Stewart v. *Jones*, 2001 NWTSC 73

Date: 2001 10 17
Docket: CV 06468

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JANET LEE STEWART

Applicant

- and -

MICHAEL GABRIEL JONES

Respondent

MEMORANDUM OF JUDGMENT

[1] By Memorandum of Judgment filed August 13, 2001 in this matter, I made an order for ongoing child support. Having now received the further material counsel asked to file on the issue of retroactive child support, this is my decision on that issue.

[2] The background of this matter is that the child for whom the support is sought was born on July 21, 1994, while the parties were cohabiting. During 1995 and 1996, a number of incidents occurred which led to the parties' separation. Although Mr. Jones disputes some of the allegations made by Ms. Stewart, and although he was acquitted on some of the criminal charges in which she was the complainant, it is clear that in June 1997 he pleaded guilty to charges arising from his having broken into and trashed Ms. Stewart's home, for which he received a total sentence of four years and nine months in gaol.

[3] In July of 1996, prior to the break and enters, the parties entered into a consent order whereby Ms. Stewart was granted interim sole custody of the child and Mr. Jones was to have supervised access. Ms. Stewart did not seek child support at that time.

[4] Mr. Jones was released on full parole in July 1999. He now lives in Alberta but works at a mine in the Northwest Territories. In January 2001 he applied for access to the child, whom he has not seen since August 1996. He had made an attempt through

counsel in 1997 for telephone access during his incarceration but Ms. Stewart would not provide her telephone number or contact him at the gaol and no further steps were taken.

[5] In response to Mr. Jones' application for access, Ms. Stewart filed an application for child support in February 2001. She seeks child support retroactive to April 1998, when Mr. Jones obtained work release. Mr. Jones argues that child support should be retroactive only to the date the application for it was filed.

[6] No issue was raised as to the Court's jurisdiction to make an order retroactive to a date before the application for child support was filed. Indeed, section 60(1)(e) of the *Children's Law Act*, S.N.W.T. 1997, c. 14, provides that a court may make an order requiring that support be paid in respect of any period before the date of the order. As the Alberta Court of Appeal stated in *MacMinn v. MacMinn*, [1995] A.J. No. 893, a parent's financial obligation to a child exists from the time the child is born and continues when the parents separate, irrespective of whether an action has been started by the custodial parent against the non-custodial parent to enforce the obligation.

[7] Despite the parent's obligation, however, an order retroactive to a time predating the application for child support is not to be made automatically. The Court must take into account a number of factors. In *Wishlow v. Bingham*, [2000] A.J. No. 809, the Alberta Court of Appeal said that "although the "norm" is that the maintenance order should be made retroactive to the date of the initial application, a judge may, if there are exceptional circumstances, make the order retroactive to an earlier date". In *Wishlow*, the Court found exceptional circumstances in the blameworthiness of the payor father and the reasonably diligent attempts by the mother to pursue child support. In that case, the father's blameworthiness arose from actions he had taken to try to avoid paying child support commensurate with his income.

[8] The judgment of the Manitoba Court of Appeal in *Andries v. Andries*, [1998] 7 W.W.R. 536 also holds that there need be some exceptional circumstance to justify the making of a retroactive support order, although it accepts as an exception the case where the payor is at fault either by failing to recognize his obvious obligation or by trying to avoid it.

[9] A somewhat broader approach was taken by the British Columbia Court of Appeal in *S.(L.) v. P.(E.)*, [1999] 12 W.W.R. 718, where the Court reviewed a number of factors which should be taken into account in determining this issue. That decision does not suggest that any exceptional circumstances are required, but it does acknowledge that a retroactive order may result in unfairness to the non-custodial parent who will usually

meet his or her child support obligations from income and whose income for the past period for which support is sought will not normally be available at the time of the application. Hence, the Court said that it is not surprising that the "norm" is to restrict retroactivity to the date of the application.

[10] The factors which the Court of Appeal said militate in favour of ordering retroactive maintenance include: (1) need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

[11] The factors which the Court listed as militating against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

[12] In my view, the positions of the Alberta and British Columbia Courts of Appeal as set out in these cases may be reconciled in that both acknowledge that the norm is not to order support retroactive to a date prior to the application, and both say that it is a matter of judicial discretion to be exercised taking into account the various factors and which may be exercised in favour of retroactivity where circumstances justify a departure from the norm.

[13] In this case, Ms. Stewart seeks child support retroactive to April 1998, when Mr. Jones obtained work release, and asks that for purposes of determining the amount of such support, income in the same amount he is now earning be imputed to him. However, the only evidence before me as to Mr. Jones' income for 1998 and 1999 is that contained in his affidavit, where he swears that he filed no income tax returns for those years and earned minimal income: $3000.00 in 1998 and $6000.00 in 1999, both of which are below the minimum at which child support is payable under the applicable *Guidelines*.

[14] There is nothing in the material before me which suggests that Mr. Jones could have earned a greater income after his incarceration or that he had earned any significant income prior to his incarceration. His relatively recent employment with the mine may well be the result of the increased mining work available in the Northwest Territories rather than a reflection of the type of employment he could have obtained in 1998 and 1999. I find the evidence insufficient to support the imputation of income sought and therefore need not decide on the retroactivity issue for 1998 and 1999 as based on his actual income as presented to me, no support would have been payable in any event.

[15] Mr. Jones' income for the year 2000 was $54,539.68 from his employment as a welding technician at the mine. As to the factors set out above, my findings are as follows.

[16] First, there is little evidence before me about need on the part of the child. Although it can be said generally that all children need, and are entitled to, the financial support of their parents, the only specific evidence on this point is that during 2000, Ms. Stewart, who bore the sole responsibility of supporting the child, earned income of $54,368.62. Her daycare costs were $2345.00. It appears from the material that she was also supporting two children from a previous relationship. On the other hand, Mr. Jones' income for that year clearly gave him an ability to pay and there is no evidence that he had any other support obligations.

[17] As to blameworthy conduct, Mr. Jones had the obligation to support his child but did not take any steps to do so. More importantly, by the actions which led to his incarceration, he put Ms. Stewart in a position where she did not want, and feared, any contact with him, as is evidenced by the various restraining orders referred to in the material and the non-contact order which was imposed as a condition of his parole. In my view, and although it is not expressly set out in her affidavit, Ms. Stewart's delay in seeking child support is explained by her wish not to have any contact with Mr. Jones. He argues that there was a non-contact condition in place to protect her and that seeking child support would not have entailed contact between them. Thus, he says, her delay is not adequately explained. In my view, however, a reasonable inference can be drawn that Ms. Stewart knew there would be little point in pursuing child support while he was incarcerated and felt that she was better protected by not seeking anything from Mr. Jones, hoping, no doubt, that he would simply not reappear in her life after his release. Mr. Jones should not be permitted to benefit from the fear he created by his actions. A parent who creates a situation of fear or apprehension in the other parent should not gain an advantage by any resulting hesitancy or delay on the part of that other parent in pursuing support.

[18] In this case, there is no evidence of incomplete or misleading financial disclosure, save for the relatively minor delay by Mr. Jones in making disclosure of his income for 1998 and 1999. There is no evidence that Ms. Stewart had to encroach on capital or incurred debt so as to meet her child rearing expenses. Nor is there any evidence of ongoing negotiations or notice of an intention to pursue support. I find, however, for the reasons set out above, that it was not unreasonable for Ms. Stewart not to pursue support in these particular circumstances and that her delay in doing so is explained.

[19] There is no evidence that making an order for child support retroactive to the beginning of the year 2000 would be unfair to Mr. Jones or place an unreasonable burden on him. His current annual income is $72,720.00. There is no evidence as to his debt situation or to show that he has other support obligations. Finally, this is not a case where the purpose of an award of retroactive child support would be to redistribute capital or award spousal support in the guise of child support. Rather, it would be to reimburse Ms. Stewart for having borne the sole burden of the expenses of maintaining the child. The financial disadvantage to a parent who alone provides for a child's welfare in circumstances in which the other parent ought to have contributed is obvious: *MacMinn v. MacMinn*.

[20] I conclude that Mr. Jones had the obligation and ability to pay in 2000. He still has the ability to pay. The only factor which might otherwise militate against ordering retroactive support, the delay in seeking it, is adequately explained by Ms. Stewart's fear of Mr. Jones because of his past behaviour.

[21] Accordingly, I order that support be payable retroactive to January 1, 2000 along with Mr. Jones' proportionate share of the daycare costs. I will leave it to counsel to determine the *Guidelines* amounts for the retroactive support, based on Mr. Jones' stated income for 2000 and 2001, and Mr. Jones' share of the daycare costs. As this order will result in Mr. Jones owing a substantial amount to Ms. Stewart for the period January 1, 2000 to June 1, 2001 (the ongoing order having commenced July 1, 2001), payments as to the retroactive support and daycare costs are to be made in the amount of at least $200.00 monthly until the full amount is paid. This will be in addition to the ongoing amounts totaling $684.42 that I ordered in the Memorandum filed August 13, 2001. I direct that counsel set out their calculations in a Memorandum for review by me when the draft order is submitted.

[22] I confirm, as agreed by counsel, that this is a final, not an interim, order.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this
17th day of October 2001

Counsel for Ms. Stewart: Sheila MacPherson
Counsel for Mr. Jones: Margot Engley

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