Normandin v. *Kovalench*, 2007 NWTSC 107

Date: 2007 12 12
Docket: S-0001-CV2005000229

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARYSE NORMANDIN

Applicant

- and -

WILFRED KOVALENCH

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant, Maryse Normandin, and the Respondent, Wilfred Kovalench, have one child, born February 9, 2004. Approximately seven months after the child's birth, Mr. Kovalench moved away from Yellowknife and relocated to Saskatchewan.

[2] This Application concerns issues of custody and access, as well as ongoing and retroactive child support. With respect to custody and access, the parties agree that the terms of an Interim Order issued by this Court on May 12, 2006 should continue. Mr. Kovalench also agrees that he has an obligation to pay child support. What is in issue is what income should be imputed to him for the calculation of the child support, and the extent to which retroactive support should be ordered.

A) IMPUTATION OF INCOME

[3] Ms. Normandin has cared for the child since his birth. She is employed part time with Canada Post. She works on an "on-call" basis. The number of hours she works varies from month to month, and as a result, so does her income. She is hoping to eventually secure a full time position with Canada Post in Yellowknife. In her income tax return for 2006 she reported a total annual income of $11,489.09.

[4] The child has had various medical problems including asthma and seizures. He has had surgery to have tubes placed in his ears. There have been expenses associated with some of his medical problems. Ms. Normandin filed documentsshowing that she spent a total of $518.20 in medication for him between February 2004 and November 2007. Ms. Normandin has had child care expenses when she has been called to work. Those costs are also expected to be ongoing.

[5] Mr. Kovalench was 58 years old at the time of the trial. He is now retired, but was employed steadily over the last several years. Between 1978 and 1999, he worked as a truck driver. Between 1999 and 2002 he did not work, as he suffered from chronic back pains that made it too difficult for him to spend continuous hours driving trucks. He started working again in 2002, this time as a cab driver. In September 2004 he decided to retire and relocated to Saskatchewan.

[6] Mr. Kovalench testified that he decided to retire because it was becoming increasingly difficult for him to drive for the number of hours that cab drivers do. He believes that his back problems are linked to an injury he sustained in a motor vehicle accident in 1971. Although he received treatment after this accident and was able to return to the mining job he held at that time, he testified that he has experienced back pain in varying degrees over the years, and that those problems increased as time went by. He has received treatment from chiropractors to assist him with those difficulties and continues to be seen by a chiropractor. He is now unable to drive for more than a few hours at a time.

[7] Mr. Kovalench has also had other medicalproblems in the past year. He suffered a series of small strokes in July 2007. It was discovered that he had significant blockages in some of his arteries and he had to undergo surgery. He is still under medical care and may be required to undergo further medical procedures.

[8] Mr. Kovalench's only current source of income are his investments. He has filed materials showing that as of September 30, 2007, the total estimated value of his investments was $608,967.28.

[9] Mr. Kovalench has been paying Ms. Normandin $200.00 in child support every month since the summer of 2004. He has not made any separate contribution for medical expenses, child care expenses, or other expenses for the child.

[10] The power to impute income to a parent is provided for at section 19 of the *Child Support Guidelines*, N.W.T. Reg. 138-98 (the *Guidelines*). The relevantportion of this provision reads as follows:

> 19.(1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
>
> > (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child for whom the parents are both responsible or any minor child or by the reasonable educational or health needs of the parent;
> >
> > (...)

[11] The phrase "intentionally under-employed or unemployed" has been interpreted in this jurisdiction as implying a deliberate course of conduct intended to enable the payor spouse to avoid or undermine his or her support obligations. *Williams* v. *Williams* [1997] N.W.T.R. 303 (SC); *Rusch* v. *Rusch* [1998] N.W.T.J. No.1.

[12] Ms. Normandin argues that Mr. Kovalenchis deliberately under-employed. She argues that notwithstanding his medical problems, retirement, in his case, is a luxury, and that he could still work and generate a much greater income. Ms. Normandin argues that income should be imputed to him corresponding to the combination of the average salary of a male person in Saskatchewan, ($39,626.00) and a figure corresponding to an annual return of 5% on his savings. This would result in imputing income to Mr. Kovalench in a range of over $70,000.00 annually.

[13] Mr. Kovalench disagrees with this. His position is that he retired for health reasons, that this decision was not made to avoid his child support obligations, and that the level of income that Ms. Normandin seeks to have imputed to him is not reasonable under the circumstances. He argues that income should be imputed to him based on a return of 5% return on his investments, which corresponds to a figure just over $30,000.00.

[14] In *Rusch* v. *Rusch*, *supra*, in discussing the question of how to assess whether a person is deliberately under-employed, the Court noted that the assessment of motive is often a difficult task, and made the following observation:

> (...) the court should be cautious about making a finding of intentional underemployment where a change of employment results from a reasonable and explained change in life, such as a change of residence.

[15] I agree that a cautious approach is warranted, whether the change in the payor spouse's life is a change of residence, a decision to retire, or another change in circumstances.

[16] Ms. Normandin points out that no medical evidence was adduced about Mr. Kovalench's back problems. It is true that there is no evidence about the exact nature of the injury he sustained in 1971, the impact that this injury may have had over time, and how it may currently interfere with his ability to work. Be that as it may, I find no reason to reject his testimony that he has suffered and continues to suffer from chronic back pains that have become progressively worse over the years. This testimony is to some extent corroborated by Ms. Normandin's own evidence. She said that during the time that they were together, there were times where he complained of a sore back and was treated by a chiropractor. I accept, therefore, that Mr. Kovalench does have back problems and that this was one of the reasons he decided to retire.

[17] What is also very significant when examining the question of whether Mr. Kovalench is deliberately under-employed is that there was no drastic change in his level of income after the birth of the child or after the parties separated. His total income (I refer here to the amounts that appear at line 150 of his income tax returns) was $10,414.14 in 2002, $17,275.13 in 2003, $14, 747.04 in 2004, and $10,340.86 in 2005. It was considerably higher in 2006, at $48,660.74. Mr. Kovalench testified that he had significant legal fees and disbursements that year, which is why he drew a much larger sum of money from his savings.

[18] Overall, these figures show that Mr. Kovalenchdid not cause his incometo drop drastically once his child support obligations arose. His decisionto retire did not result in a severe reduction of income, unlike what was the case in *Moffatt* v. *Moffatt* (2003), 67 O.R. (3d) 239. There is in fact no evidence suggesting that Mr. Kovalench deliberately decreased his income so as to undermine the objectives of the *Guidelines*. The most that can be said is that his decision to retire and to not seek other employment may have prevented him from increasing his income. I have not been referred to any case or legal principle that requires people who become parents to increase their earning potential so as to provide the maximum level of financial support to their children.

[19] In my view, it has not been established on a balance of probabilities that Mr. Kovalench has done anything with the intent to undermine his obligations to support his child. The question still remains, though, as to how much income should be imputed to him under the circumstances.

[20] If Mr. Kovalench's annual income is calculated as corresponding to approximately 5% of his investments, it brings him to an income level that is higher than what he earned for the last several years where he was employed. It also brings him to an income level that is in a range comparable to the income of the averagemale

in the province where he now resides. By contrast, the method of imputation suggested by Ms. Normandin would place Mr. Kovalench at an income level that is several times higher than his income was in any of the years that I have heard evidence about, both before and after the birth of the child, and before and after he retired. Under the circumstances, in my view, it would not be appropriate or fair to impute income to Mr. Kovalench in as high a range as what Ms. Normandin suggests.

[21] Obviously, there is no simple formula to decide how much income should be imputed to a person who is retired and living off his or her investments. The decision to impute income is one that involves a high level of discretion. *Maynard* v. *Maynard* (1999), 45 R.F.L. (4th) 385. In exercising this discretion, I must be mindfulthat one of the fundamental principles underlying our child support regime is that a parent's support obligations are determined by his or her income. But I must also bear in mind the objectives of that regime. One of those objectives, and an important one, is that there be a fair standard of support for children that ensures that they benefit from the financial means of each parent, irrespective of the parents' separation. The wording of the *Guidelines*, in this respect, is not exactly the same as the wording used in the *Federal Child Support Guidelines*, SOR 97-175. The *Guidelines* speak of establishing a fair standard of support for children that ensure that they benefit from the "financial means of each parent", whereas the federal Guidelines speak of ensuring that the children benefit from the "financial means of both spouses after separation". Despite this difference in wording, it has been a long standing principle, since before child support guidelines were even enacted, that the financial burden of a separation or divorce should not be borne primarily by children and their custodial parent. *Willik* v. *Willik* [1994] 3 S.C.R. 670, at para. XLII.

[22] I have already rejected the notion that Mr. Kovalench's decision amounts to deliberate under-employment. Nevertheless, the fact is that he did have a child at this stage in his life and he has the obligation to support that child. It goes without saying that there is a financial impact to having children. If Mr. Kovalench and Ms. Normandin had raised this child together, and Mr. Kovalenchhad made the decisionto retire, he would presumably have had to either draw more from his savingsthan would be the case if he did not have a child to support, or he would have had to make other adjustments to his lifestyle to be in a position to support the child. As I have already emphasized, to the extent possible, this child should not be penalized because the relationship has ended. He should benefit from the same level of support as would be the case if his parents were together.

[23] Child support obligations are based on income. The difficulty in a case like this one is that Mr. Kovalench has a certain level of control over his income. He is the one who can decide how much money to access from his investments. Obviously, he has to continue to manage those investments carefully. There are limits to how much he can be expected to draw from those investments each year. But under the circumstances, I cannot and should not ignore the evidence that I heard about his overall situation. As I have said he has the ability, within reason, to accessfunds when he needs to. In 2006 he purchased a vehicle worth $50,000, although I bear in mind that vehicle was partly financed and he still owes money on it. This was the same year where, I was told at trial, he had significant legal bills to pay, which also explained why he drew more funds from his investments that year. He maintains other assets, such as a motor for a boat, and a Recreational Vehicle. He lives in a house that has no outstanding mortgage.

[24] I agree that a figure corresponding to a 5% return on Mr. Kovalench's investments is a useful starting point in determining what is a fair level of income to impute to him for the purposes of child support calculations. In my view, another useful figure is the average salary for a male person in his province of residence. I have also taken into account Mr. Kovalench's overall circumstances. Having regard to those factors, I have concluded that an annual income of $40,000.00 should be imputed to him for the purposes of calculating his child support obligations. I find it is appropriate to impute this income to him from the point in time when he retired.

[25] I also find that it is appropriate for Mr. Kovalench to be required to pay a proportionate share of extraordinary expenses, pursuant to section 9 of the *Guidelines*. There is no reason why Ms. Normandin should be the sole bearer of these expenses.

B) RETROACTIVE SUPPORT

[26] The parties agree that a retroactive child support order should be made in this case, but disagree on how far back that retroactive order should go. Ms. Normandin argues that the date of effective notice should be used, and relies on an email she sent Mr. Kovalench in February 2004 where she specifically asked him to provide her with an increased level of child support. Mr. Kovalench argues that the date when the Application was filed, September 1st 2005, is the date that should be used.

[27] The question of retroactive child support was examinedin depth by the Supreme Court of Canada in *D.B.S.* v. *S.R.G.*; *L.J.W.* v. *T.A.R.*; *Henry* v. *Henry*; *Hiemstra* v. *Hiemstra* [2006] 2 S.C.R. 231. Among other aspects of retroactive child support

orders, the Court examined the question of how far back retroactive orders should go. After having outlined the various possibilities, the Court adopted the date of effective notice as a general rule.

[28] I am satisfied that it is appropriate, in the circumstances of this case, to use the date where Ms. Normandin first broached the topic of child support being increased. Using the date of effective notice, especially when there is such clear evidence about the communication, has the advantage of encouraging parties to try to resolve these types of issues amicably. The risk in using dates where formal proceedings are undertaken is that people may be inclined to initiate a Court process very early on to protect their rights, instead of approaching the other party informally to attempt to come to an agreement about what is appropriate and fair. Initiating a Court process may, in turn, make amicable resolutionsless likely. In situationsof maritalbreakdown, there are many benefits, for all involved, when the parties are able to resolve disputes without resorting to litigation. The best interests of children are often better served when litigation is avoided.

[29] This very issue was considered and commented upon by the Supreme Court of Canada in *D.B.S.* v. *S.R.G.*; *L.J.W.* v. *T.A.R.*; *Henry* v. *Henry*; *Hiemstra* v. *Hiemstra*, *supra,* at para 120:

> Disputes surrounding retroactive child support will generally arise when informal attempts at determining the proper amount of support have failed. Yet, this does not mean that formal recourse to the judicial system should have been sought earlier. To the contrary, litigation can be costly and hostile, with the ultimate result being that fewer resources - both financial and emotional - are available to help the children when they need them most. If parents are to be encouraged to resolve child support matters efficiently, courts must ensure that parents are not penalized for treating judicial recourse as a last resort (...)
>
> So long as the enforcement of child support obligations is triggeredby formal legal measures, a perverse incentive is created for recipient parents to avoid the informal resolution of their disputes. (...)

[30] For those reasons, I find that the child support order should be retroactive to September 2004, which is when Ms. Normandin sent Mr. Kovalench the email asking him to pay more child support.

[31] My finding as to how much income should be imputedto Mr. Kovalenchapplies from the point in time when he retired. Since he retired towards the end of the year

2004, I find that his retroactive child support obligations for that year should be calculated on the basis of his actual income. I also find that the Northwest Territories tables should be used for that year, since that was the place of residence of Mr. Kovalench for most of the year.

[32] Mr. Kovalench's income for 2004 was $14,747.04, which corresponds to a monthly rate of child support of $128.00 for September, October, November and December of that year. The trial evidence was that he started paying $200.00 per month in June or July of 2004. Ms. Normandin deposed in an Affidavit sworn in August 2005, which is part of the trial exhibits, that Mr. Kovalench started making these payments when the child was approximately three months old. Given that the child was born in February, on the whole of the evidence I find that Mr. Kovalench commenced making payments in June 2004. This means for the year 2004 he paid a total of $1,400.00 in child support. I have found he had an obligation to pay $128.00 per month starting in September of that year; the total amount of child support for that year should have been $512.00. As a result, he paid $888.00 more than what he was obligated to pay for that year, and that needs to be taken into account in calculating what he owes as retroactive child support.

[33] For the reasons I have already given, I find child support obligations should be calculated on the basis of an imputed annual income of $40,000.00 for the years 2005, 2006 and 2007. In those years Mr. Kovalench lived in Saskatchewan, so his child support obligations must be calculated using the tables for that jurisdiction. Using those tables, at an annual income of $40,000.00, the monthly child support is $335.00. This is $135.00 more than what Mr. Kovalench has been paying. By the end of the year 2007, the difference between what he has paid and what he owes will add up to $4,860.00. Taking into account his overpayment of $888.00 in the year 2004, I find that what Mr. Kovalench owes in retroactive child support is $3,972.00.

[34] I have already indicated that Mr. Kovalench should pay a proportionateshare of special or extraordinary expenses that may arise in the future. In my view he should also compensate Ms. Normandin for a share of some of the expenses that she has already incurred. I heard some evidence about child care expenses, but it was not sufficiently detailed for me to make a finding as to what Ms. Normandin spent for child care services since the child's birth.

[35] By contrast, with respect to medical expenses, Ms. Normandin has filed a document that shows total expenses of $518.20 between the child's birth and the time

of trial. This, in my view, is a clearly defined expense that ought to have been shared by both parents.

[36] Proportionate contributions of parents to these types of expenses are usually calculated on the basis of each parent's income. The evidence is not entirely clear or complete in this regard, which makes it difficult for me to make precise findings. I do have evidence of Mr. Kovalench's income for 2004, and I have imputedincometo him for the other relevant years. As for Ms. Normandin, one of the documents included in trial Exhibit #1 is a financial statement sworn by her in November 2005. Copies of certain income tax returns were attached to that financial statement, including her tax return for 2004. That document shows that her income in 2004 was $21,501.00. The trial evidence showed that her income in 2006 was $11, 489.09. There does not appear to be any evidence of what her income was in 2005, or of what her income for 2007 is expected to be.

[37] Under the circumstances, I am unable to calculate, in the usual manner, what each party's proportionate share of the medical expenses should be for 2004, 2005, 2006 and 2007. What seems clear from the evidence that I do have is that although Ms. Normandin's income for 2004 was higher than Mr. Kovalench's, the income I have imputed to him for the years 2005, 2006 and 2007 is much higher than Ms. Normandin's income for 2005, and likely much higher than her 2006 and 2007 income. I have concluded, therefore, that Mr. Kovalench should contribute $350.00 towards the medical expenses that were incurred for the child between his birth and the time of trial. For simplicity's sake, and for the purposes of my Order, I have added this sum to the amount owed as retroactive child support, bringing the total amount owed by Mr. Kovalench to $4,322.00.

[38] What Mr. Kovalench owes on a retroactive basis accrued over a period of over three years. In fairness to him, and particularly considering that he provided some support voluntarily and did not completely ignore his obligations to the child, he should, in my view, have the option of paying these monies over a comparable period of time.

C) CONCLUSION

[39] For these reasons, there an Order will issue with the following terms:

1. Maryse Normandin has sole custody of the child, Stephane Normandin-Kovalench, born on February 9, 2004.

2. Wilfred Kovalench will have reasonable access to the child, as agreed upon from time to time between he and Ms. Normandin.

3. Pursuant to section 19 of the Child Support Guidelines, an annual income of $40,000.00 is imputed to Mr. Kovalench for the years 2005, 2006, 2007 and onwards.

4. Commencing January 1, 2008, Mr. Kovalench shall pay child support in the following amounts:

(a) $335.00 per month as ongoing child support;
(b) a minimum of $100.00 per month towards the $4,322.00 owed in retroactive child support, until that amount has been paid in full.

5. From January 1, 2008 onwards, pursuant to section 9 of the *Child Support Guidelines*, Mr. Kovalench shall also pay Ms. Normandin a proportionate share of child care, health-related or other extraordinary expenses for the support of the child. To this end,

(a) Ms. Normandinwill provide Mr. Kovalenchcopies of receipts in support of any claim for such expenses;

(b) Mr. Kovalench's proportionate contribution will be based on the imputed income of $40,000.00;

(c) Ms. Normandin's proportionate contribution will be based on her income for the year that the claim relates to;

(d) Ms. Normandin will provide Mr. Kovalench a copy of her tax return summary on any year where she is claiming such expenses.

[40] The parties have asked to be provided an opportunity to make submissions as to costs. I am prepared to entertain costs submissions either in writing or on the basis of oral submissions. If the parties wish to deal with issue by way of written submissions, they should advise the Clerk of the Court accordingly and advise also of their proposed timelines for filing those submissions. If the parties wish to present oral submissions

on the issue of costs, they should contact the Clerk of the Court so that a date can be arranged for them to appear before me for this purpose. Either way, the parties are directed to advise the Clerk of the Court in writing of their intentions within one week of this Memorandum of Judgment being filed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
12th day of December 2007

Counsel for the Applicant: Donald P. Large, Q.C.

Counsel for the Respondent: Terri Nguyen

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HONOURABLE JUSTICE L.A. CHARBONNEAU
