SUPREME COURT OF YUKON

Citation: *HAP v DBC*, 2015 YKSC 4

Date: 20150209
S.C. No. 04-B0060
Registry: Whitehorse

Between:

H.A.P.

Plaintiff

And

D.B.C.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:
Kathleen Kinchen — Counsel for the plaintiff
D.B.C. — Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] In *H.A.P. v. D.B.C.*, 2013 YKSC 109, I ordered retroactive child support in the amount of $8,398 to be paid by the father, D.B.C., to the mother, H.A.P., as a set off for child support for the children J., who was 16 years of age and K., who was 13 years of age at the time.

[2] I also ordered the father to pay prospective child support to the mother for J. while she resided with the mother in British Columbia and the mother to pay child support to the father for K. who resides in Whitehorse. This resulted in a set off requiring the father to pay the mother $595 per month. It was understood that the child J. was

residing with the mother, although attending private school paid for by the maternal grandmother.

[3] Approximately one year later, the father now applies for recalculation of the retroactive child support based on the mother's settlement of a personal injury claim from an accident in July 2011, which I previously considered to be speculative. He also applies for an order setting aside the child support paid to the mother for J. on the grounds that J. is not residing with the mother. He further applies for an order adjusting his 2013 income to exclude the $6,350 withdrawn from his RRSP and costs in the amount of $3,000.

[4] There were numerous other matters applied for which I dismiss and specifically his application to give new evidence on the pre-application living arrangements of the children decided in the 2013 YKSC 109 judgment as well as the costs award in that matter. These latter matters do not raise a change in circumstances and are an attempt to appeal. All the evidence is in affidavit form and there was no application to cross-examine on any affidavit.

BACKGROUND

[5] Since the order of Gower J. in *H.A.P. v. D.B.C.*, 2011 YKSC 66, J. has attended private school in British Columbia paid for by her maternal grandmother commencing September 2011. She is now at that private school in her final year as a day-student. She originally resided in residence which was paid for by her maternal grandmother. In April 2013, she continued to attend the private school but stopped residing at the school and allegedly moved in with her mother who had moved to the same community in September 2012. The basis of my 2013 YKSC 109 judgment that J. resided with her

mother from April 2013 forward is now challenged on new evidence not previously known to the father.

[6] It is important to understand that when Gower J. approved J.'s attendance at the private school in British Columbia over the father's objection it was on the following basis:

> [6] The other fact which I am satisfied constitutes a material change in circumstances is that the maternal grandmother has made an offer to essentially pay for all of the school fees, the registration fees, and room and board for the child's attendance at the private school, which is a significant sum of money in excess of $30,000 a year. The issue of child support and other issues set out in the mother's notice of application have been adjourned generally. However, until child support is determined, the grandmother has also indicated an intention to cover J.'s transportation costs and any other initial costs that have to be incurred in connection with that education.

[7] Thus, the change of J. from residing at the private school to at her mother's residence was a significant factor in the calculation of child support to be paid by the father for J. Additionally my 2013 YKSC 109 judgment was based upon actual earnings of the father and mother. The mother's income was significantly lower than her 2010 maximum earnings of $45,239 because of her accident in July 2011. I declined to impute a higher income for the mother due to her injury and the fact that her personal injury wage loss claim had not resolved. However, she was able to settle her case in June 2014 for a total of $225,000 in addition to three advances of $6,000 each in 2011. Her lawyer advised, and each party accepted, that $55,000 was allocated as past loss of income and $45,000 for future loss of income in the personal injury settlement.

[8] I am satisfied that the personal injury settlement is a change in circumstances. The mother does not oppose a recalculation of child support based upon her personal injury settlement.

J.'s Living Arrangement

[9] In my order of September 26, 2013, I directed that K. would reside primarily with the father in Whitehorse and J. would reside with the mother in British Columbia on the understanding that J. was attending a private school paid by the maternal grandmother. The maternal grandmother initially paid for tuition and room and board until the child support issue was determined.

[10] In the 2013 hearing, the retroactive order addressed the period from September 1, 2011, to the end of September 2013. The mother stated that on March 14, 2013, J. moved out of the private school residence and began to live with her. On this basis I ordered that commencing October 1, 2013, the mother and father would pay each other child support based on the father's 2012 income of $86,928 and the mother's income of $21,675, her pre-personal injury settlement income as a professional hairstylist. Because K. had hockey expenses of approximately $8,000 and J. was required to have a $5,000 account at the private school for trips, events and allowance, I ordered that it would be both convenient and fair for each parent to assume responsibility for the special and extraordinary expenses for the child in their primary care. I am of the view that nothing has changed with respect to these extraordinary expenses and that the father should be responsible for K.'s hockey expenses and the mother for J.'s private school expense account.

[11] The father now alleges that J. does not reside with the mother at all and resides with the maternal grandmother. The evidence in support of this comes from two mutual

friends of the mother and father who invited the mother to a barbecue during a visit to Whitehorse in May 2014. They both swear in affidavits that the mother stated categorically that she lived by herself while J. resided with the maternal grandmother.

[12] One of the witnesses was a former employee of the mother in Whitehorse before the accident. She stated that the mother said the mother initially lived at the maternal grandmother's home after moving to British Columbia, but when she got a job, she began renting a room in a house downtown. She confirmed that the mother said that J. lived with the maternal grandmother and that J. and the mother see each other frequently.

[13] The mother responds that "J. has not resided with my mother exclusively since moving out of residence. J. resides with me but she spends a great deal of time with my mother as she always has."

[14] The mother denied that she told the two friends that she was living in a room in a house downtown. She explained that "J. and I had a disagreement before I left … to visit K. in Whitehorse and J. was staying with my mother."

[15] By way of explanation the mother elaborated in para. 8 of her affidavit #4 filed December 16, 2014:

> In response to paragraph 31 of Affidavit #5 of [the father], filed December 8, 2014, there was no false information in my previous affidavits about [J.] being in my care. [J.] has always spent a great deal of time with my mother and has a bedroom in her home. [J.] has a bedroom in my home as well. Whether [J.] is staying with my mother or staying with me, I am financially responsible for her day to day expenses.

[16] The mother also attached a letter from J. to the mother's lawyer which explained that J. used the father's child support for clothing and allowance and that some of it went into the special account at her private school. She also used it for yoga. Since the

father stopped making payments in June 2014, she got a part-time job. J.'s letter makes no mention of her residence and she did not file an affidavit denying the father's allegation. The maternal grandmother did not file an affidavit. In other words, the two best witnesses to refute the father's allegation have chosen to remain silent.

[17] In her 2013 income tax return, the mother stated that her mailing address was the address of the maternal grandmother. The mother also claimed for J. as an eligible dependant in the amount of $11,038 and stated J.'s address as the maternal grandmother's.

[18] I conclude that J. resides with her maternal grandmother as her primary residence. The evidence of the two witnesses is straightforward in contrast to the mother's ambiguous response. It is also a factor that neither the maternal grandmother nor J. filed affidavits to support the mother's position that J. resided primarily with her.

[19] I must then address what, if any, child support obligation the father has for J. when her primary residence is with the maternal grandmother who makes no claim. I am also of the view that some of the expenditures listed by J. fall into the private school expense account, which is the mother's obligation pursuant to my earlier order.

[20] As indicated above, the mother claims that she is financially responsible for J.'s day to day expenses. However, this assertion is not borne out in a letter from J. dated December 10, 2014, attached to the mother's affidavit. This letter describes using her father's child support payment to pay for clothing, shoes, toiletries and allowance. Some of it was used for her special account at the private school for field trips and special events. As I understand J.'s letter, she eventually had access to a savings account in which her father's $525 child support payment was deposited. The father arbitrarily stopped paying the child support in June 2014 according to J.'s letter.

[21] I find that the child J. has not been residing with her mother (except occasionally) but rather resides with her grandmother. I further find that the grandmother has been assuming responsibility for most of J.'s day to day expenses, and most notably for her food and lodging.

Child Support for K.

[22] The possibility of a personal injury settlement was known at the time of the September 2013 order on retroactive and prospective child support but I considered it premature as there was no settlement at that time. In the June 2014 personal injury settlement, the allocation for past income loss is $55,000 and future income loss is $45,000. This judgment is a caution about proceeding to establish child support without the details of a pending personal injury settlement or trial judgment. On the other hand, child support issues cannot always wait for a personal injury settlement or trial.

[23] There are two helpful cases on the application of personal injury settlement monies to determine the income of the injured person to calculate a child support obligation. In *Neufeld v. Neufeld*, 2001 BCSC 1197, which is distinguishable on its facts, the father received a settlement of $611,450.38 from which it was not possible to allocate compensation for lost earning capacity. The father was not able to return to his pre-injury employment as a welder in which Holmes J. assessed him as earning $40,000 per annum. The Court stated that the father's current earning level as a welder calculated without the injury was relevant, especially as the father's new source of income was not established. Holmes J., at para. 30, concluded that it was fair to impute a current Guideline income of $40,000 annually both retroactively and prospectively.

[24] In *M.K. v. R.A.S.*, 2004 BCSC 1798, Wedge J. addressed a factual situation where the father's highest income earning year prior to the accident was $29,500. Post-

accident, the father had a brain injury and was unemployable. Based upon a present value of $30,000 per year to calculate his loss of capacity to earn income, the husband settled for a structured settlement of $59,625 annually which was supplemented by $10,121 per year in CPP payments. The provincial court trial judge grossed up the annuity payment and added the CPP payments for a total imputed income of $95,465.

[25] Wedge J., on appeal, decided that it was not appropriate to take into consideration the father's total monthly structured settlement which included compensation for pain and suffering that she considered "intensely personal" (para. 32). She accepted the sum of $30,000 plus the CPP payments for a total imputed Guideline income of $40,000.

[26] Wedge J. also concluded that a yearly increase of 3% in the annuity payment was not directly related to income and should not trigger an annual increase in child support.

[27] In the case at bar, the mother earned $38,157 in 2008; $43,068 in 2009, and $45,239 in 2010, her highest pre-accident earnings. After injury in July 2011, she earned $29,998; in 2012 she earned $21,675 and in 2013, she earned $23,649.69.

[28] In my view, the appropriate past calculation for the mother's income should be based upon her actual earnings plus the allocation of the $55,000 for her income loss up to June 2014, the date of settlement. This calculation includes her actual income plus an allocation of $18,333 for each of 2011, 2012 and 2013, representing the $55,000 past wage loss award.

[29] As for prospective income from June 2014, I order that the mother's income be imputed at $48,000 going forward without any annual increase. I should add that the

categories for imputation set out in s. 17 of the Guidelines are not limited to those set out but include what the court "considers appropriate in the circumstances".

[30] The resulting income (rounded) and child support for K. to be paid by the mother is as follows:

Year	Income	Child Support
2010	$45,000	391.00 (YT)
2011	$48,000 ($29,998 + $18,333)	418.00 (YT)
2012	$40,000 ($21,675 + $18,333)	346.00 (YT) 364.00 (BC)
2013	$42,000 ($23,649 + $18,333)	383.00 (BC)

[31] The father's income (rounded) is as follows:

Year	Income
2010	$64,750
2011	$82,750
2012	$86,750
2013	$81,170

[32] I have not included the father's 2013 RRSP withdrawal of $6,350 as I am satisfied that it was used for legal fees for this court action and does not really represent earned income. I previously ordered that the retroactive calculation of child support commence in September 2011, the date J. started private school in British Columbia, thereby ending the previous shared custody arrangement.

Child Support for J.

[33] The case law is somewhat unclear on what the father's support obligation should be for J. Clearly, a support obligation continues but not on the basis of the table amount which is tailored for a primary caregiver who provides room and board for the child.

[34] The mother and father were not married so the applicable statute to determine child support is the *Family Property and Support Act*, R.S.Y. 2002, c. 83 (the "*Act*"). The child J. is under the age of majority and has not withdrawn from her parents' charge.

[35] Part III of the *Act*, entitled Support, addresses the application of the child support guidelines:

> 36(1) A court making an order for the support of a child shall do so in accordance with the child support guidelines.
>
> (2) Despite subsection (1), a court may award an amount that is different from the amount that would be determined in accordance with the child support guidelines if the court is satisfied
>
> (a) that special provisions in an order or written agreement respecting the financial obligations of the parents, or the division or transfer of their property, will benefit the child, or that special provisions have otherwise been made for the benefit of the child; and
>
> (b) that the application of the child support guidelines would result in an amount of child support that is inequitable given these special provisions.
>
> (3) If the court awards, under subsection (2), an amount that is different from the child support guidelines, the court shall record its reasons for doing so.
>
> (4) Despite subsection (1), a court may award an amount that is different from the amount that would be determined in accordance with the child support guidelines on the consent of both parents if the court is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.
>
> (5) For the purposes of subsection (4), in determining whether reasonable arrangements have been made for the support of a child,
>
> (a) the court shall have regard to the child support guidelines; and

> (b) the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the child support guidelines.

[36] The usual Guidelines approach to apply the table amount is found in *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.) at paras. 16 – 18:

> 16 The usual Guidelines approach is based on certain factors that normally apply to a child under the age of majority. That is, the child resides with one or both parents. The child is generally not earning an income and is dependent on his or her parents.
>
> 17 The usual Guidelines approach is, in most cases, 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.
>
> 18 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/or 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.

[37] This approach has been approved in *W.P.N. v. B.J.N.*, 2005 BCCA 7.

[38] The case at bar, with respect to financial support for J., is one of those circumstances that make it appropriate to deviate from the traditional table amount approach to the Guidelines. Here, J. is supported in her private school education by the maternal grandmother and she also resides primarily with the maternal grandmother who makes no claim against either parent in this case. In my view this meets the test in s. 36(2)(a) and (b) of the *Act.* "[S]pecial provisions have otherwise been made for the

benefit of the child", and given these special provisions, the requirement to pay the table amount to the mother with whom the child does not reside would be inequitable.

[39] The fact that the table amount should not be paid still requires a consideration of s. 7 expenses which may include yoga, driver training, weekly allowance and clothing. Both the father and mother have expressed a willingness to share these expenses which should be in the range of $200 per month based on J.'s letter. I add that this s. 7 expense is in addition to the $5,000 private school account for which the mother is responsible. Therefore, based upon a proportionate share according to income, the father is obligated to pay 65% and the mother is obligated to pay 35%. I have chosen 65% and 35% so that the mother and father do not have to make marginal adjustments annually. The payments shall be paid into an account in the name of the child.

[40] The table below provides a reconciliation from September 2011 to December 31, 2014, for the mother and father.

Time Period	Mother's Child Support for K. (YT Tables 2010 - 2012) (BC Tables 2013 forward)	Mother's Child Support for J.	Father's Child Support for J.
Sept. – Dec. 2011	$1,564 (4 x 391)	$280 (4 x 70) (35%)	$520 (4 x 130) (65%)
Jan. – Dec. 2012	$5,016 (12 x 418)	$840(12 x 70) (35%)	$1,560 (12 x 130) (65%)
Jan. – Dec. 2013	$3,114 (9 x 346) YT $1,092 (3 x 364) BC	$840(12 x 70) (35%)	$1,560 (12 x 130) (65%)
Jan. – Dec. 2014	$4,596 (12 x 383)	$840(12 x 70) (35%)	$1,560 (12 x 130) (65%)
Total	$15,382	$2,800	$5,200

[41] I will leave it to the parties to sort out what the father has paid under the previous order to determine what the mother owes the father as a result of this order.

[42] Going forward on a monthly basis from January 1, 2015, the mother shall pay J. $70 per month and the father shall pay J. $130 per month until J. enters college and a new calculation is required.

[43] The mother shall pay the father $439 monthly for K. commencing January 1. 2015, based upon an imputed income of $48,000 per year for 2014 forward.

[44] Counsel for the mother has also requested some guidance for the 2015 – 2016 first year of college for J. In this jurisdiction, the practice is set out in *G.T.F. v. K.L.F.*, 2009 YKSC 72, at paras. 30 and 31. It refers to a useful guideline when the child goes to university and neither parent is the primary caregiver as the child resides in neither parent's home. The practice is to assess the child's annual expenditure for tuition, school expenses, room and board, transportation and recreation and then deduct the Yukon grant, bursaries and scholarships (and the grandmother's contribution of $8,000) as well as a percentage of the child's summer earnings. The resulting amount is then paid directly to the child by each parent in proportion to their incomes which I have arbitrarily set at 65% for the father and 35% for the mother.

[45] I appreciate that this order is vastly different than my order of September 26, 2013 and it may appear to disadvantage the mother. However, it was the mother who brought the child support application prematurely before her personal injury settlement was concluded and based upon the incorrect premise that she was the primary caregiver.

[46] As to the court costs claim of the father, I appreciate that he has been inconvenienced by the order without the personal injury settlement and the order to pay

$595 to the mother. However, I am not impressed with his decision to stop payment without court approval. As the parties need to come back to sort out what is owing by the mother up to December 2014, I shall hear submission on costs at that time.

VEALE J.