SUPREME COURT OF YUKON

Citation: *A.C.M.-L. v. J.B.L.,* 2017 YKSC 5

Date: 20170131
S.C. No. 08-D4076
Registry: Whitehorse

BETWEEN:

A.M.C.M.-L.

PETITIONER

AND

J.B.L.

RESPONDENT

Before Mr. Justice R.S. Veale

Appearances:
Kathleen Kinchen — Counsel for the Petitioner
Lenore Morris — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The father applies again for a termination or variation of child support for two children, M. and G. now aged 15 and 13, pursuant to s. 9 of the Federal *Child Support Guidelines*, SOR/97-175 (the "*Child Support Guidelines*").

BACKGROUND

[2] In my Reasons for Judgment, cited as *A.C.M. v. J.B.L.*, 2014 YKSC 17 (the "February 2014 Order"), I found that the father's access or care of the children was, by agreement of the parties, slightly less than 40% and I ordered that the father continue to pay child support to the mother for both children in the amount of $1,080 (now $1,148).

[3] The father then applied in 2016 for an increase in residential time and a corresponding reduction in child support payments to the mother.

[4] In my Reasons for Judgment, cited as *A.C.M. v. J.B.L.*, 2016 YKSC 34 (the "July 2016 Order"), I denied the father's application as it related to M. because of the child's serious physical and cognitive challenges. M. suffers from Tuberous Sclerosis Complex, which results in cognitive delays, intellectual impairment, anxiety disorder and uncontrollable seizures. He will need the care and support of both parents for the rest of his life.

[5] In addition, I was very critical of the father's continuing campaign to increase his residential time:

> [35] My view of this family and the best interests of M and G have not changed. I find that the father is fixated with the unfairness that he contributes to the care of the children almost everyday but is now paying $1,148 a month child support to the mother who earns approximately twice the income he does. I conclude that he has embarked on a campaign to increase his residential time to achieve a set off of child support which he sees as the mother paying child support to him, despite the fact that this may not be the result. …

[6] However, although the father's application was more like an appeal of the February 2014 Order, I ordered one additional overnight with G. as it had been contemplated in the Custody and Access report prepared by Ms. Sheldon, the appointed child psychologist.

[7] I concluded my judgment in the July 2016 Order with the following:

> [40] However, I must express the view that has now been stated by Ms. Sheldon, Gower J., and me that the continued pushing for extra time with the children by the father has to end. The emotional stress on the children and the resulting

> parental conflicts serves no one's interest and detrimentally affects the best interests of both M and G.

[8] Counsel requested that further submissions regarding child support should be made and those have now been concluded.

[9] Counsel for the father submits that the one additional weekly overnight with G. brings the father within the “not less than 40% of the time over the course of a year” as required in s. 9 of the *Child Support Guidelines*. Counsel for the mother adamantly submits that the father’s time is still only 34.8% and there should be no s. 9 variation.

[10] I set out the specific wording of para. 5 of the February 2014 Order followed by para. 2 of the July 2016 Order:

> 5. The current schedule whereby the respondent has the Children in his care every second weekend from Friday after school until Monday morning and every Tuesday, Wednesday and Thursday from 3:00 to 6:00 p.m. and every second Monday in alternate weeks from 3:00 until 6:00 p.m. and the petitioner has the Children in her care the remainder of the time is not a share custody arrangement under s. 9 of the Federal Child Support Guidelines.
>
> 2. The residential scheduled of [G.], born June 25, 2003, is varied from the schedule set out in the February 7, 2014 Order such that [G.] shall spend every second Thursday night with the Respondent, on the week-end that [G.] and [M.] reside with the Respondent.

[11] The critical features of this family dispute is that M. is severely challenged, both cognitively and physically, and the mother earns an income ($149,191) approximately twice as large as the father’s ($78,335). To be precise, the mother earned, in 2015, a salary of $78,367.70 net of taxable benefits. Her additional income of $65,172.60 is a housing benefit which forms part of her taxable income and effectively lowers her housing costs by $650 per month. She also received a travel benefit of $5,580.

The 40% Threshold Under Section 9

[12] Before turning to the determination of whether the father meets the 40% threshold in s. 9 of the *Child Support Guidelines*, I point out that where a parent (the receiving parent) has 60% or more time with the children, child support is calculated on the income of the parent (the payor) with less than 40% of the time with the children based solely upon the income of the payor and not the receiving parent. Thus, despite the income disparity in the mother's favour, it is not a factor unless the 40% threshold in s. 9 is met. The *Child Support Guidelines* intentionally shift the Court's focus from the financial status of the custodial spouse to the income of the payor parent only. See *D.B.S. v. S.R.G.*, 2006 SCC 37, at para. 45.

[13] The applicable legislation is the following:

a. Section 1 of the *Child Support Guidelines* sets out the objective of the *Guidelines*:

> 1 The objectives of these Guidelines are
>
> (a) 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;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

b. Section 9 of the *Child Support Guidelines* states:

> Shared custody
>
> 9 Where a spouse 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 the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought. (my emphasis)

[14] In *Contino v. Leonelli-Contino*, 2005 SCC 63, the majority of the Supreme Court of Canada (with one dissent), in para. 24, stated that there is no discretion as to when s. 9 is to be applied. The 40% threshold over the course of a year must be met before the s. 9 analysis takes place.

[15] Saunders J.A. has elaborated further on the calculation of the threshold to apply s. 9 of the *Child Support Guidelines* in *Maultsaid v. Blair*, 2009 BCCA 102:

> [25] There is, in my view, no single method to employ in determining the amount of time a parent has access to their child for purposes of s. 9, given the variety of orders, agreements, and arrangements that exist in parenting situations. However, considering the language used giving the right of access, as it may apply to the criteria of s. 9, and bearing in mind the objectives of the *Guidelines* set out in s. 1, a judge must make a finding of fact as to the amount of a year in which the access parent has a right to access.
>
> …
>
> [30] I recognize this calculation brings the matter close to 40 per cent and appears arbitrary. However, in my view, it is not open to the court, faced with the express wording of s. 9, a court order particularizing "the right to access", and a

> measure of the time that falls short of the requisite 40 per cent, to ignore the words, the mandatory requirement, chosen by Parliament. In the words of the Alberta Court in *L.C. v. R.O.C*., 2007 ABCA 158, "there is no place for 'deeming' parenting time to be what it is not". (my emphasis)

[16] *Maultsaid* also established the following:

1. the time calculation in s. 9 can consider hours or days depending on which is appropriate.
2. the calculation, whether in days, weeks or hours must be calculated over a year in which the access parent has a right of access.
3. it is not open for a court to apply s. 9 unless the right to access or physical custody is not less than 40% of the time over the course of a year. There is no discretion to deem a parent to meet the threshold where they are close but not quite at 40%.

Does the Father Meet the 40% Threshold?

[17] The present sharing arrangement following the July 2016 Order is the following:

a. The parties share joint custody of the children;

b. The mother is “responsible for making day to day decision and for organizing all appointments for the Children and being the primary point of contact for all professionals dealing with the Children”;

c. During the school year [M] spends eleven nights in each fortnight with the mother and three nights in each fortnight with the father;

d. During the school year [G] spends ten nights in each fortnight with the mother and four nights in each fortnight with the father;

e. The children are with the father four of five days after school, from 3:00 p.m. to 6:15 p.m.;

f. School vacations are shared;

g. The father pays the full table amount of child support; and

h. The father pays 50% of section 7 expenses.

[18] As I indicated at para. 6 in the February 2014 Order, both counsel calculated the father's time at slightly below 40%. This is not the case before me now.

[19] Counsel for the mother calculates the father has the children, including G.'s additional overnight with the father, at 34.8% of the time, substantially less than the threshold "not less than 40%".

[20] Counsel for the father, in an affidavit filed on the day of the hearing, without giving counsel for the mother adequate time to review and respond to it, submitted that prior to the additional overnight with G., the father had access 38% of the time prior to the July 2016 Order. But after the July 2016 Order, the father calculates that his time with the children was at least 40% each month.

[21] At the outset, it is abundantly clear that the father does not meet the s. 9 threshold by any accounting simply because he has not had the increased time with G. "over the course of a year". In my view, the father cannot possibly establish the explicit requirement "over the course of a year" because a year hasn't passed since the July 2016 Order. The requirement of one year is significant to ensure that the change in access or physical custody has some permanence before the s. 9(a) to (c) analysis can be addressed. The application is premature and is dismissed on that ground.

[22] I should also add that even if the required one year had passed, the father's time with G. alone does not reach the 40% threshold by my calculation of the time. By my calculation, excluding time in school which could be considered part of the mother's time as she is on call, the most generous percentage for the father is 36%.

[23] There is no need to do a s. 9 analysis but I point out, without making a finding, that it could result in the same child support order. The fact that the mother is responsible for making the day to day decisions and for organizing all appointments for the children and being the primary point of contact for all professionals, would be a significant factor in the s. 9(c) analysis considering the serious mental and physical challenges for M.

[24] While the focus of this application is on s. 9 of the *Child Support Guidelines*, counsel for the father has added the material change of circumstance submission based on s. 17(4). In *Willick v. Willick*, [1994] 3 S.C.R. 670, at 688, a material change of circumstances means a change, known at the time of the original order, that would likely have resulted in different terms. I dismiss that application as the addition of one overnight does not amount to a material change in the context and circumstances of the care of these two children. The Court and the father were aware of the disparity in income at the time of the February 2014 Order.

[25] While this hearing was set primarily to hear the s. 9 application following the July 2016 Order, the father also requested to have the opportunity to provide for care of the children when the mother is away on business rather than having the mother place the children in her sister's care. As it is the mother's practice to have her sister move into the mother's home on these infrequent occasions, I am not inclined to grant this request

as it is in the best interests of the children to have as little disruption as possible when the mother is away.

CONCLUSION

[26] The father's application dated November 21, 2016, to vary child support and residential schedule is dismissed. Counsel may speak to costs if necessary.

[27] The mother and father advised at the hearing that M. was refusing to go to his father's house in December 2016 and January 2017. This is a very unfortunate situation for M. and his father and hopefully some counselling for M. will result in a return to the regular residential time with his father.

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VEALE J.