SUPREME COURT OF YUKON

Citation: *Allen v. Dupont*, 2014 YKSC 76

Date: 20141216
S.C. No.: 83-01214
Registry: Whitehorse

BETWEEN:

DALE ELYSE ALLEN

PETITIONER

AND:

DOUGLAS ROY DUPONT

RESPONDENT

Before the Honourable Mr. Justice L.F. Gower

Appearances:
Dale Elyse Allen — Appearing on her own behalf
Lenore Morris — Counsel for the Respondent

REASONS FOR JUDGMENT

[1] GOWER J. (Oral): I have had an opportunity to review this file. I was the presiding judge on the original without notice order and on the adjournment, and I have some familiarity with it. I have read all of the affidavit material, and I do not think that I need to reserve any further on this decision, although I will reserve the right to edit any published version of these reasons for things such as technical errors or style.

[2] This is an unusual case. It involves a judgment following a divorce dated November 1, 1983, where the father was required to pay child support of $400 a month per child for two children, commencing on November 1, 1983, and also spousal support

in the amount of $500 a month, which was payable for a fixed term, from November 1, 1983 to and including August 1, 1985. So, for the initial period, the father was required to pay a total of $1,300 a month in combined child and spousal support. I will refer to this order as "the Yukon Order".

[3] I note that there is also a separation agreement on the file, which was dated August 1, 1983. It would appear this was the initial agreement on the terms regarding child support and spousal support. Paragraph 5 specified that the child support would continue until each child reached the full age of 16 years, or was 16 years of age or over and under the mother's care but unable by reason of illness, disability, full-time attendance at an educational institution or other cause, to withdraw themselves from the mother's charge and provide themselves with the necessities of life. So, even in 1983, there was contemplation that the obligation to pay child support might terminate when the children each reached the age of 16.

[4] The father paid child support, pursuant to the Yukon Order, up to and including January 1, 1988, and then ceased. There is a factual dispute about the reasons why his payment of child support stopped at that time, and I will come back to that in a moment.

[5] However, the upshot is that the mother took no steps at all in terms of dealing with the courts to enforce payment of what she claims was outstanding child support after January 1, 1988, until she sought to register the Yukon Order with the B.C. Maintenance Enforcement Program. It appears that she did not do that until August 7, 2014, when she signed a declaration, attached to a form, which showed all the payments that she had received from the father since the Yukon Order was made.

That form, as I read it, shows that the father made every single payment of what was initially combined child and spousal support, until August 1, 1985, and thereafter the payment of child support at the rate of $800 per month. Those payments continued for each and every month, to and including January 1, 1988, and I stress that I do not see in that record any evidence of a single missed or late payment.

[6] Technically, this is the father's application to cancel the arrears which have notionally accumulated under the Yukon Order, which now total some $71,200. So, in that sense, he is the applicant and he bears an onus on his application.

[7] In another sense, in my view, the mother can be looked on as a *de facto* applicant by virtue of the long delay of over 26½ years in seeking enforcement of the Yukon Order, by registering that order with B.C. Maintenance Enforcement on August 7, 2014. In effect, by making that registration, the mother is acting as though she is coming forward and seeking retroactive child support, to begin as of February 1, 1988. Accordingly, I view her as also bearing an onus to satisfy this Court that this is appropriate relief to be granted, in all of the circumstances.

[8] I now turn to the question of the factual dispute as to why the child support ceased after January 1, 1988.

[9] The father, deposed in his first affidavit, and I quote:

> In or around January 1988, the petitioner re-married. Around the same time I received through a letter from the Petitioner telling me she had remarried, was expecting another child, and that I no longer needed to pay child support. After receiving the letter I stopped paying support to the Petitioner and until this month, she never asked me to resume doing so.

This continues in para. 6 of that affidavit:

> My son has told me he has recently spoken to his mother, who told him that at the time of her re-marriage her parents told her that she should release me from my obligation to pay support. I do not know why she has changed her mind but I know that the Petitioner and her husband have separated.

[10] Now, the father has indicated through his counsel that that letter has long since been waylaid or mislaid, and he was not able to produce it as part of the evidence on his application.

[11] The mother filed a single affidavit in response to the father's application, and she states at para. 3:

> In 1987 I remarried, Gerard Robert Allen and <u>immediately after my marriage, all child support payments became sporadic in nature</u>. I called the Respondent on numerous occasions to ask for payment of child support. I was met with resistance and excuses, and told he did not have the money available, and considered himself to be "poor". I continued to pursue the payments through monthly phone calls. [my emphasis]

[12] And then, at para. 4:

> On February 3rd, 1988, I gave birth to my third and last child, Naomi Ruth Aimee Allen. I was promptly diagnosed with Fibromyalgia and sleep depravation after Naomi's birth. Due to my condition, in addition to raising my family and taking care of a home, I was unable to fight the Respondent for the $800 per month I was owed. I subsequently stopped calling and the child support ceased completely in February 1988. There was never a document, legal or otherwise, dismissing the Respondent from his child support payments.

[13] My first concern is the statement under oath by the mother that, immediately after her marriage, "all child support payments became sporadic in nature." That simply does not accord with the record of payments which is declared by the mother to be accurate. As I said a moment ago, that record shows that there were no late or missed payments.

On the contrary, they seem to have been regularly paid on a monthly basis. So, in that sense, I have a problem with the mother bearing some kind of an onus on this application to revive a long-dormant child support order through B.C. Maintenance Enforcement.

[14] It is difficult when one is relying on affidavits. This is not a full-fledged trial where there has been cross-examination of the parties on their respective affidavits, or generally. Having said that, I prefer the evidence of the father because, given his regularity and punctuality in terms of previous child and spousal support payments for a period of about five years, it strikes me that there must have been some precipitating event for that to all of a sudden have ceased as of February 1, 1988. Further, it seems more likely than not that the precipitating event was something like the letter the father claims to have received from the mother indicating that he no longer needed to pay child support.

[15] In any event, the simple fact of the matter is that the mother has taken no steps to enforce this matter for some 26½ years. That causes me to refer to the case of *D.B.S. v. S.R.G.*, 2006 SCC 37, ("*D.B.S.*"), one of the leading cases from the Supreme Court of Canada on the issue of retroactive child support. I have already read into the record during submissions the comments of the Supreme Court, at para. 98, claiming that the case is not meant to apply to situations where arrears have accumulated. On its face, one could look at the situation in the case at bar as being equivalent to one where arrears have accumulated. However, because of the long delay and the unusual circumstances in the mother taking no steps towards enforcement, it also seems to be roughly analogous to an application by a parent for retroactive child support. *D.B.S.*

talks about the various factors which should be taken into account as part of a holistic view of those kinds of applications to decide whether retroactive child support is appropriate or not.

[16] One of the defining features of these kinds of cases is that the application for child support, in this case by way of the registration of the Yukon Order in B.C., some 26½ years later, could have been done earlier but was not: *D.B.S.*, at para. 100. That seems to be the situation here.

[17] At para. 101, the Court also goes on to say that delay in seeking child support is not presumptively justifiable and that there are two concerns at play. One is the payor parent's interest in certainty, and the second is that a delay in seeking appropriate child support for the children is a poor substitute for past obligations not met.

[18] At para. 104, the Court confirms that child support is the right of the child.

[19] At paras. 105 through 109, the Court talks about blameworthy conduct on the part of the payor parent, in this case the father, and encourages courts to take an expansive view of what constitutes blameworthy conduct. In my view, given my preference for the father's version of events as to why the child support payments stopped in February 1988, it is difficult to characterize the father's conduct here as blameworthy in any particular respect.

[20] At para. 108, the Supreme Court stated that objective indicators can be helpful in determining whether a payor parent is blameworthy. For example, the existence of a reasonably-held belief that the payor parent is meeting his support obligations may be a good indicator of whether or not that parent is engaging in blameworthy conduct.

[21] In this case, there is some objective evidence in the form of letters from the two children, who are now 35 and 39 years of age, respectively. I am going to read in both of those letters, or at least parts of them, because the mother has made a great deal in her submissions about the fact that somehow the children have been short-changed by the father's failure to pay the full amount of child support notionally due under the Yukon Order. That seems to fly in the face of the sentiments expressed by each of the two children in their respective letters.

[22] I will read first from the letter of the elder daughter, 39 years of age, in which she states:

> In regards to my father, Douglas Dupont, please accept this letter as confirmation of monetary support from my father to myself from the years after my parents divorce.
>
> In addition to paying for flights and travel for our many visits with him over the years he also bought my first vehicle. He helped me get my first apartment. My father has on several occasions given me money whenever I have asked for his help including buying winter tires for my vehicle, he helped with my mortgage payment recently as well as lent me $25,000 approximately 4 years ago to buy out a former spouse from a property I own, for this amount, we have a legal agreement showing the terms and conditions of payback. [as written]

[23] The other letter is from the 35-year-old son:

> I am writing this letter today to inform the parties involved that my father Douglas DuPont although didn't live close to us did everything in his power to be a positive part of mine and my sisters life he flew us to see him every chance he had Christmas, spring breaks and I spent every summer with him from the time I was 5 or 6 right up to my teenage years. I even lived with [him] for one year during my trouble some teenage years. There was never a time that if we needed something money, clothes, things for school that he would be there to pay for things for us. He bought my sister a car for graduation and bought two cars because one of them I wrecked so he bought me another. He also helped me

> become a plumbing apprentice and put me to work several times throughout my life. He also gave me $4000 to finish off my trade school in Edmonton. I can go on and on my dad's a good man, and I have nothing but respect for him he's helped me so much through my life and I love him dearly. [as written]

[24] There are some typographical errors in that letter, but I have reproduced it as it is written.

[25] These letters indicate to me some objective evidence to support the father's reasonable belief that he was doing what he was obliged to do in all of the circumstances, and also tends to go against the idea of the father having been responsible for any blameworthy conduct.

[26] At para. 109 of *D.B.S.*, the Court states:

> ...But having regard to all the circumstances, where it appears to a court that the payor parent has contributed to his/her child's support in a way that satisfied his/her obligation, no retroactive support award should be ordered.

[27] The other thing that *D.B.S.* talks about, at paras. 114 through 116, is the extent to which hardship to the payor parent should be taken into account. At para. 116, the Court says that courts should attempt to craft the retroactive award in a way that minimizes hardship.

[28] Another important consideration is the date on which the recipient parent gives notice to the payor parent that they intend to pursue the issue of retroactive child support. Now, in this case, arguably, no such notice was given until the father received the documentation from B.C. Maintenance Enforcement, which I understand did not come through until October 2014. Again, I am proceeding from the assumption that *D.B.S.* can be analogized to this set of circumstances.

[29] Further, at para. 123, the Court stated:

> Once the recipient parent raises the issue of child support, his/her responsibility is not automatically fulfilled. Discussions should move forward. If they do not, legal action should be contemplated. While the date of effective notice will usually signal an effort on the part of the recipient parent to alter the child support situation, a prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable interest in certainty has returned...

[30] In the case at bar, the mother claims that she was pestering the father for child support around the time of or shortly after her re-marriage, and around the time of the birth of her third child. If that is to be taken as effective notice of her intention to pursue the issue, then she did not do anything after that, for a period of 26½ years, which, in my view, constitutes a prolonged period of inactivity.

[31] At para. 133 of *D.B.S.*, the Court states that all of the relevant circumstances must be taken into account, and that the payor parent's interest in certainty must be balanced with the need for flexibility and fairness.

[32] Finally, at para. 135 of *D.B.S.*, the Court notes that:

> The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them...

That, again, strikes me as being potentially relevant to the case at bar.

[33] I also note that the father, in fact, paid a total of $40,800 in child support over the five years from 1983 to 1988 when, if he had paid child support pursuant to the *Child Support Guidelines*, would only have been obliged to pay something in the

neighbourhood of $12,000. Further, if the father was required to have paid child support over the total period from 1983 to 1997 (when the children ceased to be entitled), inclusive, based on his income information (a statement of Canada Pension Plan contributions indicating his annual incomes from 1970 through to 2011), he would only have been obliged to pay a total of $44,196.

[34] Having taken all of the circumstances into account, and applying the principles from *D.B.S.* to the case at bar, I am satisfied that the father's application should be granted, and I proceed to cancel all the arrears of child support accumulated under the Yukon Order.

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GOWER J.