

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *J.F.L. v. M.L.*, 2007 YKSC 03

Date: 20070105
Docket No.: S.C. No. 04-B0081
Registry: Whitehorse

Between:

J.F.L.

Plaintiff

And

M.L.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Kathleen M. Kinchen
E. Joie Quarton

Counsel for the plaintiff
Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the father for child support from the mother arising out of a shared custody arrangement.

[2] The mother and father lived in a common-law relationship for approximately 14 years. They have three children aged 11, 10 and 5.

[3] Both the father and mother are teachers. However, in 1998, the father decided to change careers and become a chiropractor. The mother supported the father in his career change and the family moved to Ontario so the father could pursue his studies.

The family lived off savings, RRSP's, a line of credit and the mother's teaching income. The mother took one year off from teaching when their third child was born but she returned to full-time teaching in 2002 to support the family. The father taught summer school and tutored in addition to his chiropractic studies.

[4] The father completed his chiropractic program in April 2003 and was employed as a teacher from April until June.

[5] The family returned to the Yukon in the summer of 2003. The mother continued her employment as a teacher. She earned \$82,812.35 in 2003; \$64,837.33 in 2004 and \$76,796.61 in 2005.

[6] The father did not commence his chiropractic business until November 2003, when he worked part-time as a chiropractor and part-time as a teacher. He earned \$41,562.25 in 2003.

[7] In January 2004, he resigned from his part-time teaching position in order to devote his full attention to his chiropractic business. He worked as a chiropractor in Whitehorse as well as in the communities of the Yukon outside Whitehorse. His income dropped to \$15,334 for 2004. In order for the father to travel to the communities, the mother had to purchase a new car in February 2004 and assume \$500 monthly payments.

[8] At the end of September 2004, the mother and father separated although they remained in the same residence until January 2005 when they physically separated. They have shared care and control of the children with the children residing with each parent on an alternating weekly basis. The father stopped travelling to the communities when they separated in September 2004.

[9] When the father and mother physically separated in January 2005, the father returned to a temporary teaching position from February to June 2005. He continued to practice as a chiropractor on a part-time basis during the school year and on a full-time basis in July 2005. He took three weeks off with the children for a family reunion. His income for 2005 was \$38,203.00.

[10] He has decided to stop his part-time teaching and to continue working full-time as a chiropractor. He anticipates earning \$18,000 in 2006.

[11] In January 2005, the mother paid the father \$610 as child support on a straight set-off basis. The father disagreed with that amount and refused to accept a similar cheque for February 2005. No further child support was paid by the mother until she commenced paying \$300 per month in March 2006.

[12] I find the following facts:

1. the father had no constraints in terms of earning income in 2006. He could have continued as a part-time teacher and part-time chiropractor as he did in 2005;
2. the father could have put in extra hours to increase his chiropractic income in the weeks when he did not have the children;
3. the father decided to stop working as a chiropractor in the communities.

DECISION

[13] There are two issues to address. The first is the income to be imputed to the father for 2006. The second is the amount of child support to be paid based upon the shared custody arrangement.

The father's Imputed Income

[14] The imputation of income is governed by s. 17(1)(a) of the Yukon Child Support

Guidelines:

“17(1) The court may impute such amount of income to a parent as it consider appropriate in the circumstances. The circumstances to be considered include

(a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent;

... ”

[15] I have found that the father has made choices in terms of the work that he wishes to do and the amount of time he devotes to his chiropractic business. He does so with the full knowledge, and therefore intent, that he will be under-employed to a significant extent. He intentionally plans to earn \$20,000 less in 2006 than he earned in 2005. That, in my view, is intentional and unreasonable while his children require support.

[16] The law on the imputation of income is summarized in *Pagani v. Pagani*, 2000

BCSC 75, in paragraphs 19 and 20 by Martinson J.:

“[19] Imputing income is the way in which the court gives effect to the legal requirement that a parent must earn what the parent is capable of earning. The British Columbia Court of Appeal in *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528, pointed out that the income-imputing provisions of the Guidelines are similar to pre-Guideline tests based on capacity. That is, the court must consider not only the amount of income a spouse actually earns but also "the amount of income a spouse could earn if working to capacity."

[20] The following principles apply when determining capacity to earn an income and, in my view, they are particularly important in this case:

1. There is a duty to seek employment in a case where a parent is healthy, and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor."
2. When imputing income based on intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income."

[17] There is simply no impediment to the father earning an income in the amount he did in 2005 while still maintaining and building his chiropractic business.

[18] I find it appropriate to impute his income for 2006 at \$38,000.

Child Support in Shared Custody

[19] In this case, the father and mother share the care and control of their children on an equal basis. This brings into play s. 9, the shared custody provision of the Yukon

Child Support Guidelines:

“Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of child support for the child must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the parents;
- (b) the increased costs of shared custody arrangements; and
- (c) the condition, means, needs, and other circumstances of each parent and of any child for whom child support is sought.”

[20] Section 9(a) is described as the simple set-off which is the starting point of any analysis. In this case, the mother would be required to pay the father \$613 per month based on her income of \$76,000 and his imputed income of \$38,000. As a result of recent amendments, that set-off increased to \$720 in May 2006.

[21] The Supreme Court of Canada has stated at paragraph 49 of *Contino v. Leonelli-Contino*, 2005 SCC 63, the following:

“Hence, the simple set-off serves as the starting point, but it cannot be the end of the inquiry. It has no presumptive value. Its true value is in bringing the court to focus first on the fact that both parents must make a contribution and that fixed and variable costs of each of them have to be measured before making adjustments to take into account increased costs attributable to joint custody and further adjustments needed to ensure that the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought. *Full consideration* must be given to these last two factors. ...”

[22] It is my view that both the mother and father maintain full households for the three children and all the associated expenses. The mother is already incurring additional debt to finance a second car for the benefit of the father pursuing income in the communities. It would be unfair to apply the simple set-off in those circumstances. The father undoubtedly has the lesser income and should receive child support from the mother but not in the full amount of \$613, now \$720. There is no simple formula to apply. To ensure that the needs of both parents and the children are met, it would be fair for the mother to pay the father \$300 as a set-off up to May 2006 and \$350 thereafter. This permits the father to be assisted in his child caring activities but does not deprive the mother whose needs are at least that of the father's while she continues to pay off the new car.

[23] I therefore order the following:

1. the father's income for 2005 was \$38,000 and the mother's \$76,000;
2. the father's income for 2006 shall be imputed at \$38,000;
3. the mother shall pay child support to the father in the amount of \$300 per month commencing April 1, 2005 and \$350 per month commencing May 1, 2006;
4. the arrears of child support for the period of April 1, 2005, to December 1, 2006, are \$3,650 and shall be paid in lump sum by December 1, 2006, or by instalments of \$200 per month commencing December 1, 2006;
5. the parties shall share equally the cost of extracurricular activities and daycare as agreed;
6. the parties shall exchange Income Tax Returns and Notices of Assessments by June 30 each year that there is an obligation to pay child support.

[24] The father, having had a mixed result, but having had to bring this application, shall have 50% of his costs on scale 3.

Veale J.