wish their children to be burdened with student loans.

[33] I am mindful of the fact that the father indicated a willingness to pay these expenses directly to the eldest daughter and that he much prefers to pay support directly to his eldest child. The parents do not communicate and as a result it is

important to establish clear direction on which parent is responsible for the initial expenditures to support their children, rather than having a continued disagreement which is destructive to the relationship between the parents and the eldest child. In this case it is appropriate that the mother be responsible for the eldest child and the father for the youngest child, for their respective post-secondary education in the first instance. For the 2007 – 2008 year, there was no agreement between the parents and each dealt with the eldest child and determined what their contribution would be. For that year, it is appropriate to continue the child support payment to and including August 2008. Therefore, the father is required to pay arrears of child support to the mother in the amount of \$729 for December 2007, \$727 a month for January to and including August 2008, for a total amount of \$5,816. The situation is somewhat different for the 2008 – 2009 year as the father did contribute \$400 per month for eight months, for a total of \$3,200. While it is somewhat difficult for me to determine the total expenses for the 2008 – 2009 year, it is not equitable to have the father pay child support to the mother as well. The father shall pay \$800 to the eldest child representing the two missed payments. All I can direct is that the father and mother share in the cost of post-secondary education for the eldest child in proportion to their respective incomes, after the appropriate deductions for the Yukon Grant and the earnings of the eldest child. In my view, it is not particularly fair to have the father continue to pay child support for the eldest child where that child is very close to being financially independent. However, to ensure that the father contributes his share, he shall pay \$400 per month to the eldest child for September 2008 to and including August 2009. The decision to terminate

support for post-secondary education must be by court application, unless the parents otherwise agree.

[34] The next issue is how the educational expenses of the youngest child shall be determined and paid for. For the youngest child, the mother is required to pay the table amount of \$340 commencing December 1, 2009 until the youngest child reaches the age of majority. Up to the age of majority, the parents shall be required to pay the costs of her post-secondary education according to the general formula on a proportional basis to their incomes as determined above, with the mother receiving credit for her child support payments.

[35] As there may still be unresolved financial issues for both children for the 2009 – 2010 year, I am available for judicial settlement conference with binding arbitration should the parties be interested.

SUMMARY

[36] To summarize, the mother shall have custody of the eldest child and the father shall have custody of the youngest child. The mother shall be responsible for the initial expenditure for the eldest child and the father for the youngest child in their post-secondary education.

[37] The father shall pay \$3,200 to the mother for retroactive extraordinary expenses.

[38] The mother shall pay arrears of child support to the father in the amount of \$8,391 and pay \$340 per month commencing December 1, 2009. The father shall pay arrears of child support to the mother in the amount of \$6,545.

[39] In total, the father shall pay \$9,745 to the mother which may be offset by the \$8,391 the mother owes to the father.

[40] Counsel should file a Final Order with the relevant terms of the previous order and the order in this judgment.

[41] It is my inclination that there should be no costs awarded as each parent has had some success in this judgment. However, counsel are at liberty to make submissions as to costs.

[42] I thank counsel for their assistance in this application. Counsel may speak to any obvious mathematical errors.

VEALE J.