Short v. *Anderson*, 2009 NWTSC 12

Date: 2009 02 26
Docket: S-0001-FM2008000037

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JESSICA SHORT

Applicant

- and -

ANDREW ANDERSON

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant mother seeks an order for retroactive child support as well as an order for s.9 child care expenses retroactive to March 1, 2008 and on a go forward basis.

[2] The parties began living in a common law relationship in approximately 1998. There were two children of the relationship, namely, D. A, born August 10, 2000 and D. A., born December 5, 2003. The parties separated in December 2007 on the occasion of the Applicant obtaining an Emergency Protection Order and they have not cohabited since. The mother has been granted day to day care and custody of the children.

[3] On February 28, 2008, the Applicant filed an Originating Notice of Motion claiming custody, possession of the marital home, division of matrimonial assets, child support and s.9 expenses.

Retroactive Child Support

[4] On interim application, the Respondent represented his yearly income to be $39,520.00, and on that basis, he was ordered to pay child support in the amount of $602.00 per month on March 13, 2008 commencing March 1, 2008.

[5] Subsequently, and after better disclosure of the Respondent's income, the amount of child support was increased, effective July 1, 2008, to $783.00 monthly by Order of this Court on June 26th, 2008. This was based upon an income of $51,700.00 which had been agreed upon by counsel. It is noted that in the Order of Justice Charbonneau of June 26th, while the parties agreed on the amount of child support, there was no agreement that it should not be retroactive. On the contrary, the issue was alive at that time and was specifically adjourned by the chambers judge to be dealt with at a special hearing.

[6] The Applicant argues the Respondent should pay the difference between the two court ordered child support amounts for the period between March 1, 2008 and June 1, 2008.

[7] The Respondent says there has to be a point where interim orders are left in place and the parties move on with the case. No authority is cited by the Respondent in support of this submission.

[8] There is no argument that March 1, 2008 is an inappropriate date for the commencement of retroactive child support if it is to be ordered in this case. As of March 1, 2008, then, the Respondent was under a legal obligation to pay child support based on his actual income in accordance with the table amounts under the Child Support Guidelines.

[9] Whether he was under a misapprehension or otherwise, the Respondent under-represented his income at $39,000.00 per annum at the hearing of the initial court application. This resulted in an incorrect and lower amount of child support being ordered.

[10] There may be some instances where the Respondent's submission may have merit; however, this is not one of them. To accede to this argument would, in essence, reward the Respondent from having failed to provide accurate information in the first instance about his actual income. Had he done so, this application would have been unnecessary.

[11] Accordingly, the Respondent is ordered to pay retroactive child support to the Applicant in the sum of $784.00 for the months of March to June, 2008 inclusive at the rate of $100.00 per month until paid in full.

Child Care Expenses

[12] Since the parties have separated, the Applicant has been incurring child care expenses of between $800.00 and $1,000.00 per month, figures that I find to be reasonable, and she asks that the Respondent be ordered to pay his proportionate share under s.9 of the *Child Support Guidelines* on a go forward basis as well as retroactively.

[13] The Respondent strongly resists her plea and submits that this is an extraordinary expense and one that was contemplated and reckoned into the table amounts as an "every day" expense and should be borne solely by the Applicant from the child support payments. In support of his argument, counsel for the Respondent cites *Hansvall, v. Hansvall*, [1997] S.J. No. 782 (Sask. Q.B) and referred to certain select paragraphs in the judgment which he reproduced.

[14] In Reply, the Applicant's counsel reproduced the entire case and referred the court to other passages in the judgment which support the Applicant's position.

[15] Section 9 of the Child Support Guidelines passed in support of the *Children's Law Act*, S.N.W.T. 1997, c. 14 reads as follows:

> 9. (1) In a child support order the court may, on the application of a parent or another party to the application, provide for an amount to cover all or any portion of the following expenses, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, if the parents lived together with the child, to the family's spending pattern before the separation:
>
> (a) child care expenses incurred as a result of the employment, illness, disability or education or training undertaken to gain employment of the person who has lawful custody of the child or with whom the child lives;
>
> (b) that portion of the medical and dental insurance premiums attributable to the child;
>
> (c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy,

occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education;

(f) extraordinary expenses for extracurricular activities.

[16] The Respondent argues, among other things, that the Applicant need establish "necessity and reasonableness", and the Court must consider the means of the parents to afford the expense and the spending patterns of the parties prior to separation. He cites a number of cases in support of this proposition. No issue is taken with these submissions since the principles argued are embodied in s.9.

[17] I have carefully reviewed the *Hansvall* case and would make these observations. In that case, the Applicant sought not only special orthodontic and optometric expenses for the children but also "... a host of school sports fees and expenses (including curling, soccer, volleyball, basketball, badminton and associated travel) and extracurricular sport and cultural activities fees and expenses (including figure skating registration and coaching, swimming and piano lessons, music festival and exams and the like)." [see page 3, para.4.2,]

[18] It was in the context of this fact situation that the chambers judge expressed certain views such as "s.7 orders should be the exception and not the rule" and " these expenses become 'special or extraordinary' only when they exceed what would have been the norm for a family at that particular income level or alternatively when they involve unusual expenditures such as those required by a child with a disability." [see page 9, paras 16 & 17] Again, no issue is taken with the views of the chambers judge in that case. Significantly, the judge also found that "with the exception of the orthodontic expenses, the s.7 child expenses sought by Ms. Brossart are simply a means to obtain a level of child support over and above the table amounts of the Guidelines." [see page 12, para. 30]

[19] Most significantly and as underscored by counsel for the Applicant in her Memorandum, the chambers judge stated at paragraph 24 of his judgment:

> The exceptions are medical and dental insurance premiums and post-secondary education expenses under s. 7(1) (b) and (e) respectively. They are treated differently in that they are not required to be "special" or "extraordinary". Presumably no portion of these categories of expenses and health-related expenses were included in the Guideline table amounts. The same can be said of child care and health-related expenses that meet the qualifying conditions listed in ss. 7(1)(a) and (c) respectively. [emphasis mine]

[20] The relevant qualifying condition under s.9(1)(a) is that the child care expenses be incurred "as a result of the employment ... of the person who has lawful custody of the children...". This is the case with the Applicant before me.

[21] The Respondent also relies on *Miller* v. *McClement* [1997] S.J. No. 761, *Ennis* v. *Ennis* [1998] A.J. No.1616, and *Krislock* v. *Krislock* [1997] S.J. No. 698 to support his arguments that the party claiming expenses under s.9 has the burden of establishing that the expense is in fact "extraordinary" and that courts must be careful to ensure that "add ons" are not awarded when they should be included within the table amounts of child support. These authorities do not assist the Respondent since, in each case, the court was considering a claim pursuant to s.9(1)(f) or "extraordinary expenses for extracurricular activities".

[22] Turning to other considerations embodied in s.9, the first being reasonableness and necessity, the court is mindful of the obligations of both parents to support their children which means the Applicant would be expected to earn an income. Where she does this outside the home, as here, of necessity child care costs will be incurred where the children are young or of tender years. Given that the Respondent earns $51,700.00 and the Applicant $28,600.00 annually (total $80,300.00) I find that it is well within the means of the parties to bear this expense. It is noted that in *Scott v. Scott*, BCSC 844 (cited by the Respondent) the Court allowed the child care expenses noting that they were clearly "necessary" to allow the mother to work.

[23] Finally, having regard to the family's spending pattern prior to separation, in argument the Applicant's counsel asserts that the mother gave evidence that the family utilized and paid for childcare before separation. Having reviewed all the affidavit material filed by the Applicant, I was unable to identify such evidence although it may have been offered at her examination for discovery. Notwithstanding that, given the evidence of the Applicant that when she was staying at home full time with the children, the Respondent called her lazy and yelled at her to get a job and assist the family financially, and given the evidence of personal assets owned by the Respondent

and the evidence as a whole, I am satisfied that child care expenses would be reasonably incurred and consistent with the family's spending pattern prior to separation.

[24] The Respondent's counsel has argued that child care is an "extraordinary" expense, presumably since it is specifically listed in s.9(1)(a). No cases have been cited to support this submission. The Applicant has pointed out that the word "extraordinary" only appears in ss. 9(1)(d) and (f). The fallacy in the Respondent's argument that child care should be considered an everyday expense and funded from the child support payments (in part) is that not all separated parents have children who require child care. This fact is the rationale for setting out child care expenses under s.9. To illustrate, the mother of a newborn child may stay at home with the child for one or two years after birth; most teenage children would not require child care; and no children who have reached the age of majority but are unable to withdraw themselves from the charge of the parents would require child care. If child care expenses were "built in" to the table amounts, in these circumstances, the payor parent would be paying a portion of child support for non-existent expenses.

[25] Given my analysis, I find that the Respondent is obligated to pay a proportionate share of child care expenses.

Retroactivity

[26] On the issue of retroactivity, again, the Respondent's obligation to pay child care dates to March 1, 2008. He chose to oppose the Applicant's request and allow her to bear the burden solely, and might I add unreasonably, for this expense. I say "unreasonably" not only because of the reasons enunciated above but also because requests for child care expenses in this jurisdiction are entirely commonplace and routinely granted, often on the consent of the parties (*Stewart* v. *Stewart*, [2008] N.W.T.J. No. 60; *Frank* v. *Auger*, [2006] N.W.T.J. No. 67; *Normandin* v. *Kovalench*, [2007] N.W.T.J. No. 105). Because of the high cost of living in the north, few families can afford the luxury of one of the spouses not working. It is the norm and not the exception that both spouses work and earn income. There is nothing whatsoever "extraordinary" or "special", in the popular sense of those words, about child care expenses in this environment. I see no reason why the Respondent should escape his legal obligation in this case to pay child care expenses from March 1, 2008, simply because he opposed the application. Accordingly, the Respondent shall pay his

proportionate share of child care expenses based on an income of $51,700.00 retroactive to March 1, 2008.

Quantum

[27] On the issue of quantum, it is clear from the Applicant's Memorandum that in the period prior to the return of the this application, Examinations for Discovery were conducted and, among other things, the Applicant gave evidence to the effect that child care costs were reduced from what they were earlier in the year presumably in September, 2008, although there is no evidence of this on file. There is also some confusion related to costs of D.'s "Four Plus" program and amounts that should have been paid during the summer months. Accordingly, I am going to leave it to counsel to attempt to resolve these issues and the amount which the Respondent should pay monthly toward the retirement of retroactive child care expenses taking into account all his obligations. I would encourage counsel to come to an agreement and to submit a consent order for the Court's approval, failing which this matter may be set down for a special hearing before me since I am seized with this application.

Costs

[28] The Applicant has succeeded on this application and shall have costs which I hereby set at the sum of $500.00 inclusive of disbursements.

[29] Counsel for the Applicant is asked to take out the formal Order to be submitted to me for approval prior to filing.

D.M. Cooper
J.S.C.

Dated this 26th day of February, 2009.

Counsel for the Applicant: Karina Winton
Counsel for the Respondent: Hugh Latimer

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