Cardinal v. Cardinal 2006 NWTSC 53 Date: 2006 10 18
Docket: DV 6101-03139

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LAURA CARDINAL

Petitioner

-and-

AMOS CARDINAL

Respondent

MEMORANDUM OF JUDGMENT

[1] The parties were divorced in December 1999 and at that time a Corollary Relief Order was issued a) imputing income of $57,900 to the Respondentfather for purposes of the *Child Support Guidelines*, and b) requiring the Respondent father to pay $827/month as child support for the two children of the marriage. In June 2006 the Respondent father filed a Notice of Motion in these proceedings, seeking retroactive adjustments to the Corollary Relief Order. In August 2006 the Petitioner mother filed her own Notice of Motion, also seeking retroactive adjustments to the CorollaryRelief Order. These two applications were heard together.

[2] The Petitioner mother initiated the original proceedings in 1999 by formally serving on the Respondent father a Petition for Divorce and a Notice to the Respondent. These documents state clearly that the Petitioner mother is seeking, *inter alia*, a Court order requiring the Respondent father to pay child support in accordance with the *Child Support Guidelines*. Further, the documentsstate that if the Respondent father fails to provide certain financial information and documentation to the Court by a certain date, that the Court may impute an income to him. The Respondentfather did not provide the required information or documentation, did not respond to the Divorce Petition, and accordingly was noted in default. The Corollary Relief Order issued, requiring him to pay child support for his two children in the amount of $827/month, commencing January 1, 2000. In one of the Petitioner's affidavits filed on the present

applications, she states that in the six years or more which has passed since the Court issued the Corollary Relief Order, the Respondent has not made any voluntary payments under the Order, i.e. that all payments under the Order have been the result of garnishee proceedings against his pay cheques. In affidavits filed subsequently by the Respondent, he does not refute this statement.

[3] There is evidence before the Court in the form of the Respondent's tax returns indicating that his reported annual income in recent years was as follows:

2002:	$82,622
2003:	$83,449
2004:	$93,593
2005:	$84,742

There is also uncontested evidence before the Court indicating that the Petitioner mother, who has had custody of the two children, has been earning annual income in the range of $25,000 - $26,000.

[4] The older child A.C. turned 19 years of age in April 2004 and ceased attending school upon her graduation in June 2004.

[5] The younger child J.C. turns 19 years of age on November 26, 2006. She is not currently attending school. She works part-time or full-time at a bakery. She lives at home with the Petitioner mother.

[6] The Respondent father has worked in recent years at a mine operated by BHP Billiton. In his affidavit he states that he was fired from this employment in September 2005. He also states his belief that he was fired because of his involvement with the union. He says he has filed a grievance with respect to the termination of his employment. He also says he has been unable to obtain replacement employment since September 2005. He does not provide any particulars of his current efforts to obtain employment.

[7] There is evidence before the Court that, whether through involuntary payroll deductions or otherwise, the Respondent father was generally current in meeting his child support obligations of $827/month under the 1999 Corollary Relief Order in the time period 2000-2005. The payments were made to the Maintenance Enforcement

Office, and then disbursed to the Petitioner mother on a monthly basis. However, the most recent summary from Maintenance Enforcement Office affixed to the affidavit material filed with the Court indicates that the Respondent father has made only a few partial payments, voluntary or non-voluntary, since September 2005, and that the arrears stood at $6829. as at August 2006.

[8] In his Notice of Motion filed June 26, 2006, the Respondent father seeks a variation of the Corollary Relief Order, in particular:

a) providing that his obligation to pay child support for the child A.C. ceased on June 30, 2004;

b) providing that his obligation to pay child support for the child J.C. will cease on her 19th birthday, i.e., November 26, 2006;

c) suspending his obligation to pay child support for the child J.C., effective October 2005, and;

d) also, reducing the child support arrears to $1618., which he calculates having regard to his requests (a) (b) & (c) above, while acknowledging that he ought to have been paying child support at a higher rate in 2002, 2003, 2004 & 2005 because of his actual income in those years.

[9] In her counter motion filed on August 4, 2006, the Petitioner mother seeks the following relief:

a) a retroactive variation of the Corollary Relief Order to reflect the actual income of the Respondent father in the years 2002-2005 and a corresponding adjustment of the child support payable during that time period, and;

b) a finding that the Respondent father is intentionally underemployed or unemployed and an attribution of income to him commensurate with his average income for the past three years.

[10] Both counsel cite the recent decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.* 2006 SCC 37 in their respective submissions to the Court on the "retroactivity" aspect of the within application.

[11] I note that in the Respondent's Notice of Motion and supporting affidavit, both filed June 26, 2006, he expressly acknowledged his obligation to pay child support in accordance with his actual income of $80,000 - $93,000 in recent years prior to his dismissal from employment in September 2005. However, in the brief filed on his behalf on September 21, 2006 in advance of the hearing of his application, he seemsto retreat from that position. It is clear that in his Notice of Motion he was mainly seeking retroactive relief on account of (i) the fact that the older child ceased to be a "child of the marriage" on June 30, 2004 and (ii) the fact that he was fired from his then employment in September 2005. Retroactivity, in my respectful view, cannot be called upon in aid of altering some aspects of a Court order and resisted in other aspects of the same Court Order, in the circumstances of this case. Sauce for the goose, sauce for the gander.

[12] The evidence before the Court indicates that as at June 30, 2004 the Respondent father was current with his court-ordered child support obligations. As it is agreed between the parties that A.C. ceased to be a "child of the marriage" on June 30, 2004, the Corollary Relief Order must be varied retrospectively to that date in order to provide that the Respondent father is required, from that date forward, to pay child support for the younger child only.

[13] In the *D.B.S.* decision the Supreme Court of Canada gave an extensive analysis of the issue of retroactive child support. One statement was to the effect that retroactive child support ought not be ordered for a person who is an adult (i.e., who is over the age of 19 years and not dependent) at the time that the application for retroactive child support is made. In my view this means that, on the present application, the Court cannot order retroactive child support for A.C. See paragraphs 86-90 of *D.B.S.*

[14] On balance, in the circumstances of this case, I find that justice and fairness requires that the effective date for re-calculating the proper amount of child support , retrospectively, ought to be June 30, 2004, i.e., to reflect both the fact that the older child was no longer a child of the marriage and the fact that the payor parent (the

Respondent father) was earning a significantly higher income than that imputedto him in the Corollary Relief Order.

[15] Accordingly, I order that the Respondent father is required to pay child support for the younger child for the last six months of 2004 based on a guideline income of $93,593., and for the year 2005 based on a guideline income of $84,742.

[16] I turn now to the Respondent father's request that his child support obligations be "suspended" on account of the termination of his employment in September 2005, and the Petitioner mother's corresponding request that the Court imputeincome to him pursuant to s.19(1)(a) of the *Child Support Guidelines*.

[17] A parent's legal obligation to support his/her child continues during periods of unemployment, or between jobs. There is an onus on a parent to seek and find replacement employment so as to enable him/her to fulfill his legal and moral obligations to his/her child. The economic consequences of a parent's employment termination should not be visited upon his/her dependant child.

[18] The Respondent father does not provide any details as to where he has been "looking for work" nor the "every employer I could think of" to whom he has made application. There is evidence before the Court that the Respondent father is 39 years of age, in good health, and has much experience in the mining industry. It is implausible that he has been unable to find employment in the NorthwestTerritories in the past twelve months. On this application by the Respondent father to suspend his child support obligations, there is an onus on him to justify his unemployment, and to provide full disclosure to the Court. He has not done so. Accordingly, I impute income to him at his pre-termination level, i.e. $84,742 per annum.

[19] Finally, I turn to the issue of when the Respondent father's obligation to pay child support for the younger child ends.

[20] Any child support order issued pursuant to the *Divorce Act* relates only to a "child of the marriage". The *Act* provides that a child who has attained the age of majority (19) only remains a "child of the marriage" for purposes of a child support order if the child is unable to withdraw from the charge of her parents, or obtain the necessaries of life "by reason of illness, disability or other cause".

[21] The younger child J.C. turns 19 on November 26, 2006. Without other evidence, the Respondent father's obligation to provide child support in accordance with the Corollary Relief Order (as varied herein)ends on November 30, 2006. If the Petitioner mother, or J.C., wishes to assert that J.C. remains a "child of the marriage" beyond November 30, 2006, the onus is on them to make an appropriate application to the Court in that regard.

[22] To conclude, the Corollary Relief Order of December 8, 1999 is varied as follows:

effective July 1, 2004, requiring the Respondent father to pay child support for the younger child only, in particular;

(i) $788/month for the period July 1, 2004 - December31, 2004, based on guideline income of $93,593;

(ii) $719/month for the period January 1, 2005 to April 30, 2006, based on guideline income of $84,742;

(iii) $776/month for the period May 1, 2006 to November 30, 2006, based on guideline income of $84,742 (new guidelines).

[23] As there is divided success, each party shall be responsiblefor their own costs of these applications.

J.E. Richard,
J.S.C.

Heard at Yellowknife, NT
the 17th day October, 2006

Counsel for the Petitioner: Karina Winton
Counsel for the Respondent: Donald Large