

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Pauch v. Pauch*, 2005 YKSC 8

Date: 20050203
Docket No.: S.C. No. 98-D3038
Registry: Whitehorse

Between:

DEBRA LYNN PAUCH

Petitioner

And

JOHN FRANCIS PAUCH

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Debbie P. Hoffman
Kathleen M. Kinchen
Lana Wickstrom

For the Petitioner
For the Respondent
For the Director of Maintenance Enforcement

REASONS FOR JUDGMENT

INTRODUCTION

[1] The respondent father has made a variation application to reduce his child support for two children aged 17 and 14 years. The application is based on the father's back surgery that took place on November 20, 2003. The father seeks a reduction in child support since December 2003 and rescission of arrears accruing since that date. The mother submits that no reduction should be made based on the past income of the father.

ISSUES

[2] There are two issues to consider:

1. Should the father's child support be calculated on his recent disability income or having regard to his last three years of income pursuant to section 17 of the Guidelines?
2. What is the effect of a previous order of the Territorial Court on November 22, 2000, ordering that there will be five days imprisonment for each non-payment of arrears?

BACKGROUND

[3] The father and mother were married in 1988. They separated in March 1997.

They have two children now aged 17 and 14 years.

[4] At the time of separation, the father was a self-employed truck driver who earned approximately \$60,000 a year. The mother was a partner in a retail business. Her income was not stated at the time of separation. Based upon subsequent years, it was probably below \$30,000 a year.

[5] The father and mother entered into a separation agreement dated March 15, 1997, with a parenting agreement attached. It was agreed that both children would reside with the mother.

[6] The following terms were set out in the separation agreement:

1. the father agreed to pay the mother \$600 per month for the two children commencing August 15, 1997;
2. the child support was to be reviewed on a bi-annual basis as the needs of the children and parental income changed;

3. the parents agreed to share extraordinary expenses defined as dental care, school activities, kids' activities, clothing and related expenses on a 50-50 basis.
4. if the father remained in the family home, the mother was to be paid \$55,000 representing her equity in the home.

[7] After separation, the father remained in the family home and the mother purchased a condominium with her equity.

[8] The mother filed a petition for divorce on June 30, 1998, in this Court, but until the present variation application, the divorce file was dormant. All the enforcement proceedings took place in the Territorial Court under the *Maintenance Enforcement Act*, R.S.Y. 1986, c. 108.

[9] The father made child support payments until he sold his trucking business in 1998.

[10] The Director of Maintenance Enforcement began proceedings to collect child support. On June 26, 2000, the Territorial Court fixed arrears of child support at \$12,550 as of May 30, 2000. The Territorial Court also ordered that the child support payable by the father be reduced to \$300 per month as the eldest child was living with the father. However, the eldest child returned to live with the mother in October 2000. It was unfortunate that the father's obligation was reduced in the manner it was, as the father took advantage of the situation and refused to pay more than \$300.00 per month even after the eldest child returned to live with the mother. In retrospect, the father's obligation should have been kept at \$600 per month until all the arrears were paid.

[11] The Director of Maintenance Enforcement brought proceedings again. The Territorial Court fixed arrears of child support at \$12,394.21 as of November 1, 2000. It reinstated the obligation of the father to pay \$600 per month to the mother. It relieved the father from the bi-annual review and the obligation to pay one half of the extraordinary expenses. It is significant that Barnett T.C.J. found as a fact that the father had made a very determined effort to cheat his creditors and his wife.

[12] Judge Barnett also ordered that the father pay \$200 per month towards arrears commencing May 2001 and on the 25th day of each month thereafter. He also made the order that the father serve five days of imprisonment for each payment of arrears not made by the due date. I will discuss the imprisonment order below.

[13] The father paid only \$134.50 towards child support between Judge Barnett's order dated November 22, 2000, and July 20, 2001. The arrears grew to \$16,759.71 by July 20, 2001. At that time, the father sold the family home and a Maintenance Enforcement lien produced the sum of \$15,387.75 for the mother, leaving a balance of arrears outstanding in the amount of \$1,371.96.

[14] The father made no child support payments until May 31, 2002, when a federal income tax garnishment produced \$5,137.29 which reduced his outstanding arrears to \$2,834.67.

[15] After the father sold the family home in the Yukon, he moved to Alberta. Arrears of child support continued to increase until he was located in Alberta. Arrears were paid up on July 19, 2002, but they have been ongoing in the amount of several hundred dollars on a monthly basis as Alberta Maintenance Enforcement collects by enforcement.

[16] However, since the father had a back operation in November 2003, the arrears have once again grown to the point where they are \$7,115 as of December 14, 2004.

THE VARIATION APPLICATION

[17] The father filed a variation application on July 15, 2004, supported by an affidavit with minimal disclosure. The father apparently injured his lower back in July 2003 resulting in back surgery on November 20, 2003.

[18] His application, which was first heard on November 18, 2004, provided only a copy of his inpatient form indicating a diagnosis of degenerative disc disease. His income for 2003 was \$72,979. His affidavit stated that he began to receive short term disability benefits from November 20, 2003 until they ceased at the end of May 2004. He was unable to obtain workers' compensation and as of July 14, 2004, he had not received any long-term disability payments or any income at all since May 20, 2004.

[19] His affidavit provided no medical evidence to support his statement that he was disabled. Since his operation in November 2003, he has paid only \$260 of child support.

[20] I adjourned the application to give the father an opportunity to provide medical evidence supporting his disability claim, evidence of his disability income and his income for 2001, 2002 and 2003.

[21] The father filed a further affidavit for the December 15, 2004 continuation of his application. He indicated the following earnings history:

2001	42,014
2002	68,704.60
2003	72,979.22

[22] He also provided a letter from his union dated November 4, 2004, confirming that he received short term disability benefits of \$413 per week or \$59 per day from

November 21, 2003 to May 20, 2004. This letter also advised that he was on long-term disability benefits on May 21, 2004 and was in receipt of same, contrary to his sworn affidavit of July 14, 2004.

[23] He produced a letter dated August 5, 2004, that he received from the Maritime Life Assurance Company indicating that a cheque, which would have been in excess of \$5,000, was enclosed in the letter.

[24] However, he denied that he received the disability cheque but he acknowledged that the insurance company has been depositing monthly payments of \$1,919.30 into his bank account. This disability payment will continue to May 21, 2006, if his disability prevents him from working at his own occupation.

[25] Contrary to his Financial Statement filed November 16, 2004, indicating a monthly income of \$1,919.30, his counsel now advises that he is receiving \$2,250 per month. The father's explanation is that the \$1,919.30 was a net figure.

[26] The only independent evidence that the father is disabled is a one page hard-to-read photocopy of the last page of a report from his surgeon dated January 19, 2004. It appears to say that he is not a candidate for trial employment as it is too soon to determine. It also appears to say he will need 24 months recovery.

[27] The father declined to present any medical evidence from his treating doctor in Whitehorse stating that he could not afford the \$400 cost of a report. He did not produce the medical file of the treating doctor which could presumably be obtained for photocopy costs.

[28] I find that the father's actual income for 2004 is \$24,698.35.

Issue 1 Should the father's child support be calculated on his recent disability income or having regard to his last three years of income pursuant to section 17 of the Guidelines?

[29] Counsel for the father seeks to have the Court determine the father's income based upon his disability income commencing December 1, 2003. This would result in child support payments of \$308 from December 1, 2003, to May 21, 2004, and \$407 in child support payments from May 21, 2004 onwards. Thus, by this calculation of the father's income, a portion of the \$7,115 owing as of December 14, 2004, would be rescinded.

[30] Counsel for the mother submits that the Court should proceed to recalculate the child support for 2002, 2003 and 2004 based on the actual income earned by the father or, alternatively, determine his annual income based upon the average of the three years. The former calculation results in child support payments as high as \$977 per month and the latter based on the three year average of \$55,460.72 would result in a child support payment of \$768 per month. Counsel for the mother also submits that the Court should exercise its discretion to impute income to the father and increase the monthly child support accordingly.

[31] The Federal Child Support Guidelines provides the following objective, among others:

Objectives

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;

...

[32] The Guidelines also provide that fairness is a consideration in determining a spouse's annual income:

Calculation of annual income

16. Subject to sections 17 and 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General from issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.

Pattern of income

17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[33] I am also guided by section 17(4) of the *Divorce Act* which states as follows:

Factors for child support order

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[34] In my view, the fairness principle established in the Guidelines applies in these circumstances. The father has earned past incomes that would require child support payments as high as \$977 per month according to the Guidelines. It would be manifestly unfair to permit the father to continue to pay the court ordered amount of \$600.00 (which corresponds to a Guideline income of \$30,600) but as soon as his income declines below \$30,600.00, permit him to pay a lower Guideline child support amount. A parent is

not entitled to ignore the Guidelines when they do not suit him, but seek to apply them when they are in his favour.

[35] A fair and reasonable determination of the annual income of the father should be based upon an average of his 2002, 2003 and 2004 income. That average is \$55,460.72 and the corresponding child support payable is \$768 per month. Paying this increased amount would be somewhat unfair for the father under his disability income, although not wholly undeserved given his lack of voluntary payment of the bulk of his child support obligation. In all the circumstances, it is appropriate and fair to order that his child support obligation continues at \$600 per month. This is based upon a Guideline income of \$30,600 which is somewhat higher than his disability payments but fair in terms of his past three years of higher income.

[36] The result of this decision is that the father has an ongoing monthly child support obligation in the amount of \$600.00 with arrears of \$7,115.00 as of December 14, 2004.

[37] I am also ordering the father to put the children on his health care plan which will reduce the cost of prescription drugs, dental and optical expenses.

[38] I order the father to provide the Director of Maintenance Enforcement and the mother with a copy of his Notices of Assessment for 2002 and 2003.

[39] I further order the father to provide the Director of Maintenance Enforcement and the mother a copy of his income tax return and Notice of Assessment for all future years by June 30 of the following year. This means, for example, that he must provide these documents by June 30, 2005, for the taxation year 2004.

[40] I also order that the father pay special costs to the mother for this application in the amount of the actual legal fees and disbursements incurred by her. The mother has

had substantial success in this application and she should not be required to suffer any financial loss as a result of the father's application.

[41] Given the history of the father's conduct towards his child support obligation, I order that he is required to pay into court \$1,500.00 as security for the mother's costs prior to bringing a further application.

Issue 2 What is the effect of a previous order of the Territorial Court on November 22, 2000, ordering that there will be five days imprisonment for each non-payment of arrears?

[42] Counsel for the Director of Maintenance Enforcement submitted that the father should be imprisoned pursuant to Judge Barnett's Order. While I do not say that such an application cannot be made in the future, I ruled that it was inappropriate to do so at this hearing.

[43] Firstly, the Order was made on November 22, 2000, and the Director of Maintenance Enforcement has not pursued the Order until this hearing on December 15, 2004, some four years later. No notice was given to the father that such an application would be raised.

[44] Secondly, on July 20, 2001, the father paid, albeit by collection proceedings, the sum of \$15,387.75 which would arguably be applied firstly to the past arrears of \$12,394.21.

[45] However, as I indicated to counsel for the Director of Maintenance Enforcement, her application may be renewed upon notice to the father given the lapse of time from Judge Barnett's order of November 22, 2000.