Norris v. Norris, 2005 NWTSC 18

Date:2005 02 03
Docket: S-001-DV6101-03520

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ANGELA NORRIS

Applicant

-and-

FREDRICK NORRIS

Respondent

MEMORANDUM OF JUDGMENT

[1] In this matter, which was before me in Chambers on January 14, 2005, the Applicant seeks the following relief as set out in her Notice of Motion:

a) An order varying the terms of the Corollary Relief Order made by Justice J.E. Richard in this matter on February 16, 2004 to reflect the Respondent's updated annual income and to reflect the new child support payment in accordance with the federal *Child Support Guidelines* enacted pursuant to the *Divorce Act* (Canada);

b) An order varying the terms of paragraph 4 of the Corollary Relief Order made by Justice J.E. Richard on February 16, 2004 to automatically increase the child support payment to $1,500.00 per month commencing September 1, 2005 if the Respondent fails to provide the annual financial information as required pursuant to the federal *Child Support Guidelines* enacted pursuant to the *Divorce Act* (Canada);

c) An order directing the Respondent to pay retro-active child support to April 1, 2003 in accordance with his annual income pursuant to the federal *Support Guidelines* enacted pursuant to the *Divorce Act* (Canada);

d) An order directing the Respondent to pay costs of this application on a solicitor/client basis.

[2] The Respondent has not been represented by counsel in these proceedings, which is unfortunate because some of the issues arising from the material filed could have benefited from fuller argument and analysis. On January 14, 2005, I adjourned this matter for one week to give counsel for the Applicant an opportunity to file the cases she relies on. She has filed those cases along with written argument, all of which I have reviewed.

[3] The material before me from the Respondent consists in part of financial documentation which he delivered to the Applicant's counsel. On October 22, 2004, Vertes J. ordered that the Respondent file sworn material and he did file a document not in affidavit form and without a proper jurat, although apparently sworn, on November 9, 2004. I have taken that document into account. However, an unsworn document submitted in court on January 14, 2005 on the Respondent's behalf by a non-lawyer, Ms. Murdoch, has not been taken into account.

Background

[4] The parties were married in 1994 and separated in April 2002. The Applicant filed a Petition for Divorce in October 2003, seeking joint custody of the two children of the marriage with their primary residence to be with her and child support payable by the Respondent pursuant to the federal *Child Support Guidelines*. The Petition did not request retroactive child support.

[5] The Respondent was noted in default in the divorce proceedings and the Applicant submitted documents for a "desk divorce"in February 2004. In her affidavit in support of the request for a divorce and a corollary relief order, she set out the arrangements for custody and child support as follows (only those portions relevant to this application):

> 7. The following arrangements have been made for custody and child support for the children: The Respondent has agreed to my having sole custody of the children, and he will pay to me child support for Jessica the amount of $653.50 per month. Amber is not the Respondent's biological child and as such I am not seeking maintenance for her from the Respondent. A copy of the Respondent's email to my lawyer is attached as Exhibit "B" setting out the terms of his agreement. A copy of correspondence from the Respondent's employer setting out his income is attached as Exhibit "C". The Respondent's annual income is $76, 195.80, and my annual income is $54,000.00.
>
> I would request the Respondent to provide to me, on an annual basis, by no later than July 1st of each year, a copy of his income tax returns and notice of assessment for the previous year for the purpose of adjusting the amount of child support payable by the Respondent. I would request that any adjustment of child support be effective on the 1st day of September each and every year.

[6] The Applicant also submitted a corollary relief order ("the order") on the desk divorce, which was issued by Richard J. on February 16, 2004. The provisions of the order relevant to child support are as follows:

> 2. The Respondent shall pay to the Petitioner for the support of the child of the marriage Jessica Kristine Norris born September 4, 1991 in the sum of $653.50 each month, commencing on February 1, 2004, and remaining payable on the first day of each and every month thereafter until further Order of this Honourable Court.
>
> 3 The Respondent shall provide to the Petitioner on an annual basis, by no later than July 1st of each year, a copy of his income tax returns and notice of assessment for the previous year for the purpose of adjusting the amount of child support payable by the Respondent. Any adjustment of child support would be effective the 1st day of September each and every year.
>
> 4. The Respondent shall contribute 50% towards extra-curricular activities for the child Jessica Kristine Norris, as to be determined between the parties.

[7] In October 2004, the Applicant brought an application requesting that the terms of the order be varied to reflect the Respondent's updated annual income and the *Guidelines* amount of child support based on it. The application also requested that

paragraph 4 of the order be varied to increase monthly child support automatically to $1500.00 should the Respondent fail to provide the annual financial information required.

[8] That application resulted in the October 22, 2004 order of Vertes J., to which I have referred earlier. The October 22 order provided that:

> 1. The Respondent is required to provide detailed financial information, meaning a detailed breakdown of his total earnings from all sources, for the years 2002, 2003 and 2004 to date;
>
> 2. If the Respondent obtains new employment starting in the near future, he is required to provide a statement from his employer indicating his total income;

[9] The October application was adjourned to December 3 and then to January 14. In the meantime, in November, the Respondent filed the sworn information that I have referred to earlier. That information consists of a statement by the Respondent detailing his income, including allowances and benefits, for 2002, 2003 and 2004 and his expected income from a new job to commence in December 2004. Attached to the statement are pay stubs for the end of each of 2002, 2003 and 2004.

[10] Along with the foregoing, there is before me documentation provided by the Respondent to the Applicant's counsel and submitted by her. That documentation consists of copies of a T-4 Statement of Remuneration Paid and Notice of Assessment for the 2003 taxation year, an income tax return for 2002 and a letter from the Respondent's new employer containing salary information. It appears that the Respondent has not provided his 2003 income tax return as required by the corollary relief order.

[11] On January 13, 2005 the Applicant served on the Respondent a Notice of Motion requesting the relief I have set out at the beginning of this Memorandum of Judgment. This is the first document in these proceedings to request retroactive child support, although counsel for the Applicant advised in Chambers that she told the Respondent verbally at the December appearance that retroactive support would be sought.

[12] I will deal with the issues on this application in the following sequence:

(i) the request for child support retroactive to April 1, 2003;

(ii) the request for a variation of the corollary relief order to reflect the Respondent's updated income and a new child support payment;

(iii) the request for a variation of the corollary relief order to reflect an automatic increase in the monthly child support to $1500.00 if the Respondent fails to provide the income information required by the corollary relief order;

(iv) the request for solicitor and client costs.

(i) The request for child support retroactive to April 1, 2003

[13] The Applicant takes the position that the Respondent did not provide full disclosure of his income at the time of the corollary relief order and thereafter. It is her submission that I should take the Respondent's 2003 income of $109,331.00 and order retroactive child support for the 2003 year in the *Guidelines* amount of $901.00. The Applicant's written argument asks that I impute the 2003 income for the 2002 year because of an alleged failure by the Respondent to provide full disclosure of his 2002 income. However it seems to me that there is no need to impute income since the 2003 income has been disclosed and there is no request for child support for 2002. Further, the documentation discloses some aspects to the 2003 income - for example, retroactive pay - that would seem to be non-recurring amounts which may make 2003 a unique year and therefore inappropriate to use for purposes of imputing income for other years.

[14] The main issue is whether there should be any order for retroactive support in the circumstances of this case. Counsel for the Applicant relies on recent decisions of the Alberta Court Appeal in *D.B.S. v. S.R.G.,* 2005 ABCA 2 and *Henry v. Henry*, 2005 ABCA 5. These decisions are highly persuasive since the Northwest Territories Court of Appeal is largely made up of members of the Alberta Court of Appeal.

[15] In *D.B.S.* and in *Henry*, the Court of Appeal confirmed that a court has a discretion to order retroactive child support; it is not mandatory. That discretion must

be exercised in a manner consistent with and shaped by the fundamental principles of child support and the stated goals and objectives of the *Guidelines.*

[16] The Court of Appeal also made it clear that the court's power to grant retroactive support comes from the variation provisions in s.17 of the *Divorce Act* and is premised on a change in circumstances. Under s.14 of the *Guidelines*, one such change is an increase in income that would change the table amount of support. A change of income therefore changes the amount of the base support obligation.

[17] The Court of Appeal also confirmed that the following considerations are relevant in exercising the discretion to award retroactive child support:

1. A child is entitled to child support. Need is presumed.

2. The *Guidelines* presume an ability to pay on the part of the payor in accordance with his or her income as determined in accordance with s.16 of the *Guidelines.*

3. Blameworthy conduct on the part of the payor is not required.

4. The payee does not need to demonstrate an encroachment on capital.

5. Notice of an intention to pursue child support is not a prerequisite to a retroactive award.

6. Whether there is an unreasonable burden placed on the payor must be established, is not assumed and available payment options should be considered to alleviate any unreasonable burden. Any burden placed on the payor must be balanced against the corresponding deprivation to the payee and the child.
7. A lump sum payment is not precluded merely because it "redistributes capital".
8. The date of the increased income as defined by the *Guidelines* is the presumptive date for the commencement of a retroactive award unless the payor has satisfied the additional financial obligation in some other manner, has taken all reasonable steps to fulfill the obligation, has a previous arrangement for child support that contemplates the provisions of the *Guidelines* or the payee fails to act diligently without reasonable excuse.

[18] The documentation before me indicates that the Respondent paid no child support until the corollary relief order was made in February 2004. His employment income for 2002 and 2003 was:

2002 - $67,035.25
2003 - $109,331.00

[19] The February 2004 corollary relief order states the Respondent's annual income as $76,195.00.

[20] The Applicant argues that the Respondent failed to disclose the true amount of his 2003 income. Now that the amount is known, she argues, that constitutes a change in circumstance entitling her to retroactive support. She claims it back only to April 2003 and not for the first year following their separation in April 2002. No other significance to the April 2003 date is apparent from the material.

[21] Attached to the Applicant's affidavit submitted on the application for retroactive support are a number of "e-mails" between the Applicant and the Respondent pre-dating the corollary relief order. From a review of these e-mails it is fair to say that the Respondent was uncooperative on the issue of child support, unwilling to pay and even threatened at one point to leave his position as a police officer if he had to pay what he felt was too much support.

[22] However, although the e-mails indicate that the Respondent was uncooperative, they also reveal that he told the Applicant that with overtime and transfer money, his income for 2003 was $98,000.00 and he recognized that the *Guidelines* support amount for that income is $822.00 per month. He also referred to being aware that the Applicant wanted support back to April 2003. He gave various reasons why he felt he could not afford to pay the monthly amount and retroactive support in addition to his other obligations.

[23] In an e-mail dated February 9, 2004, the Respondent offered to pay $653.50 per month, which is the *Guideline* figure for income of $76,195.80. When the Applicant submitted her documents for the desk divorce, she submitted along with them the Respondent's e-mail containing the offer and a letter from his employer, stating that

his annual salary effective January 1, 2003 was $64,059.00 plus an isolated post allowance of $12,136.80 for a total of $76,195.80. The corollary relief order, also submitted by the Applicant for the desk divorce, used the latter figure as the basis for the monthly child support amount of $653.50.

[24] Based on the above, in my view, the Respondent did not fail or refuse to disclose his income. He made the Applicant aware that his income for 2003 was $98,000.00, which is very close to the $100,725.73 shown on his T-4 slip for 2003. That figure, $98,000.00, is substantially more than the figure the Applicant submitted with the divorce documents. Although it is also less than the $109,331.00 set out in the May 2004 Notice of Assessment, it is not ascertainable from the material filed why the assessment had that result or whether the Respondent could have expected that he would be assessed in that amount.

[25] What is important is that the Applicant knew, at the time she applied for the corollary relief order, that the Respondent made at least $20,000.00 more in 2003 than the $76,195.80 he offered to base child support on. Yet in her application for the desk divorce, she represented his income as being $76,195.80.

[26] This leads to the next issue which is whether, having accepted the Respondent's offer to settle based on income of $76, 195.80, the applicant can now disregard that settlement and ask the Court to do so as well.

[27] In her affidavit, the Applicant refers to the Respondent's uncooperative stance and says that she agreed to his settlement proposal to end the fighting and against her lawyer's advice. She refers to not wishing to aggravate the Respondent because of his negative responses.

[28] It is evident from the affidavit that the Applicant had legal advice, which she chose not to accept. There is no evidence that she was coerced in any way into accepting the Respondent's proposal. Although the settlement was not committed to writing by way of a separation agreement or minutes of settlement, the corollary relief order submitted at the time of the divorce application reflects what the parties agreed to. It is clear from the e-mails that were exchanged that retroactive support was also "on the table".

[29] This is not meant as criticism of the Applicant for accepting the settlement proposal. She was in the best position to know whether it was to the benefit of her and the children to accept the settlement proposal and proceed from there rather than seek an order based on the higher income figure and encounter opposition from the Respondent. She had legal advice so is assumed to have accepted the proposal with full knowledge of what her other options were.

[30] In *D.B.S.*, the Alberta Court of Appeal said that there are certain exceptions to the obligation to pay child support retroactive to the date when the obligation arose. One of those exceptions is where the parties have made mutually satisfactory arrangements for child support which take the *Guidelines* and their effect into account (at paragraph 136 of *D.B.S.*).

[31] This exception is based on the principle that parties to a matrimonial dispute should be encouraged to settle their differences. In *D.B.S.*, the Court described the rationale this way:

> [140] This exception recognizes that settlements freely negotiated between the parties are preferable to court-imposed orders. The flexibility available, the appreciation of economic necessities, and shared values have the potential to maximize available resources and to prevent conflict. Furthermore, unlike a court, the parties, for obvious reasons, will remain involved in the day-to-day administration of their respective finances. However, a support agreement should address continuing disclosure of income and the entitlement of the payee to make an informed decision based on that information.

[32] Considering that the Applicant had legal advice and that there is no evidence of coercion and no evidence that the amount agreed on was insufficient for the support of the children, I see no basis on which to interfere in the settlement. Although retroactive support was not referred to in the settlement proposal made by the Respondent and accepted by the Applicant, it is clear from the e-mails that there had been discussion of it. The Applicant did not pursue it at the time the corollary relief order was sought. I infer that it was considered to be part of the settlement since no other explanation for why she did not pursue the claim at that time arises from the material before me.

[33] For the above reasons, I decline to grant an order for retroactive support.

(ii) <u>The request for a variation of the corollary relief order to reflect the Respondent's updated income</u>

[34] In the written argument filed, the Applicant appears to seek a variation of the corollary relief order to substitute the Respondent's assessed 2003 income and the corresponding child support amount for what was ordered, in effect granting support in the new amount retroactive to February 16, 2004. However, in her submissions made in Chambers, I understood counsel for the Applicant to indicate that she was not seeking any variation for the period February to August 2004.

[35] Having considered both alternatives and for the same reasons set out in the section above, I decline to order any retroactive variation for the period February to August 2004.

[36] As for ongoing support, that is governed by paragraph 3 of the corollary relief order, which requires the Respondent, by July 1 each year, to provide the Applicant with copies of his income tax return and notice of assessment for the previous year for the purpose of adjusting the child support payable. Any adjustment is to be effective September 1 of each year.

[37] Therefore, based on his 2003 income of $109,331.00, the Respondent should pay $907.00 per month, effective September 1, 2004.

[38] Although this means some retroactivity, to September 1, 2004, since it is contemplated by the corollary relief order and since the Respondent must have been aware, because of the terms of the order, that an adjustment of this nature was to come into effect, in my view the considerations that apply to the claim for support retroactive to April 2003 do not apply to this aspect of the child support. Furthermore, the delay to January 2005 in dealing with this matter is due to the Respondent's failure to disclose his income as required in a timely fashion.

[39] The corollary relief order makes it clear that child support is to be reviewed and adjusted annually. The need for annual recalculation of support based on changes in income was also recognized in *D.B.S. v. S.R.G.* A payor cannot expect his child support payments to remain the same despite increases in his income.

[40] In the sworn document he filed, the Respondent indicates that some of the additions to his 2003 base income consist of retroactive pay or other taxable benefits. He seems to have taken the position that these are not properly included in his income for purposes of calculating child support. However, pursuant to s.16 of the *Child Support Guidelines*, it is his total income that is to be considered and all the material before me indicates that for 2003, that figure is $109,331.00. Whether the Respondent's 2003 income tax return would shed further light on this is unknown since he did not disclose that document.

[41] Accordingly, as required by paragraph 3 of the corollary relief order, the child support payment commencing September 1, 2004 is $907.00 per month. Unless otherwise ordered by the Court, that payment amount will be in place until the next recalculation after the Respondent discloses his 2004 income information and the September 1, 2005 adjustment is made .

(iii) The request for an automatic increase to $1500.00 per month

[42] The Applicant seeks an order that if the Respondent does not make the financial disclosure required by July 1, 2005 under the corollary relief order, a child support payment of $1500.00 per month automatically be required beginning September 1, 2005.

[43] Under the *Guidelines*, a monthly payment of that amount would be based on annual income exceeding $150,000.00.

[44] There is no evidence that the Respondent was ever able to earn that amount in his previous position as a police officer or that he will able to earn it at his current employment with a mining company. Therefore, the figure is arbitrary and the only reason for it is punitive. I decline to grant that order. It is always open to an applicant to request, on proper grounds, that income be imputed to a payor, but the basis for imputing income must come from evidence about the payor's income history and what he could or should earn.

[45] In my view the appropriate order is one that will have the recalculated child support amount remain in place until further order of the court.

(iv) Costs

[46] The Applicant requests costs on a solicitor and client basis. Such costs are normally awarded only in special circumstances, for example where there has been reprehensible conduct by a party or the Court feels it should mark its disapproval of a party's conduct: *Woodley v. Yellowknife Education District*, 2000 NWTSC 7.

[47] Although the Respondent was not co-operative in providing his financial information on a timely basis during the course of this application and in response to the July 1 deadline in the corollary relief order, and has not yet provided a copy of his 2003 income tax return, I balance that against the fact that the application for retroactive support has been dismissed. Although in no way condoning the Respondent's actions, I order costs to the Applicant on a party and party basis only.

Summary

[48] It will be noted that I have not taken into account the Respondent's December 2004 change of employment in adjusting the child support payments. I have adjusted payments strictly in accordance with the terms of the corollary relief order and any further adjustment will be the subject of the September 1, 2005 recalculation. The Respondent's combined 2004 income from the new position and his former employment will be reflected in his tax documentation for 2004. The earlier the Respondent makes the required disclosure of his 2004 income tax return and notice of assessment under the terms of the corollary relief order, the earlier the parties will be in a position to determine whether they can agree on the amount of support payable and perhaps deal with any adjustment by way of a consent order instead of a contested court application.

[49] In summary, the orders I make are as a follows:

1. The corollary relief order of February 16, 2004 is varied as follows: effective September 1, 2004, based on the Respondent's 2003 income of $109,331.00, child support is payable in the amount of $907.00 per month on the first day of each month until further order of the Court;

2. The application to increase child support to $1500.00 per month if the Respondent fails to provide his annual financial information is dismissed;

3. The application for child support retroactive to April 1, 2003 is dismissed.

4. The Respondent shall pay costs of this application to the Applicant on a party and party basis.

[50]

V.A. Schuler
J.S.C.

Heard at Yellowknife, NT January 14, 2005

Dated at Yellowknife, NT
this 3rd day of February, 2005.

Counsel for the Applicant: Betty Lou McIlmoyle
The Respondent was not represented by counsel and did not appear in person.