SUPREME COURT OF YUKON

Citation: *J.L.S. v. P.D.T.S.*, 2019 YKSC 49

Date: 20190913
S.C. No. 14-D4639
Registry: Whitehorse

BETWEEN

J.L.S.

PLAINTIFF

AND

P.D.T.S.

DEFENDANT

Before Mr. Justice G.M. Mulligan

Appearances:
Mark T. Chandler — Counsel for the Plaintiff
Megan É. Whittle — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff, J.L.S. (the mother) brings an application for child support against the defendant, P.D.T.S. (the father). The father opposes the relief sought.

Background

[2] The parties began a relationship in 2008, and married December 29, 2012. They have two children of the relationship, D.H.J.S., born in 2009, and X.A.E.S., born in 2011. The parties separated January 1, 2014 and were divorced in November of 2015.

Since separation, they have been involved in a co-parenting arrangement, currently operating on a week-on/week-off schedule. The parties consented to a psychological custody and access report, and that report was received from Dr. Peter Mueser in January of 2019.

[3] The plaintiff was employed as an administrative assistant, but in August of 2018, left work for medical reasons. She is currently supported by Social Assistance.

[4] The respondent is self-employed, carrying on business as a sole proprietor. According to his Notice of Assessment filed, his Line 150 income for 2018 was $36,400. This included his net business income after deductions of $27,957, together with his net rental income of $8,442. His Line 150 income was lower in prior years.

[5] It is significant to note that in 2013, the last year of their marriage, the father made $63,678 as a wage earner in the construction industry. His transition to self-employment as a construction contractor has led to lower reported Line 150 income every year thereafter. As a result of his self-employment, he deducts expenses relating to the business, including a portion of rental for his property, his vehicle and related expenses. With the use of his own sweat equity and assistance from his parents, he now owns a home.

[6] The issue before the court, in my view, is whether or not the father is underemployed by reason of his transition doing similar work as a self-employed individual, rather than as an hourly wage earner, a transition that took place soon after separation.

[7] The *Federal Child Support Guidelines* provide guidance in situations such as this. The objectives of the *Guidelines* in part are “To establish a fair standard of support

for children that ensures that they continue to benefit from the financial means of both spouses after separation". With respect to imputing income, s. 19(1) provides "The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances includes the following: … (g) the spouse is intentionally underemployed or unemployed…"

[8] An individual is entitled to make that choice and there may be many reasons for it. But if it affects his ability to support his children the Court has jurisdiction to consider whether or not this choice amounts to underemployment under the *Guidelines*.

[9] In my view, the father is underemployed by reason of a change in employment from wage earner to a self-employed individual immediately after separation. The issue for the court is to determine in a fair and balanced way, an appropriate imputed income for the father in these circumstances.

[10] After submissions, the parties through their counsel, made settlement offers to each other to assist in the determination of an imputed income here. The mother submits that an imputed income of $72,000 is appropriate, consisting of rental income of $8,000 and imputed income of $63,000. She seeks retroactive support from January 1, 2019, when the parties received the assessment report from Dr. Mueser. The father submits that an imputed income of $58,000 is appropriate, being $50,000 for wage income and $8,000 for rental income.

[11] I am satisfied that a retroactive child support order to January 1, 2019 is appropriate here. That is when the parties received the report of Dr. Mueser. Because the father is providing custody to the two children on a sharing basis, I am satisfied that a retroactive award going beyond 2019 would only serve to provide a financial hardship

to the father at a time when he is supporting his children fifty percent of the time. A larger financial burden would have the possibility of reducing the living standard of the children while in his care.

[12] I am satisfied that an imputed income of $72,000 is appropriate here. In 2013, he earned $63,000, and there is no evidence that wages in his sector in the community have gone down since then.

[13] That figure imputes income to him of $63,000 for wages, which is the same amount he was capable of earning during the currency of the marriage. I accept submissions of counsel that an income of $72,000 would yield an offset payment of $300 per month from the father to the mother. I therefore order child support for the two children from the defendant father to the plaintiff mother in the amount of $300 per month commencing January 1, 2019. Arrears of child support from January 1 to September 1, 2019 at $300 per month are $2,700. I am satisfied that they may be repaid at the rate of $100 per month until paid in full.

[14] As no costs were sought by either side, no costs are ordered.

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MULLIGAN J.