Date: 2008 11 25
Docket: S-0001-FM 2006000023

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JENNIFER LYNN VORNBROCK

Applicant

- and -

MALCOLM ANDREW JAEB

Respondent

MEMORANDUM OF JUDGMENT

Background

[1] The background of this matter is set out in a Memorandum that I filed on April 24, 2008 (the "April Memorandum") in an attempt to clarify the outstanding issues for the parties, who were both self-represented at the time.

[2] As set out in the April Memorandum, a number of financial issues were set over to be heard on June 19, 2008. On the latter date, both parties agreed to a further adjournment to July 31, 2008. On July 31, 2008, counsel for the Applicant had just been retained and the matter was set over to October 9, 2008 with a direction that any further material to be relied on by either party was to be filed on or before September 30, 2008.

[3] The only new material filed is an affidavit filed by the Applicant on August 25, 2008. The Respondent's last affidavit was filed in February 2008.

[4] To summarize the situation as it now stands, an interim order was made on July 25, 2006 giving the Applicant day to day care and control of the parties' child and containing other related provisions. It also declares that the Respondent has annual income of $35,250.00. The material in the court file indicates that figure

was arrived at by averaging the Respondent's income over previous years. Child support was ordered based on that income in the amount of $321.00 per month retroactive to January 1, 2006, without prejudice to an adjustment if the Respondent was found to have a greater income. He was also ordered to pay his proportionate share of day care costs. An order was then made on November 29, 2007 quantifying the Respondent's share of daycare costs in the sum of $3,251.90 for the period January 2006 to August 2007 without prejudice to a final calculation of such costs.

[5] By the order of November 29, the Respondent was also ordered to file his income tax returns and assessments by no later than June 1 in each year as well as his income tax returns and assessments for the years 2005 and 2006.

[6] In the April Memorandum, I set out the issues to be addressed as follows:

> - whether the Respondent's ongoing child support payments should remain in the amount previously ordered or be varied;
>
> - the setting of an amount for the Respondent's proportionate share of daycare costs since August 2007 and ongoing;
>
> - whether there should be a retroactive variation of the amounts the Respondent has already been ordered to pay;
>
> - if any variation is ordered, whether that results in a recalculation of any amounts owed by the Respondent;
>
> - whether the Respondent has failed to comply with the previous court orders and, if so, the consequences of that.

[7] In the April Memorandum, I reminded the Respondent of the requirement in the November 29, 2007 order that he provide his income tax returns and assessments for 2005, 2006 and 2007.

Positions of the parties

[8] In Chambers on October 9, 2008, the Applicant indicated that she is not seeking to have the Respondent cited in contempt for failure to comply with the requirement to provide financial information. She is seeking the following: (i) a

determination of the Respondent's proportionate share of daycare costs since August 2007; (ii) a finding that the Respondent is intentionally underemployed and an order imputing income to him; (iii) dismissal of the Respondent's application for a retroactive variation of the child support he has been ordered to pay. The Applicant does not seek a retroactive increase in the monthly child support.

[9] The Respondent has not filed his income tax returns and assessments; instead he has filed only tax return summaries for 2005 and 2006 and wage statements for 2007. He has not provided the Court with any updated financial information and specifically has not provided any documentation as to where he is currently working and what he earns. In his oral submissions in Chambers on October 9 he indicated that he continues to work in his family's businesses. He also indicated that he does not wish to work at one of the mines because he wants to spend time with the parties' child. He stated that he does not believe the child support he pays will go to the child but that it will instead be used to pay down the Applicant's car loan. His position is that the child support and his share of the daycare costs that were ordered should be decreased retroactively based on the income figures he has provided and that any further payments should also be based on those figures.

The Respondent's failure to make proper financial disclosure

[10] Since the Applicant does not seek to have the Respondent held in contempt of court for failing to file the required financial documents and failing to comply with the court order requiring the filing of his income tax documentation, I have decided not to deal with the contempt issue. The sanctions for contempt of court, which can include a fine and imprisonment, generally operate to the detriment of the child because the result is that money or resources that could be used for child support are not available. I will, however, take into account the Respondent's failure to provide the required documentation as set out below.

Whether there should be a variation of the child support payments previously ordered

[11] As indicated above, the Applicant does not seek a retroactive increase in the child support payments of $321.00 per month that were ordered in July 2006. The Respondent on the other hand seeks a retroactive decrease in those payments. He bases this request on the information that he has provided about his income.

[12] In his affidavit filed in June 2006, the Respondent says that he works in his family's tourism business as assistant manager and is a minority shareholder in the corporation that owns the business. He had a second job with an airline cargo company but left it after the parties separated. The incomplete financial information provided indicates total income of $35,068.35 in 2004 and $10,036.00 in 2005. In his affidavit, the Respondent says the decrease in income is due to his having left the airline cargo job and the family business having suffered financial reverses. He says, however, that he was able to make child care payments of $500.00 per month until December of 2005, using funds from a property sale.

[13] In his affidavit filed in February 2008, the Respondent says that employment in his family's businesses is his only source of income. He provides incomplete income tax information indicating total income in 2006 of $14,937.50, although his affidavit says $21,307.00. He also provides Employee Earnings Summaries for one of the family companies for the year 2007, indicating wages paid to him in the amount of $19,450.00 and an advance of $2,000.00 for a total of $21,450.00.

[14] The Respondent has not made proper financial disclosure and specifically has not provided his complete income tax returns and assessments. The onus is on him to provide full information to justify the decrease he seeks. Similarly, although he claims that the child support ordered to date has resulted in hardship to him because it leaves him with little income for his own needs, he has provided no information about his living expenses.

[15] As the necessary information has not been provided, it would not be appropriate to decrease retroactively the amount of child support the Respondent was ordered to pay and accordingly his application in that regard is dismissed.

Whether there should be a variation of the amount previously ordered as the Respondent's proportionate responsibility for daycare costs

[16] As noted above, the Respondent was ordered to pay to the Applicant the sum of $3,251.90 for his proportionate share of day care costs for the period January 2006 to August 2007. The Applicant does not seek an order increasing that amount. The Respondent seeks to have it reduced based on the information he has provided about his income. However, as I have explained above, he has not

provided full and complete information. Therefore, I decline to reduce the amount and it will remain payable as ordered.

Ongoing child support

[17] The Applicant submits that the Respondent is underemployed. Section 19(1)(a) of the *Child Support Guidelines* under the *Children's Law Act*, S.N.W.T. 1997, c. 14 (which is in substance identical to the same section in the *Divorce Act* on which some of the cases referred to are based) provides that the court may impute such an amount of income to a parent as it considers appropriate in the circumstances, which circumstances include that the parent is "intentionally under-employed or unemployed", other than where the under-employment or unemployment is required by the needs of the child or the reasonable educational or health needs of the parent.

[18] The Applicant did not urge any particular test for or interpretation of s. 19(1)(a), other than to equate intentional with voluntary and point out that the Respondent admits that he works for his family's business and is not looking for employment elsewhere, which she characterizes as voluntary, that is, a choice, on his part.

[19] 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 (S.C.); *Normandin v. Kovalench*, 2007 NWTSC 107. This is also the interpretation given to s. 19(1)(a) by the Alberta Court of Appeal in *Hunt v. Smolis-Hunt*, [2001] A.J. No. 1170, 2001 ABCA 229. Using this approach, there must be either proof of a specific intention to undermine or avoid support obligations, or circumstances which permit the court to infer that the payor's intention is to undermine or avoid his or her support obligations. It is sometimes referred to as a "bad faith" test.

[20] The majority of courts across Canada have adopted a less stringent test based on reasonableness: *V.L.W. v. J.E.W.*, [2007] ABQB 358. They look at whether the payor has intentionally chosen employment that does not maximize his or her earning potential and then ask whether that choice is reasonable in all the circumstances. Among the considerations that may lead a court to determine that

an employment choice is unreasonable are persistence in unremunerative employment or unrealistic or unproductive career aspirations: *V.L.W.*, paragraph 25, quoting from decisions of the Manitoba Court of Appeal.

[21] The reasonableness test has been used in at least one case in this jurisdiction, *Tybring v. Tybring*, 2003 NWTSC 67, where the test was described as follows, at paragraphs 9 and 10:

> The concept of "intentional under-employment" is meant to encompass those situations where a parent chooses to earn less than he or she is capable of earning. It is an objective assessment of the reasonableness of that parent's conduct in light of all the circumstances.
>
> The general principles are well-known. Parents have a joint and ongoing legal obligation to support their children. The amount of support is based not just on what a parent does earn but on what a parent can earn, having regard to such factors as the age, education, experience, skills and health of the parent as well as such matters as the availability of work and the ability of the parent to relocate.

[22] Whether the stricter test used in Alberta or the reasonableness test used elsewhere should prevail must await a decision by the Supreme Court of Canada. In the meantime, of course, the Alberta test is highly persuasive in this jurisdiction. It has been refined somewhat at the trial level. In *V.L.W.*, Kenny J. reviewed another trial level decision, *Mercer v. Mercer*, [2004] A.J. No. 851, and concluded as follows at paragraph 33:

> The interpretation of s. 19(1)(a) in Alberta requires that the payor's choice of employment, or lack of employment, be premised on an intent to evade their child support obligations in order to impute an income. However, the decision in *Mercer* allows this intention to be inferred if it is the natural consequence of the payor's actions. If, in making that choice, the payor realizes that this ultimately has an adverse effect on their child's access to support, then the bad faith test in *Smolis-Hunt* may be made out.

[23] In applying either of the tests to this case, I first note that there is no evidence that, if the Respondent is under-employed, such under-employment is required by the needs of the child or the reasonable educational or health needs of the Respondent. Thus, the exception in s. 19(1)(a) does not apply here.

[24] There is no evidence before me about the Respondent's level of education, experience or skills. He has not provided that information just as he has not provided complete financial information. Although he represented to the Court on April 17, 2008 that he was waiting to hear about employment with one of the mines, he has not provided any evidence as to whether such employment was offered to him or what, if any, other efforts he has made to obtain employment outside the family businesses. In Chambers on October 9, 2008, he stated that he does not want to work at a mine because he wants to spend time with the parties' child. He also submitted, in effect, that since the Applicant knew what he did for a living when she became involved with him, she should not expect him to earn a higher income than what he can get with the family business. This position taken by the Respondent leads me to conclude that he has made the choice to remain employed in the family business notwithstanding that the negative effect it has on his earning ability. The focus should not be on what his work or income was at the time he and the Applicant got together; it should be on his obligation now to contribute to the support of their child.

[25] The Respondent gave up a second job with an airline shortly after the parties separated. He has provided no evidence as to whether he has tried to get secondary employment since then.

[26] Although the Respondent claims that the past orders of this Court have caused him financial hardship, he has provided no evidence about his living expenses or how they are paid. In his affidavit sworn June 22, 2006 he states that the family business does not pay any of his expenses. However, in her affidavit sworn July 19, 2006, the Applicant states that the Respondent has provided her with cheques drawn on the family's business account for child support and she attaches one such cheque as an exhibit. The Respondent does not make any comment on that in his subsequent affidavit, leaving the allegation unaddressed. That, along with his failure to provide any evidence about his living expenses despite his claim of hardship, and his failure to file the financial information he was ordered to, leads to the conclusion that the Respondent has not made full and frank disclosure about his financial situation. It also leads me to the conclusion that he has made the choice to remain employed in the family business knowing that his income from it, as he represents that income, will have a negative effect on the child's access to child support. Thus, I draw the inference that the Respondent's intention is to

avoid payment of anything more than minimal child support. This satisfies the "Alberta" interpretation of the test for intentional under-employment.

[27] Even on the less strict test of reasonableness, I find that the Respondent is intentionally under-employed. In my view it is not reasonable for the Respondent to continue to be employed solely in family businesses that, according to his own affidavits, are suffering "a significant drop in business" which has led to a situation where his "ability to increase my personal income has been adversely affected".

[28] Having found, therefore, that the Respondent is intentionally under-employed, the next step is to impute income to him. The question is how much income to impute.

[29] The Applicant asks that income be imputed to the Respondent in the amount Statistics Canada indicates as the average annual earnings in 2005 for males living in the City of Yellowknife, $69,165.00. The child support payable based on that income is $641.00 per month.

[30] That amount is, of course, substantially more than the Respondent's annual earnings in any year as represented by the documentation he has provided. But the problem is that he has not provided all the documentation required to allow the Court to come to a conclusion as to what his true income is. Nor has he provided any evidence that would lead me to conclude that he cannot earn that level of income if he obtains employment outside his family's business.

[31] In the circumstances, I will impute yearly income of $69,165.00 to the Respondent. The child support payable will therefore be $641.00 per month, due on the first day of each month, commencing October 1, 2008.

[32] Child support is for the benefit of the child and to assist with the expenses of raising the child. Choosing to own and drive a vehicle is not unreasonable for a parent with a child to transport; unless there is evidence to the contrary, the expense of a vehicle would normally be considered a household expense that benefits the child. The Respondent's concern that the Applicant will use the child support he pays to pay down her car loan is not well-taken.

Daycare costs for the period September 1, 2007 to August 31, 2008

[33] The Applicant will not incur daycare costs after August 31, 2008 while the child is in school. However, she claims payment by the Respondent of a proportionate share of the daycare costs incurred after August 2007, which are not included in the $3,251.90 that the Respondent was ordered to pay as referred to above.

[34] The total daycare costs from September 1, 2007 to August 31, 2008 are $6,820.00 ($2,720.00 + $4,100.00). The Applicant suggests that the Respondent be ordered to pay fifty percent of those costs even if the income imputed to the Respondent would require that he pay more than fifty percent.

[35] Looking at the year 2007, the income imputed to the Respondent under the July 2006 order ($35,250.00) is less than the Applicant's income of $39,474.02. For the year 2008, however, the Applicant's income is approximately $28,000.00, consisting of employment insurance benefits, part-time wages and education funding. So the Respondent's proportionate share for 2008 would be greater than fifty percent. In the end, therefore, I think the Applicant's proposal that the costs be split equally is fair.

[36] Accordingly, the Respondent will pay half of the daycare costs for the period September 1, 2007 to August 31, 2008, which is $3,410.00.

Summary

[37] The amount of child support payable by the Respondent to the Applicant will remain in the amount of $321.00 per month as required by the order made July 25, 2006 until October 1, 2008.

[38] Commencing October 1, 2008, the monthly child support payment is increased to $641.00 based on annual income imputed to the Respondent in the amount of $69,165.00.

[39] The Respondent remains liable to pay the amount of $3,251.90 to the Applicant as his proportionate share of daycare costs from January 2006 to August 2007.

[40] For the period September 1, 2007 to August 31, 2008, the Respondent will pay the Applicant the amount of $3,410.00 as his proportionate share of day care costs.

[41] The above orders result from the applications that were before me on October 9, 2008. However, for the sake of clarity as to financial issues, I remind the parties that the costs order made against the Respondent on November 29, 2007 is still in effect. Also still in effect is the clause in that same order that requires the parties to provide income tax returns and assessments to each other on an annual basis no later than June 1 of each year.

[42] I would ask that counsel for the Applicant draft the formal order and submit it to me for review.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
25th day of November 2008

Counsel for the Applicant: Betty Lou McIlmoyle
The Respondent appeared in person.

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OF THE HONOURABLE JUSTICE V.A. SCHULER
