IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *J.R.T.* v. *L.A.B.,* 2004 YKSC 66

Date: 20041012
Docket No.: S.C. No. 97-D2906
Registry: Whitehorse

Between:

J.R.T.

Petitioner

And

L.A.B.

Respondent

Publication of the name of a child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act.*

Before: Mr. Justice R.S. Veale

Appearances:
Shayne Fairman — Counsel For the Petitioner
Kathleen M. Kinchen — Counsel For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ms. B. (the mother) has applied for a variation of a child support order dated August 20, 1998. However, the August 20, 1998 order was recently reviewed on the issue of child support. This application raises issues of *res judicata*, delay, agreement to waive child support and retroactivity.

FACTS

[2] The mother and Mr. T. (the father) were married on October 15, 1988, and they separated in October 1996. A child was born on August 11, 1989, and he is now fifteen years old.

[3] An interim order was filed on October 21, 1997, granting interim joint custody of the child to the father and the mother with the primary residence with the father. The mother was ordered to continue paying child support in the amount of $300.00 per month. The mother was $900.00 in arrears and that was to be deducted from her share of the sale of the matrimonial home.

[4] A divorce judgment was granted on August 20, 1998. A corollary relief order filed on that date continued the joint custody of the child with primary residence with the father. The arrears of child support, which had increased to $2,700.00, were cancelled and it was agreed that the mother would pay no child support until September 21, 1999, in exchange for the transfer of the family home to the father. The issue of the child support to be paid by the mother was to be reviewed on September 21, 1999.

[5] This Court did not review the child support in September 1999 as the father and the mother reached a verbal agreement, the terms of which are disputed. It is not disputed that the parents agreed to share custody of the child from September 1999 to September 2002.

[6] The father said it was agreed that neither parent would pay support to each other during this period as the mother was adamant that she not pay any further child support to the father.

[7] The mother states that there was no agreement to forgo child support. She now claims child support from January 1, 2001 to December 31, 2001 and for August 2002. During the September 1999 to September 2002 period, the mother established another relationship. There is a daughter from this relationship and the mother remained at home to look after her. In her affidavit filed March 12, 2001, she stated that “Due to my continuing care for [my daughter], I do not anticipate returning to full-time employment in the near future”.

[8] In her affidavit filed June 1, 2004, however, she stated that “Commencing January 2001, I began actively seeking employment”.

[9] The mother did not earn an income between January 1, 2001 and December 31, 2001. However, she started a childcare business from her home in November 2001 and was able to earn an income as of January 2002.

[10] I am unable to make a finding of fact on the conflicting affidavits of the parties as to whether there was an agreement to not pay child support during the period of shared custody. That appears to be unnecessary, as I will discuss later.

[11] On March 12, 2001, the mother filed an application to vary the corollary relief order of August 20, 1998. In that application, she sought shared custody of the child alternating on a weekly basis and child support commencing January 1, 2001.

[12] On March 20, 2001, the father filed an application to vary the August 20, 1998 corollary relief order. The father sought sole custody of the child and child support.

[13] Both applications were heard on May 20, 2001. The Court ordered that the matter be placed on the trial list and recommended a custody and access report.

[14] There were no further proceedings until the custody and access report was filed on June 19, 2001. The parties then commenced negotiations based upon the custody and access report but no agreement was reached until July 2002.

[15] It appears that in July 2002, the parties reached a less than amicable agreement whereby the mother's home became the primary residence for the child and the father became the access parent. The father subsequently moved to British Columbia in October 2002.

[16] The dispute did not return to court until May 2003 when the father brought an application to vary the August 20, 1998 order. He applied for a joint custody order without primary residence designation, specified generous access and child support after a determination of the residential and access arrangements for the child.

[17] On May 27, 2003, I ordered joint custody of the child, no primary residence designation, specified access and child support of $385.00 per month commencing April 1, 2003, payable by the father. It appears that the father has paid child support since September 2002 just before he left for British Columbia. The father also pays the costs of access from British Columbia. I note that the cross-applications of March 2001 were referred to in submissions made on May 27, 2003, but no specific claim was put forward by either parent relating to the March 2001 applications.

[18] This brings us to the present application of the mother to vary the August 20, 1998 order to obtain child support from January 1, 2001 to December 31, 2001 and for August 2002.

[19] Counsel for the mother states that in May 2003 she and the mother decided not "to muddy the waters" with the child support claim from March 2001. Counsel for the

mother takes responsibility for the delay between May 2003 and September 4, 2004, when this application was heard.

[20] I find that the mother was staying at home with her child as a matter of choice. In 2000, she earned $5,782.00 from employment insurance benefits. In 2001, she earned approximately $4,284.00 in gross business income which resulted in no income after deduction of expenses. In 2002, she earned $9,761 from her childcare business.

[21] I also find that the father did earn a higher than usual income in 2001 through a contract in Inuvik. He normally earned in the range of $44,000.00 but he jumped to $65,803.00 in 2001.

[22] The father's income in 2000 was $36,641.00 and in 2002 it was $44,947.00. His average income for the years 2000, 2001 and 2002 was $49,130.00.

[23] The father states that he and his current spouse were involved in a serious motor vehicle accident in March 2002. He has been the primary income earner until April 2003 when his wife returned to work on a full time basis. He pays all the costs of transportation for access of one week each Christmas, spring break every year and five weeks each summer. That is a significant financial burden.

ISSUES

[24] There are two issues to consider:

Issue 1: Are there any legal principles that should be applied to prevent this child support claim from proceeding?

Issue 2: Should there be a child support order on the merits for the father to pay the mother for 2001 and August 2002?

THE LAW

[25] There is a long-standing principle of law called *res judicata.* Simply put for this context, it means that no party is entitled to raise an issue that should have been raised in previous litigation. The purpose of the principle is both to ensure that there is an end to litigation and that a party is not subjected to litigation on the same issue more than once.

[26] There is also a principle of law that a party may lose a right by not pursuing it diligently through neglect or delay.

[27] However, it is clear that in the modern law of child support the right to child support is the right of the child, not the parent. Thus, the child's right cannot be waived, bargained away or lost by neglect. The Court is always free to intervene to determine the appropriate level of support for a child. See *Richardson* v. *Richardson,* [1987] 1 S.C.R. 857 at 869 – 70 and *S.(L.)* v. *P.(E.)* (1999), 175 D.L.R. (4th) 423 at para. 58 (B.C.C.A.).

[28] The father's counsel has raised the issue of retroactivity. An order will be considered retroactive when the commencement of the child support pre-dates the filing of the application or giving notice of the claim. The *Divorce Act,* R.S.C. 1985, c.3 (2nd Supp.), permits retroactive child support orders. See *Darlington* v. *Darlington* (1997), 32 R.F.L. (4th) 406 (B.C.C.A.).

[29] Section 9 of the federal Child Support Guidelines provides for factors to be considered where the parents have shared custody of a child, which prevailed in 2001 and most of 2002. It 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.

DISCUSSION:

Issue 1: Are there any legal principles that should be applied to prevent this child support claim from proceeding?

[30] Counsel for the father submits this claim for child support is a new claim that should have been raised at the application of the father in May 2003. This would have the advantage of considering the claims all in one hearing and giving the father some certainty.

[31] Counsel for the mother responds that notification was given in her application of March 12, 2001, and that the mother never abandoned her claim. She submits that custodial matters were more pressing and the mother had every intention to pursue child support.

[32] In submissions before me, neither counsel referred to the fact that the issue had already been ordered to the trial list on May 20, 2001. Neither counsel requested that the matter go to trial now. It is my impression that counsel were implicitly consenting to have the child support issue proceed by a variation application on affidavits rather than a full trial.

[33] I am of the view that there is no legal principle preventing this child support application from being heard. It is the claim of the child and although there has been delay in bringing it forward, it should not be visited on the child. Further, the father had notice of the claim during the relevant period. On account of that notice, it cannot be considered to be a retroactive claim. The order of May 20, 2001, putting the child support claim on the trial list, effectively kept the matter alive. Arguably, the father may have assumed the issue was not going to proceed. However, the law is clear that the principles of *res judicata*, delay and waiver do not apply to child support claims. Thus, even a finding that the mother agreed not to claim child support for the period in question (which finding I have not made) would not prevent the claim from being considered.

Issue 2: Should there be a child support order on the merits for the father to pay the mother for 2001 and August 2002?

[34] I have found that the mother chose not to earn income in 2001 and accordingly it is appropriate to impute some income to her for 2001. I am going to impute an income of $9,000.00 which would result in an average income of $8,181.30 for the years 2000, 2001 and 2002.

[35] The father, on the other hand, had an income that varied considerably but averaged $49,130.00.

[36] In my view, section 9(c) of the Child Support Guidelines should apply as the father and the mother were sharing the custody of their son on a relatively equal basis in 2001. Applying their respective incomes to the basic table amount, the mother would not pay any child support to the father. The father would pay $420.00 per month to the

mother. However, I have found that the costs of access paid by the father are a significant burden. It would be unfortunate for a child support order at this late date to result in decreased access between the father and his teenage son.

[37] It would also have been reasonable for the father to assume that the issue of child support was concluded in May 2003. Although the obligation to pay child support always remains to be determined on the merits, the circumstances of the father, at this late date, are not as advantageous as they were in 2001.

[38] In my view, considering the means, needs and other circumstances of each spouse and of the child, I order the father to pay child support to the mother for the period of January to December 2001 in the amount of $200.00 per month for a total payment of $2,400.00. This child support shall be paid commencing January 1, 2005, in the amount of $100.00 each month until the full amount of $2,400.00 has been paid.

[39] There shall be no costs order.

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VEALE J.