

SUPREME COURT OF YUKON

Citation: *D.H.B. v. B.E.H.*, 2018 YKSC 40

Date: 20180808
S.C. No. 17-D5044
Registry: Whitehorse

BETWEEN

D.H.B.

Plaintiff

AND

B.E.H.

Defendant

Before Mr. Justice P. Kane

Appearances:
Paul Di Libero
Kathleen Kinchen

Counsel for the plaintiff
Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The father, pursuant to the *Family Property and Support Act*, R.S.Y. 2002, c. 83, and the Federal *Child Support Guidelines* and on the basis of a material change in circumstances since the parties' execution of their separation agreement, seeks:

- a. an order that the parties' two children shall reside equally with each parent namely, to alternate weeks with each parent;
- b. an order terminating or adjusting his child support obligations in the parties' separation agreement to reflect such equal residency time and the fact he is now unemployed;

- c. an order cancelling his arrears of child support since January 2018, including the arrears claimed for s. 7 extraordinary expenses; and
- d. an order that future special and extraordinary expenses shall require the prior agreement of both parties, which agreement must not be unreasonably withheld.

BACKGROUND

[2] The parties married in October 2009. They separated on April 26, 2017, at which time they lived in Whitehorse. Their son and daughter are currently 8 and 7 years of age.

[3] On October 7, 2017, the parties executed a separation agreement and a co-parenting agreement. The father waived his right and opportunity to consult with legal counsel prior to signing those agreements.

[4] The separation agreement provides that:

- a. the parties recognize the importance of joint decision-making regarding the children;
- b. the mother is to have primary day-to-day care and control of the children while the father shall have reasonable access, upon reasonable notice, for reasonable times, including a minimum of 4 evenings and 2 overnights per non-work periods during on-shift rotations and no less than that during his non-work periods;
- c. the parties acknowledge that the matters of custody and access are always open to review in a court of law and that if there has been a

significant change in circumstances, it may be in the best interests of the children for custody or access to be varied or changed;

- d. the father based on his 2016 annual income of \$35,325, agreed to pay the mother \$518 monthly child support and his then 38% share of receipt evidenced extraordinary or special expenses including daycare cost; and
- e. the parties acknowledge that child support was always open to review by the court and should there be a significant change of circumstances, it may be in the best interests of the children for the child support provisions therein to be varied.

[5] The co-parenting agreement provides that:

- a. the children shall reside primarily in the mother's home however this may change with work situations and as the children get older;
- b. the residence for the children will be within the catchment district of their then current school in Whitehorse, Yukon, unless both parents agreed to change the children's school;
- c. the father shall have access to the children at any time upon providing adequate notice as well as work-related absences related to the mother's employment;
- d. the parties shall jointly make major parenting decisions;
- e. the parties recognize the importance of the children seeing both parents as often as possible. The importance of that major factor shall be considered when choosing the place of residence. If one parent moves away from Whitehorse, the children's place of residence and time with

each parent will be discussed and jointly decided, failing which the services of a co-parenting advisor, then lawyers and finally the court shall be engaged to determine the issue.

[6] The primary residence, care and control of the children was with the mother pursuant to the above agreements entered into 9 months ago, which the father now seeks to change. He alleges he never would have agreed to the above terms had he then been unemployed and able to remain unemployed due to the current financial support of his new partner.

[7] The father started seeing his new partner shortly after the separation of the parties in April 2017. In December 2017, he began living with this new partner in her home in Carcross where his partner owns and operates a business. His new partner has a 7-year-old daughter who resides with her. It is stated they intend to marry in the future.

[8] The father was employed as a helicopter pilot since at least 2008 with several employers working out of Yellowknife, Fort McMurray, Haines Junction and then Whitehorse. This employment involved long hours, frequent absences from home and rotational work schedules such as 4 weeks on-call followed by 2 weeks off.

[9] The father was diagnosed with cancer in 2012, took some time off work but then returned to work as a pilot in 2014. The mother indicates the cancer treatments ended in March 2013 and that the father simply chose not to go back to work until 2014.

[10] The father in 2016 took one year off work to consider and find non-pilot employment. He commenced such new employment during 2016 but was only employed during the period of probation. The mother states the father did not

successfully complete the probation period of this new employment and then did little to find other employment.

[11] During his time off work in 2014 and 2016, it is not disputed that the father actively participated in family related tasks and was involved with his children.

[12] The father obtained new employment as a helicopter pilot in May 2017. He subsequently ruptured his eardrum and lost this employment in December 2017. He has been unemployed since December 2017 which is the month he moved to and began living in Carcross with his new partner. There is no evidence he tried to find new employment in the past six months. The father and his partner's affidavit state that they prefer he remain unemployed and at home for the foreseeable future.

[13] The father unilaterally ceased paying child support and his 38% share of after school child care costs in December 2017 based on his loss of employment. He announced his unwillingness to contribute towards the cost of upcoming 2018 summer camps for the children on the basis of his lack of income and his willingness that the children are welcome to reside with him during the weeks they would otherwise attend such camps.

POSITION OF THE PARTIES

[14] There is conflicting evidence whether the father intends to resume working as a helicopter pilot in the future, seek alternative employment or remain unemployed at home for the "foreseeable future" while providing care and support for his children when they are with him and for the 7-year-old daughter of his new partner.

[15] The father's physician signed a note indicating he be off work for medical reasons between January 5 and May 31, 2018. Subsequent medical testing and opinion

filed indicates there has been resolution of the original pain in the left ear, however the father reports decreased hearing in that ear as well as brief episodes of lack of balance for which further medical examination is scheduled. The medical reports filed note the ongoing testing as to this hearing and balance issue and the patient's employment as a helicopter pilot. Helicopter pilot employment is irrelevant to hearing and balance issues unless:

- a. the father hopes to resume that form of employment; and/ or
- b. remaining at home and unemployed "for the foreseeable future" is only a short term plan.

[16] The father in his April 9, 2018 affidavit states:

- a. that he had an April 9, 2018 appointment with his aviation doctor to get a medical assessment and opinion "on when I could return to work as a pilot";
- b. due to the recent developments in his relationship with his new partner, he "may not be returning to work as a helicopter pilot";
- c. he and his partner have decided that it would be best if he stayed at home "for now" to care for his partner's daughter while his partner is at work, which arrangement is working well in providing care and a stable home environment for his partner's daughter and he and his partner can both see him continuing to remain at home "for the foreseeable future"; and
- d. the risk associated with flying helicopters and the associated absences from home that employment requires detracts from his parenting availability and impairs the relationship with his partner, as it did in the

past. That leads him to conclude that he is not willing to take those “risks again anytime soon”.

[17] The father’s partner favours him not resuming employment as a helicopter pilot. She supports his current status of staying at home and the care he provides for her daughter and his children.

[18] The father relies upon post separation agreement changes in circumstances in seeking termination of child support and week-about residence of his children with him, namely:

- a. his current unemployment and lack of income; and
- b. his move to and current residence in another community.

[19] He acknowledged during argument he may be forced to seek employment if now ordered to pay child support. The time demands associated with the resumption of employment, including as a helicopter pilot, would likely impair his availability and therefore ability to drive the children daily to and from Whitehorse every second week.

[20] To their credit, each party acknowledges the other is a good, loving and caring parent of their children. The mother acknowledges she would agree that the children reside one week with each party if the father currently lived in Whitehorse and not some distance away in another community.

[21] The mother opposes alternating weekly residence for the children because:

- a. that would require the children travelling approximately 110 minutes or almost 2 hours per day during the school year, which requires that they wake up at approximately 6:30 rather than 7 a.m.;

- b. such driving exposes the children to risk of accident, particularly during the extended and challenging winter season;
- c. it would interfere with normal child related afternoon and weekend programs, activities and time with their friends in Whitehorse; and
- d. the three-bedroom home of the father and his partner has her son and daughter sharing one bedroom or sleeping outside a bedroom elsewhere in the home.

[22] The mother in opposing the children residing alternate weeks with each parent proposes that:

- a. the children reside with each parent on alternating weeks during the summer school vacation, Christmas school break and spring school break;
- b. otherwise reside with their father every 2nd weekend from Thursday after school, instead of Friday, until commencement of school on Monday morning;
- c. plus such other times as the parties agree including her work-related travel absences;
- d. the father is not entitled to unilaterally opt out of his obligation to pay child support by electing to not seek employment and remain at home;
- e. the father has not proven his prior health related issues prevent him from obtaining employment; and
- f. the Court should impute \$35,000 income to the father, which is at a lower level and comparable to his 2016 annual income of \$35,325.

ANALYSIS

Child Support

[23] The father alleges the children have resided with him more than 40% of the time thus engaging s. 9 of the Federal *Guidelines* which, in the case of shared custody, provides that the determination of the amount of child support must take into consideration the *Guideline* amount of child support payable by each parent.

[24] Many parents in Canada may prefer to not work and to be at home and care for the children at lunch hour and after school. That option is not available to many parents, including the mother.

[25] Unemployment for the “foreseeable future” is currently the father’s preference, which his partner supports as he, during her extended working hours, cares for her daughter. The financial support provided by his partner permits him his current unemployed status which he wishes to continue for the “foreseeable future”, but may become impossible to continue if the Court orders him to pay full child support.

[26] Financial support of young dependent children is not optional.

Equal Residency

[27] The father submits the children have resided with him for more than 40% of the time and over 50% in some months since December 2017.

[28] Including holiday periods such as Christmas, March break and Easter when the children are not travelling daily to attend school in Whitehorse, the children have spent considerable time residing with their father, including in-school periods when their mother is away for work-related business.

[29] The calendar evidence indicates the children resided over night with their father:

- a. 13 nights in December 2017;

- b. 18 nights, including 2 weeks, in January 2018;
- c. 11 nights in February 2018;
- d. 14 nights, including 2 weeks, in March 2018;
- e. 11 nights including one week in April 2018;
- f. 10 nights, including one week, in May 2018; and
- g. 15 nights including 2 weeks in June, 2018.

which represents 43.8% of overnights during the most recent seven month period during which the father was intentionally unemployed.

[30] The father relies upon *Geddert v. Geddert*, 2004 BCSC 564, paras. 6, 25, 26 and *C.J.C. v. M.D.C.*, 2016 BCSC 472, paras. 4, 22 and 29. *Geddert* involved a parent's relocation which necessitated the 11, 14 and 16-year-old children travelling 96 km per day to and from school. *C.J.C.* involved an 11 and 13-year-old travelling 1.5 hours in mid and lower British Columbia.

[31] The court found no change of circumstance in *Geddert* and no relocation in *C.J.C.*

[32] *Geddert* and *C.J.C.* are distinguishable from the present case as:

- a. the parties' separation agreement in both of those cases provided for joint custody with the children residing an equal amount of time with each parent;
- b. the older age of those children compared to this 7 and 8 year old; and
- c. the much milder winter climate where those parties resided.

[33] Given:

- a. the recent date of the separation and cohabitation agreement;

- b. the conflicting evidence as to how long this decision to be unemployed “for the near future” will continue;
- c. the younger age of these children;
- d. the two-hour daily highway driving particularly during the lengthy Yukon winter conditions; and
- e. the children’s extracurricular programs now and in the future will be interrupted or prevented by their absence every second week;

leads the Court to conclude that the best interests of the children presently is that they continue to have their primary residence with their mother in Whitehorse.

[34] This conclusion is reinforced given the decision herein that the father pay off-set child support and his proportionate share of s. 7 expenses commencing August 1, 2018. That determination as he states may require he obtain employment. Such employment may impair his ability to commute twice daily to Whitehorse during the school year should the children reside with him every second week. The children require stability and should not be subjected to a changed regime of alternating weeks with each parent, only to have that reversed should that become problematic as a result of the father’s new employment demands.

[35] The children shall reside with their father, who is responsible for their transportation from and to Whitehorse:

- a. every second week during the academic year from after school on Wednesday until their return to school the following Monday morning, plus any statutory holiday on that Thursday or Monday;
- b. for 7 days every 2nd week during the school summer holidays; and

c. one half of school vacation periods at Christmas, Easter, March break etc.

Off-Set Child Support

[36] In seeking equal alternate weeks with his children and in his reliance upon s. 9(a) of the *Guideline* that the Court in determining child support should off-set the amount of child support payable by each parent, the father submits he should have no child support obligation.

[37] The s. 9 *Child Support Guideline* requirement that the Court consider the table amount of support for each parent in determining the amount of child support is conditional upon the spouse exercising a right of access of not less than 40% of the time over the course of a year. The father's quantity of access with his children between separation in April and December 2017 is not in evidence. His employment as a helicopter pilot during that period would have limited his access time with his children.

[38] In short, the Court is unable to determine the quantity of access the father has had during the past year. In the result, this application on that basis is premature:

A.C.M.-L. v J.B.L., 2017 Y.K.S.C. 5, paras. 12, 13 and 21 and *Maultsaid v. Blair*, 2009 BCCA 102, paras. 25 and 30.

[39] The father in addition relies upon there being a material change of circumstances in support of his request to terminate or reduce his child support obligation namely, his current unemployment and his move to Carcross.

[40] A material change of circumstance consists of something which, had it been known, would likely have resulted in different custody and access terms than those agreed to as contained in the separation agreement: *Willick v Willick*, [1994] 3 SCR 670 at 678.

[41] The parties agree that the father's December 2017 loss of employment and his current residency constitute material changes of circumstances permitting the Court, if appropriate, to vary the terms of their separation agreement as to when the children will reside with each parent and as to child support.

[42] The Court agrees there has been a material change in circumstances pursuant to s. 14 (a) of the Federal *Guidelines* since the October 2017 separation agreement was entered into.

[43] The changed circumstances of moving to Carcross and not seeking employment during the last 6 months are however elections made by the father. The issue is not that he medically cannot as yet return to flying as he and his partner have agreed he will no longer pursue that form of employment. The issue is his decision to not seek and obtain alternate employment for the "foreseeable future", as he did for a period in 2016. That raises the issue whether income for the purpose of child support should be imputed as sought by the mother and if so at what level.

Imputing Income

[44] Section 19 (1)(a) of the Federal *Guidelines* permits the Court to impute such income as considered appropriate in circumstances which include a spouse intentionally being underemployed or unemployed unless that is required by the needs of a child or by the reasonable educational or health needs of the spouse.

[45] The children in issue do not need the father to be unemployed. Unemployment is not required by the father's health or his pursuit of education.

[46] Where a parent provides insufficient information as to an alleged illness causing his or her unemployment, income will be imputed based on the previous year's income:

Karrawan v. Mabrouk, 2015 ONSC 7451.

[47] The father acknowledges that he is intentionally unemployed. The Court accordingly will impute income pursuant to s. 19(1)(a).

[48] The amount of income to be imputed is to be determined based upon past income, including the averaging thereof if in evidence.

[49] The evidence of the father's prior income is his acknowledgement in the October 2017 separation agreement that his annual income was \$35,325 upon which he agreed to pay monthly child support in the amount of \$518 per month.

[50] I am not satisfied that there are special circumstances which warrant the Court's exercise of its discretion pursuant to s. 36 (2) of the *Family Property and Support Act* to determine a level of child support below the *Guideline* level.

[51] The father, commencing August 1, 2018, shall pay monthly child support pursuant to the Yukon *Support Guidelines* on the 1st of each month to the mother in the amount of \$514 based upon imputed annual income to the father of \$35,000.

[52] The father, commencing August 1, 2018, shall also contribute his proportionate share of reasonable and document evidenced s. 7 expenses for the children including daycare. The parties' proportionate share thereof are:

- a. 24% in the case of the father, based upon the imputed annual income of \$35,000; and
- b. 76% in the case of the mother, based upon her 2017 annual income of \$111,000.

Support Arrears

[53] I am not satisfied that the father for medical reasons is currently capable of resuming employment as a helicopter pilot. He has decided that he does not wish to continue that form of employment in any event.

[54] Medical evidence recommending he be off work between December 2017 and May 30, 2018, is sufficient to vary and relieve him of his child support obligations during those months. Permitting two months thereafter to seek and obtain employment other than as a pilot is reasonable based upon on the best evidence available.

[55] Child support arrears, including contribution towards s. 7 expenses, are accordingly rescinded for the period December 1, 2017 until July 30, 2018.

KANE J.