

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Hall v. Hall*, 2005 YKSC 38

Date: 20050620
Docket No.: S.C. No. 95-D2720
Registry: Whitehorse

Between:

CATHY EVELYN HALL

Petitioner

And

ADRIAN THOMAS HALL

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Cathy Hall
Elaine Cairns

On her own behalf
For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Mr. Hall for a variation of a child support order. There is one child of the marriage, now 11 years old.

[2] Mr. and Mrs. Hall were divorced on July 8, 1996 and Mr. Hall was ordered to pay \$325.00 per month for child support.

[3] The arrears of child support stand at \$5,869.01 as of March 16, 2005.

[4] There is a change of circumstances under section 14(c) of the Federal Child Support Guidelines since the child support order was made prior to the coming into force

of the Guidelines on May 1, 1997. Under the Guidelines, taxable income of \$37,600 would result in a child support payment of \$325 per month.

[5] The issues for determination are the income that should be imputed to Mr. Hall for 2003, 2004 and 2005. This will determine the appropriate arrears and the ongoing child support.

BACKGROUND

[6] The parties were married on December 14, 1991. Their child was born on February 18, 1994 and they divorced on July 8, 1996. The corollary relief order required Mr. Hall to pay child support in the amount of \$325 per month. Mr. Hall is also obliged to pay child support for another child born October 1987 from another relationship in the amount of \$200 per month.

[7] Mr. Hall has not had a great difficulty in making these payments to 2003, although not always voluntarily. Prior to the divorce, he was employed as a permanent seasonal firefighter. He earned \$50,283 in 1993 and \$42,287 in 1994. However, in 1994, he left his job to be trained and work as a sheet metal worker so that he could be employed all year around and presumably earn a greater income.

[8] It has not worked out that way. He has averaged \$20,000 to \$22,000 for the years 1995 to 1999.

[9] In 1999, he injured his elbow while working as a sheet metal apprentice. He has been receiving benefits from November 5, 1999 to July 17, 2003, when his vocational retraining was completed. In total, he has received \$114,434.89 from the Yukon Workers' Compensation Health and Safety Board. This is a benefit that is not taxed. On an annual basis, this benefit amounts to \$32,695.67.

[10] Mr. Hall is seeking a reduction in his arrears for 2003, 2004 and 2005. There is no evidence that he was unable to work and no medical evidence that he cannot work as a sheet metal worker.

[11] In 2003, he retrained as a marine deck officer and has been unable to obtain any employment whatsoever in this field. His work has been sporadic since then.

Fortunately, he has returned to his sheet metal employment. He now earns the equivalent of \$39,180 based on full time employment at a wage rate of \$19.59 per hour, resulting in a child support payment of \$337 per month. He testified that this is a temporary position as a sheet metal apprentice.

[12] Mr. Hall's income information is incomplete. He has not filed tax returns for the 2003 and 2004 years.

[13] He initially stated that his 2002 income was approximately \$15,400. He subsequently corrected that when he filed his income tax return and declared a total income of \$29,587.80, all non-taxable from workers' compensation. He then reported additional income of \$2,300 from Princess Cruises in 2002.

[14] In his initial affidavit, he reported his 2003 income at approximately \$19,782. He then stated that \$17,354.75 was a tax free benefit from workers' compensation. He also provided a T4 from G.P. Distributing Inc. for 2003 in the amount of \$2,428.14. He also received social assistance in the amount of \$3,795. Therefore, his total earnings for 2003 are \$23,577.89, as opposed to the \$19,782 he initially declared.

[15] His 2004 reported income is \$6,851.55 plus social assistance in the amount of \$2,648 and an additional \$1,000 for a total of \$10,499.55. His attempts to actively seek employment are hotly contested by Mrs. Hall, particularly relating to a failed attempt to

use his scuba diving training to work for his brother. Mr. Hall states that it didn't work out because of a BC Ferry Corporation strike that affected his brother's business. As a result, he stayed in BC to look for work as a marine deck officer, a dubious proposition given his failure to obtain employment in this field in 2003.

[16] In my view, Mr. Hall has clearly been under-employed for a man with skills as a forest firefighter, marine deck officer, sheet metal worker and scuba diving trainee. He has stated that his doctor advised him not to work as a sheet metal worker but he has not provided any medical evidence to support that statement.

IMPUTATION OF INCOME AND CALCULATION OF ARREARS

[17] The Federal Child Support Guidelines permit income to be imputed to a spouse in the following circumstances:

1. Where the spouse is intentionally under-employed or unemployed pursuant to section 19(1)(a);
2. Where the spouse is exempt from paying federal or provincial income tax pursuant to section 19(1)(b);
3. Where the spouse has failed to provide income information when under a legal obligation to do so, pursuant to section 19(1)(f); and
4. The court may draw an adverse inference against a spouse who fails to provide income information on an application pursuant to section 23.

[18] In my view all of the above apply to the circumstances of Mr. Hall. He brings an application for a variation without filing personal income tax returns for the key years 2003 and 2004 in circumstances where his documentation of income earned is inadequate.

[19] In addition, I am satisfied that he has been intentionally under-employed. He has three occupations that provide access to jobs and income as his recent employment as a sheet metal worker indicates.

[20] For the year 2003, he had significant tax free benefits from workers' compensation and I impute his income to be \$25,000. This results in a child support payment of \$222 per month. I calculate Mr. Hall's reduction in arrears for 2003 at \$3,900 (12 x 325) minus \$2,664 (12 x 222) for the sum of \$1,236.

[21] For the year 2004, Mr. Hall reported earnings below the threshold level for payment on child support. Nevertheless, he is an individual capable of obtaining employment and I impute an income of \$25,000 for 2004. This results in a reduction of arrears in child support payment of \$1,236 for 2004.

[22] For 2005, I impute an income of \$39,180 which results in a child support payment of \$337 per month commencing March 1, 2005, when he obtained employment at this amount of annual income. His arrears for January and February should be calculated at \$650 (2 x 325) minus \$444 (2 x 222) for the sum of \$206.

[23] Although in *Ford v. Hombert*, 2004 YKSC 21, I suggested that a residual discretion remained (based on *Earle v. Earle*, [1999] B.C.J. No. 383 (B.C.S.C.)) to order the payment of arrears if the change of circumstances was not significant and long lasting. However, that discretion only exists at the stage of determining whether there has been a change of circumstances requiring a variation. That change of circumstances exists in this case and the only task is to apply the Guidelines to determine what arrears remain outstanding. See *Shankland v. Harper*, 1995 BCCA 0045 at paragraph 20.

[24] I find that Mr. Hall is entitled to a reduction of arrears as follows:

2003	\$1,236
2004	\$1,236
2005	<u>\$206</u>
	\$2,678

[25] His outstanding arrears of \$5,869.01 should be reduced by \$2,678, leaving an outstanding balance of \$3,191.01. Any arrears accumulating since March 15, 2005 should be added to this sum.

[26] His new monthly child support payments are \$337 per month and the arrears of \$3,191.01 should be paid at the rate of \$100 a month commencing July 1, 2005 until paid.

[27] Costs may be spoken to if necessary.

VEALE J.