

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *L.M.M.V. v. K.L.B.*, 2005 YKSC 01

Date: 20041203
Docket: S.C. No. 03-B0010
Registry: Whitehorse

Between:

L.M.M.V.

PLAINTIFF

And:

K.L.B.

DEFENDANT

Publication of the name of the 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:
Emily R. Hill
Peter Morawsky

For the Plaintiff
For the Defendant

REASONS FOR JUDGMENT

[1] VEALE J. (Oral): I am going to give my judgment orally. I am going to grant the application for retroactive child support in the amount of \$4,823 which is based on a child support monthly amount of \$371 for the period of September 2002 until May 2003 and from February 2004 until May 2004.

[2] The background to this matter is that the parents lived in a common-law relationship between May 1999 and September 2002. They had one child of the relationship.

[3] They separated in September 2002. I note that there was a considerable amount of spousal violence resulting in three charges being laid against the father.

[4] Count #1 dealt with committing an assault and threatening to use a weapon to wit a paring knife on our about July 2000; Count #2, on or between December 1, 2002, and December 30, 2002, the father committed an assault on the mother; and Count #3, on or between July 1, 2002, and October 30, 2002, the father knowingly uttered a threat to cause bodily harm to the mother.

[5] Those matters were all dealt with in the Territorial Court on October 16, 2003, and the father was convicted on all three charges. I take notice of the fact that there was a considerable amount of violence and abuse to the mother arising out of those three counts.

[6] The three counts were not laid until May 2003 and at that time, I understand that the father was under conditions not to have any contact with the mother.

[7] On his conviction, he was given time served and sentenced to 24 months probation with a number of conditions which I understand are outstanding today.

[8] This matter was first brought to court when the writ was filed in May, 2003, and there was a without notice order from this Court at that time giving the mother the sole custody of the child, as well as exclusive possession to the city and country property owned by the parties with additional restraining order terms that were necessary.

[9] The father then applied to the court in May 2004 and was granted an order that allowed him to reside at the country property. During that hearing, Mr. Justice Gower heard evidence about the income of the father, and with the consent of the father and the mother, he made an interim child support order for the child in the amount of \$371, commencing June 1, 2004.

[10] Additionally, he ordered interim spousal support in the amount of \$369.92, also commencing on June 1, 2004, and I understand that was to deal with mortgage payments and taxes.

[11] I should indicate that Mr. Justice Gower indicated the parties agreed to the terms of that order on the understanding that either party was free to return with further affidavit material to vary those amounts. That is essentially what has occurred in that the mother, on August 5, 2004, filed this Notice of Motion for the retroactive child support order.

[12] I should indicate that during the hearing before Mr. Justice Gower, both parties were self-represented. On this application, fortunately, both parties have counsel.

[13] There were a number of adjournments from the Notice of Motion filed August 5, 2004. It was originally scheduled to be heard on September 7, 2004. That was adjourned to October 5, 2004, and it was adjourned again, and these were all by consent, to November 16, 2004. They were adjourned because the parties, through their counsel, were making efforts to settle a number of other outstanding property issues in addition to the child support application before the Court.

[14] However, on November 16, 2004, it appeared that settlement discussions were not bearing any fruit and Ms. Hill advised Mr. Morawsky that she would be proceeding with the matter on today's date, December 3, 2004.

[15] With respect to the factors that apply when one is considering retroactive child support, I am going to follow the factors set out in the case of *S. L. v. E. P.*, 1999 BCCA 393, which was adopted in this Court in the case of *D.I. v. S.D.*, 2003 YKSC 33. I am going to deal briefly with some of the factors that come into consideration in favour of an order for retroactive child support.

[16] The first one is the need of the child and the corresponding ability to pay on the part of the non-custodial parent. It appears in this case that the child was in great need, given the separation of the parties, and the financial obligations that they had entered into with respect to the two properties.

[17] The non-custodial parent, in this case, the father, certainly had an ability to pay in that he receives, I understand, \$3,000 per month from the Workers' Compensation office in Whitehorse.

[18] The second factor to consider is whether or not there has been some blameworthy conduct on the part of the non-custodial parent. In this case, it is clear that there has been no financial disclosure given by the father since this action was commenced in May 2003. If my understanding is correct, I believe also that he has not made any voluntary payments of child support and those payments have had to be garnisheed from the Workers' Compensation office.

[19] The third factor is the necessity on the part of the custodial parent to encroach on capital. It appears from the affidavit of the mother that she has suffered considerably financially and she has taken the responsibility of ensuring that the mortgages are maintained on the two properties. To do so, as well as supporting her child, she has gone into a significant amount of debt on a monthly basis and continues to do so.

[20] The fourth factor is, whether there is an excuse for the delay in bringing the application. In this case, the delay, as I understand it, is that the separation took place in September 2002 and there was no notice given until May 2003. But I consider that the significant disruption to this family as a result of the assaults perpetrated by the father offers a valid excuse in the circumstances for there being the delay which, quite frankly, I do not consider to be very significant in any event.

[21] The fifth factor, is notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end. In this case there have been – well, there was certainly notice in August 2004 that the application for retroactive child support would be pursued. There have been negotiations to deal with that, that have been broader than that issue, but nevertheless they have failed and there has been considerable opportunity for the father to file material or indeed negotiate a settlement to this matter.

[22] This is an application that is always dealt with in terms of the best interests of the child and I have no doubt that the best interests of the child in this case dictate that retroactive child support should be paid.

[23] I understand that during submissions of counsel there was some issue with respect to the father not receiving financial payments from the Workers' Compensation

office during incarceration and at any time that he is not present in the territory. I simply raise that for counsel as a matter that might be pursued to assist the mother and the child in the circumstances.

[24] Are you seeking costs, Ms. Hill?

[25] MR. MORAWSKY: My Lord, if I might --

[26] THE COURT: Is the answer to that "yes" or "no"?

[27] MS. HILL: No.

[28] MR. MORAWSKY: My Lord, if I might speak to one issue that you expressed some uncertainty about in your decision and that is the issue of no voluntary payments. I would just like to note for the Court that once a support order is filed with Maintenance Enforcement for enforcement by either of the creditor or the debtor that they normally proceed to act. I would also ask Your Lordship to note that Justice Gower's order specifically indicates that it would be filed with the expectation that the director would enforce any default or arrears.

[29] THE COURT: I am sorry. I am not quite clear why you are raising these issues.

[30] MR. MORAWSKY: My Lord, I gathered that you took it of some import that the father did not make any voluntary payments.

[31] THE COURT: I did.

[32] MR. MORAWSKY: And on the issue of payment, I would ask that Your Lordship consider making some sort of monthly payment award.

[33] THE COURT: For the retroactive child support?

[34] MR. MORAWKSY: For the retroactive, yes. I would suggest something on the order of \$100 or \$150 a month.

[35] THE COURT: Thank you. What do you have to say, Ms. Hill, with respect to that? I did not specifically make that order, I guess on the understanding that it might come out of the sale of the property somewhere down the road.

[36] MS. HILL: It seems to me that in reality that there is a lot of it that comes through enforcement through garnishment and because, as my friend pointed out, that just because something is registered with Maintenance Enforcement does not mean that you can't make voluntary payments. You can go in and pay them, it does not need to be garnished or that it would come out of sale of the properties down the road. So I don't take great issue with my friend's proposal but I do not know that it is necessary. I think if the order is for that amount presumably the mother will register it with Maintenance Enforcement and they will take off as much as they are allowed to take off which is a reasonable amount under the legislation. And then down the road if the father wants to pay it all off or there is a sale of the property then the entire amount can be paid off at once.

[37] THE COURT: Thank you. Mr. Morawsky on behalf of the father has asked that the retroactive child support order be ordered to be paid on a monthly basis. I have heard both counsel on that subject but I do not feel that I have enough information about the necessity of making that into a monthly payment order and counsel can come back again if it is appropriate in the circumstances to do so.

[38] There will be no order for costs.

VEALE J.