Large v. *Large*, 2007 NWTSC 57

Date: 2007 08 08
Docket: S-0001-FM-2007-000078

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DONALD P. LARGE

Applicant

\- and -

MARY E. LARGE

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application to vary a child support order made pursuantto the *Divorce Act (Canada)*. The respondent, although served with notice of this application, has not attorned to the jurisdiction of this court. Since she is a resident of Prince Edward Island, any order I make is provisional only and will have to be confirmed by the competent court of that jurisdiction before it is of full force and effect.

[2] The parties were divorced in 2002. They have one son, Andrew, now 25 years old. A judgment issued by the Supreme Court of Prince Edward Island on May 24, 2005, requires the applicant to pay child support of $609.00 per month. Andrew was then, and still is, a university student. The applicant seeks to vary the order by terminating support retroactively to the date that Andrew ceased residing with the respondent (some time prior to December, 2006). Alternatively, the applicantseeks to vary the amount payable to something more appropriate than the amount, as now, stipulated by the Federal Child Support Guidelines.

[3] Child support is payable for a "child of the marriage" as that term is defined by the *Divorce Act*. In the case of children over the age of majority (that being 18 in Prince Edward Island), s. 2(1)(b) of the Act defines a "child of the marriage"to mean a child who is under the charge of the parents "but unable, by reason of illness,disability or other cause, to withdraw from their charge or to obtain the necessaries of life". The phrase "other cause" has been interpreted to include attendance at a post-secondary

education institution. The inability to withdraw from the parents' charge is an economic one. To be in the charge of a parent means that the parent pays for the support of the child. Thus, the parent who is receiving support, or claims support for an adult child, bears the onus of establishing that the child is still a "child of the marriage": see *Rebenchuk* v. *Rebenchuk*, [2007] M.J. No. 130 (C.A.), at paras. 24-26.

[4] In the case of an adult child, the amount of support is calculated by reference to s. 3(2) of the Guidelines:

> 3.(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
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> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

The applicant says that if any support is to be ordered it should be some amount calculated on the basis of s. 3(2)(b) above.

[5] In this case it is particularly difficult to draw any firm conclusionssince much of the information that would be relevant, and indeed critical, is in the possession of the respondent or Andrew. The applicant has provided what information he can but much of it is conjectural. The applicant has sought information from the respondent but without success. What I do accept, from the evidence presented, is the following.

[6] Andrew commenced full-time studies at Sir Francis Xavier University in September, 2000. In 2002 he changed universities and entered a business administration course at the University of Prince Edward Island. He is considered to be a "full-time student" although it appears that he takes three courses per semester as opposed to five courses. The applicant says that this makes Andrew a part-time student only but this is disputed by Andrew in an e-mail message sent to his father. Andrew has been living on his own since moving out of the respondent's home sometime prior to or in December 2006, when the respondent remarried. Andrew is working full-time at a student summer job and will be continuing his studies this fall.

[7] The applicant says that Andrew is capable of and in fact is supporting himself. His career goals are unknown or uncertain. The applicant also submits that Andrew is eligible for student financial assistance.

[8] There is no evidence as to Andrew's expenses and the sources of his income. There is no evidence as to whether he receives any support from the respondent. This is particularly problematic if the onus is on the respondent to prove that Andrew still comes within the definition of "child of the marriage". But, here, the applicant has the burden of showing a change of circumstance. My only point is that, without financial information from both the respondent and Andrew, I cannot attempt the analysis required by the Guidelines even if I am convinced that some amount of support should be paid.

[9] There is evidence that the relationship between the applicant and Andrew is broken. What the reason for that is or who may be to blame for that are questions that I cannot answer on this one-sided application. Nevertheless, the fact that there is a severance in the parent-child relationship is a factor to consider.

[10] Andrew's age and the length of time he has been attending school are also factors to consider. Generally speaking there is no arbitrary cut-off point based either on age or scholastic achievement. But it is rare to find cases that have extended support to children beyond ages 25 or 26. An accepted test is to what extent would these parents, if still living together, have continued to support their son, having regard to their own means and needs. But, again, in the absence of a complete evidentiary base, I cannot draw any conclusions on this point. Speaking generally once more, I am inclined to agree with the observations in *McCrea* v. *McCrea*, [2005] O.J. No. 50 (S.C.J.), per Wein J. at paras. 29-31:

> How long should postsecondary support continue? . . .
>
> The line is difficult to draw. In most cases, parents and children will be able to agree on the timing for end of support. Sometimes students on a co-op course take extra time, or students often take a year out to earn money or for other reasons.
>
> Still, parents should not be legally obligated to provide for adult children indefinitely. Either the date on which a first degree is received, assuming continuous applied study at a reasonable level of success, or the date when the child reaches the age of twenty five, when independent borrowing is more readily available, is a reasonable cut off point for most cases where the parties cannot otherwise agree.

[11] I am satisfied, based on the evidence presented to me, that there has been a change of circumstance, that being Andrew now living independently. I am further satisfied that he is no longer to be considered a "child of the marriage" as that term is defined in the *Divorce Act.* Andrew is now 25 years old. He has been enrolled in university courses for the past 7 years. He is no longer under the charge of his parents. Therefore, the order of May 24, 2005, will be varied to delete the obligation to pay child support, such variation to be effective from the first day of January 2007.

[12] I direct the applicant to prepare a formal order for my approval. Once filed, the order along with a copy of these reasons together with all of the material filed by the applicant shall be transmitted to the proper authorities in Prince Edward Island for confirmation.

J.Z. Vertes
J.S.C.

Dated this 8th day of August 2007.

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