

SUPREME COURT OF YUKON

Citation: *J.A.L. v. A.A.J.*, 2020 YKSC 7

Date: 20200225
S.C. No. 18-B0070
Registry: Whitehorse

BETWEEN

J.A.L.

PLAINTIFF

AND

A.A.J.

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
Gregory Johannson

Counsel for the plaintiff
No one appearing for the defendant

REASONS FOR JUDGMENT (Imputed Income Application)

INTRODUCTION

[1] On January 22, 2020, counsel for the plaintiff father applied for an order imputing an annual income to the defendant mother in the amount of \$31,200 requiring a child support payment of \$265.24 from the mother to the father. The imputed income is based on a minimum wage of \$15 an hour in Alberta, where the mother resides.

Although I initially granted the order, I have reservations about doing so as there is no information whatsoever about the mother and her ability to work. The mother has been substitutionally served and has not provided any information to assist the Court. I have declined to sign the order and dismissed the application to impute the mother's income.

BACKGROUND

[2] The father provided the following evidence by way of affidavit:

...

3. I am the father of [J.J.], born August 23, 2015.
4. His mother is [A.J.], the Defendant. I was in a relationship with the Defendant for approximately four years.
5. In November 2015 I spent one year in custody at the Whitehorse Correctional Centre beginning in approximately November 2015. I was released in October 2016.
6. Child protection authorities intervened in approximately November 2015. They expressed concerns with [A.J.] and myself as a result of my criminal charges.
7. By direction of Family and Children Services, [J.] went into foster care when I went to jail, where he remained until I was released in October 2016.
8. [A.] did not make any effort towards addressing child protection concerns.
9. I completed counselling and parenting courses in jail and when I got out. As soon as I was out of jail I began pursuing parenting of [J.]. I began with supervised then unsupervised and overnight visits, and in April 2017 I was given custody of [J.] by FCS.

[3] On May 30, 2019, the court made the following order:

1. The Plaintiff shall have custody and primary care and residence of [J.A.J.], born August 23, 2015 (hereinafter [J.]).
2. The Defendant shall be entitled to exercise access with [J.] beginning with supervised access and transitioning to overnight access at dates and times to be agreed upon between the parties on the condition

that the Defendant makes reasonable efforts to improve her parenting skills.

3. The Defendant shall provide annual income tax assessments to the Plaintiff annually commencing June 1, 2019 and each year thereafter. The Defendant shall pay the Plaintiff child support in the amount prescribed by the Federal Child Support Guidelines.
4. The Plaintiff and Defendant shall equally share the cost of any special and extraordinary expenses for [J.], as defined by section 7 of the Child Support Guidelines.
5. The Plaintiff shall be at liberty to apply for [J.]'s passport without the need for the Defendant's signature.
6. The Plaintiff shall be able to travel with [J.] within Canada and Alaska without the Defendant's consent or approval upon providing one week's notice in advance of travel to the Defendant by email.
7. The requirement for a Family Law Case Conference shall be waived.

[4] The father indicated that the mother was in Alberta but he provided no information about her, except that she is approximately 31 years old. There is no indication of her education, job experience, health or suitability for a particular, or any occupation. The defendant mother did not provide her 2018 financial information as ordered in para. 3 of the May 30, 2019 court order.

[5] The Court has also learned that on October 19, 2016, the father was sentenced to 13 ½ months in custody for five separate assaults on the mother over a period of one year, from December 2014 to November 2015 (*R. v. Lilley*, 2016 YKTC 56).

[6] While both were reported to be intoxicated, the father punched, choked and bit the mother. The mother was pregnant during two of the assaults and their three-month-old child was present during the last assault.

[7] That may or may not explain the mother's failure to appear and respond in this matter.

Law of Imputation

[8] Section 17 of the *Yukon Child Support Guidelines*, O.I.C. 2000/63, (the mirror of s. 19 of the Federal *Child Support Guidelines*) states the following:

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

- (a) the parent is intentionally under-employed or unemployed, other than where the underemployment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent;
- (b) the parent is exempt from paying federal or provincial income tax;
- (c) the parent is a non-resident of Canada and resides in a country that has effective rates of income tax that are significantly lower than those in Canada; (Paragraph 17(1)(c) amended by O.I.C. 2005/35)
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the parent's property is not reasonably utilised to generate income;
- (f) the parent has failed to provide income information when under a legal obligation to do so;
- (g) the parent unreasonably deducts expenses from income;

(h) the parent derives a significant portion of income from dividends, capital gains, or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the parent is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

(2) For the purpose of paragraph (1) (g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act (Canada).

[9] The most utilized subsection is s. 17(1)(f), the failure of a parent to file income information when under a legal obligation to do so, although the use of the word “include” suggests that other circumstances may be considered appropriate for the court to exercise its discretion to impute income.

[10] The *Family Property and Support Act*, R.S.Y. 2002, c. 83, provides for the application of child support pursuant to s. 34.

[11] Section 45, of the *Family Property and Support Act*, requires both the applicant and the respondent (“each party”) to file and serve a financial statement. Section 34 prevails over s. 19(1) of the *Yukon Child Support Guidelines*, which only requires the parent “whose income information is necessary to determine the amount of the order”.

Thus, the applicant must file the income information in s. 19, which at a minimum must include:

(a) a copy of every personal income tax return filed by the parent for each of the three most recent taxation years;

(b) a copy of every notice of assessment and reassessment issued to the parent for each of the three most recent taxation years;

(c) if the parent is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the parent's employer setting out that information including the parent's rate of annual salary or remuneration;

(d) if the parent is self-employed, for the three most recent taxation years,

...

[12] Section 17 of the *Yukon Child Support Guidelines* must also be read in conjunction with s. 22(1)(c) as follows:

22.(1) If a parent fails to comply with an order issued on the basis of an application under paragraph 20(b), the court may,

...

(c) proceed to a hearing, in the course of which it may draw an inference adverse to the parent and impute to that parent income in such amount as it considers appropriate.

[13] In the case at bar, neither parent provided the income information required in s. 34 of the *Family Property and Support Act*.

[14] Gower J. in *Waldron v. Dumas*, 2004 YKSC 50, set out, at para. 10, what is appropriate in the circumstances, i.e. reasonable by paraphrasing *Donovan v. Donovan*, 2000 MBCA 80, at para. 21, and *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (B.C.S.C.), at para. 14:

1. There is a duty to seek employment where a parent is healthy and there is no reason why the parent cannot work.
2. The court must consider what is reasonable in the circumstances. The factors to be considered include the availability of work as well as the parent's:

- age
 - education
 - experience
 - skills
 - health
 - freedom to locate
 - other obligations
3. A parent's limited work experience and job skills do not justify failing to pursue employment which does not require significant skills, or alternatively, employment where the necessary skills can be learned on the job. This may mean that the parent will have to take employment at the lower end of the wage scale or employment which is not in the parent's desired area.
 4. A court may impute income to a parent who persists in obtaining employment which produces little or no income [presumably subject to item 3 above].
 5. A parent who pursues unrealistic or unproductive career aspirations will not be excused from their child support obligations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[15] Needless to say, this application did not provide the evidence to consider when the court exercises its discretion to impute income as well as the failure to file a financial statement or the minimum information required in s. 19(1) of the *Yukon Child Support Guidelines*.

[16] Family law counsel should also be aware of Justice Gower's decision in *M.A.B. v. H.I.L.*, 2010 YKSC 8. In that case, a father failed to have income imputed to the mother for reasons set out in para.32:

[32] To summarize on the issue of imputation of income, while I acknowledge that the father's counsel has made a few good points, taking all of the circumstances into account,

including the sexual assault in November 2005 and the birth of the mother's second child on March 9, 2009, the mother has satisfied me that her underemployment was required by her reasonable educational needs. I acknowledge that, with some greater effort, she could perhaps have completed the program sooner than she has, or alternatively, that she could have earned more than she has over the past few years. However, the standard is reasonableness, not perfection, and I conclude that any lack of diligence in that regard by the mother is insufficient to require that I impute income to her under s. 17(1)(a) of the *Yukon Child Support Guidelines*.

CONCLUSION

[17] I conclude that simply providing the Court with statistical information on average earnings from the jurisdiction where the parent resides does not meet the onus to establish the appropriateness or reasonableness of an order imputing income to a parent who fails to appear or file a response.

VEALE C.J.