Date: 2012 03 02
Docket: S-1-FM-2007-000150

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CRYSTAL BENWELL

Applicant/Respondent

-and-

WILLIAM PAUL VILLEBRUN A.K.A. WILLIAM PAUL BEAULIEU

Respondent/Applicant

MEMORANDUM OF JUDGMENT

[1] This is an application by William Paul Beaulieu under the *Children's Law Act*, S.N.W.T., 1997, c. 14, to set aside child support provisions of a domestic contract (the "agreement") and for an order directing that child support be paid in an amount consistent with the Child Support Guidelines. He also seeks a reduction of arrears, and leave to have DNA testing done to determine paternity. Ms. Benwell indicated her consent to DNA testing in her affidavit.

[2] Mr. Beaulieu and Ms. Benwell lived together from October 1, 2004 until February 9, 2007. Ms. Benwell initiated proceedings in this Court under the *Children's Law Act* in December of 2007 in which she sought, among other things, child support in accordance with the Child Support Guidelines. Ms. Benwell's application was adjourned without a date because the parties entered into the agreement on April 9, 2008.

[3] The agreement gives custody to Ms. Benwell and requires Mr. Beaulieu to pay $500.00 plus one half of child care costs, per month, commencing on April 1, 2008. Child support is to be reviewed annually and, if necessary, adjusted on July 1 of each year and each of the parties agreed to supply each other with certain financial information by June 1 of each year. The agreement contains no reference to the amount of Mr. Beaulieu's income at the time, nor to the Child Support Guidelines; however, Ms. Benwell had sworn an affidavit in support of her application in which she stated Mr. Beaulieu earned approximately $30,000 per year at the time working for his uncle's plumbing business in Fort Smith.

[4] Ms. Benwell was represented by a lawyer when the parties entered into the agreement and it was her lawyer who prepared it. (She is no longer represented by counsel.) Mr. Beaulieu did not have a lawyer and did not get legal advice. Indeed, he expressly waived his right to legal advice. A copy of the agreement was filed with the Court as an exhibit to an affidavit sworn by Ms. Benwell's then lawyer on May 20, 2008, but provisions respecting custody and support were never incorporated into a court order.

[5] Mr. Beaulieu indicates that when he signed the agreement in April of 2008, he was living and working in Fort McMurray, Alberta, earning approximately $19.00 an hour. He quit his job and moved back to Fort Smith a month later, however, because of the cost of living in Fort McMurray and the distance from his family. He resumed work with his uncle's plumbing business for approximately $15.00 per hour. It also appears that he worked as a seasonal fire fighter for a short period of time that year. According to the income tax statement included as an exhibit to his affidavit, the Mr. Beaulieu's total income for 2008 was $19,506.00. Although he continued to work in his uncle's business, his income declined significantly in 2009, for which he reported only social assistance of $653.00. There is no explanation provided for this drastic reduction in income. He has not filed a return for 2010, but indicates that he was incarcerated for all but approximately six weeks of that year. He was again incarcerated from February until July of 2011 for assault and other charges. Ms. Benwell was the complainant on the assault charge. After his release in July of 2011, the Applicant obtained employment with a construction company, for approximately $16.00 an hour. He deposed in his affidavit that he was considering a return to school in September to study a trade, which would leave him without any income; however, his counsel confirmed at the hearing that he decided not to do so.

[6] The child continues to live with Ms. Benwell, who has been almost entirely responsible for her support, including payment of daycare and after school care expenses. The child has a medical condition for which Ms. Benwell may seek treatment in the United States and which may not be covered by her extended health care insurance plan. She estimates that this may cost up to $4,875.00 in total. Ms. Benwell indicates that she has already forgiven $6,000.00 in child support arrears, which was credited to Mr. Beaulieu by the Maintenance Enforcement Administrator.

[7] The issues to be determined are as follows:

(1) Can the child support provisions of the agreement be set aside?
(2) If so, what is the appropriate amount of ongoing child support? and
(3) Should arrears be reduced?

Can the Child Support Provisions of the Agreement be Set Aside?

[8] Ms. Benwell urged that the provisions in the agreement respecting child support should remain in place. In her view, Mr. Beaulieu entered into the agreement voluntarily, something that is expressly acknowledged in paragraph 8.05. Moreover, he waived, in writing, his right to legal advice. He should not now ask to have it set aside.

[9] The law recognizes that it is important to respect the agreements reached by parents and spouses upon the dissolution of the family unit. To do so encourages settlement outside of court, which has several obvious advantages, including financial and emotional cost savings, the ability to "fine-tune" arrangements to address a family's unique circumstances, and a certainty upon which parties can rely in ordering their affairs for the future. Accordingly these agreements are afforded great weight and they will not be set aside without good reason.

[10] Balanced against this, however, is a recognition in the law that a party's or a child's circumstances may change after the agreement is made such that it is no longer appropriate, as well as a recognition that, sometimes, people enter into agreements that are unreasonable or unfair without realizing it at the time. This has

been codified in legislation in section 59.2 and subsection 70(4) of the *Children's Law Act*, both of which permit the Court to set aside the provisions of an agreement, such as the one here, in certain circumstances. It is upon these that Mr. Beaulieu relies. Each must be considered separately.

Setting Aside under Section 59.2

[11] Section 59.2 is as follows:

> 59.2. A court may set aside a provision respecting support for a child in a domestic contract and may determine and order support for the child in an application under section 59 notwithstanding that the domestic contract may contain an express provision excluding the application of this section, where
>
> (a) the provision results in unconscionable circumstances;
> (b) the provision is in respect of a child who qualifies for an allowance for support out of public money;
> (c) there is, at the time the application is made, a default of at least three months duration in making a full payment of support under the domestic contract; or
> (d) the court is not satisfied that reasonable arrangements have been made for the support of the child.

[12] In stipulating that the ". . .court may set aside a provision respecting support for a child in a domestic contract and order support for the child *in an application under section 59* . . ." (emphasis added) it is clear that the Court's power to set aside a provision in an agreement under section 59.2 may only be exercised in conjunction with an application for support. Standing to bring an application for support is, in turn, limited by subsection 59(2) to: the custodial parent or another person who has custody of the child; the child him- or herself; or, in certain circumstances, the Minister responsible for the *Social Assistance Act*. The non-custodial parent - in this case, Mr. Beaulieu - is not included in this list.

[13] Other courts considering substantially similar provisions have reached the same conclusion: *Porter v. Porter,* [1979] O.J. 4091, 8 R.F.L. (2d) 349 (S.C.); *Gold v. Gold,* [1980] O.J. No. 2799 (Co. Ct.); *Watling v. Watling,* [1986] N.B.J. No. 374 (Q.B.); *Bruni v. Bruni,* [2010] O.J. No. 5148. In *Porter,* Boland, J., reached

the following conclusions with respect to an almost identical provision in the *Family Law Reform Act,* 1978 (Ont.), c. 2:

> On the literal interpretation of s. 18(4) alone, I find that the function of the word "and" between the clause" the court may set aside a provision for support in a domestic contract or paternity agreement" and the clause "may determine and order support" is meant to be conjunctive rather than disjunctive, thus making the two powers of the Court described in those clauses, concurrent. I come to this conclusion because if the word "and" is not interpreted as serving a conjunctive function, as opposed to a disjunctive one, then the last clause of the paragraph, "notwithstanding that the contract or agreement contains an express provision excluding the application of this section", would be completely out of place. Surely, if it were the intention of the Legislature to make the two powers given to the Court in s. 18(4) completely unrelated and autonomous, the "notwithstanding" clause would appear immediately after the first clause in the paragraph. As I find that the two judicial powers described in s. 18(4) are intended to be concurrent powers, the phrase "in an application under subsection 1", must be seen as applying to both clausal antecedents of the subsection rather than just the one immediately preceding it. For these reasons, I have come to the conclusion that the power of the Court to interfere with the support provisions of a domestic contract can only be exercised under s. 18(4) within the context of an application for support under s. 18 of the Family Law Reform Act, 1978.
>
> Apart from a literal reason, there is also a contextual reason for reaching this conclusion. The jurisdiction of the Court to interfere with support provisions in domestic contracts is contained in a subsection of a section which clearly is intended to establish the law concerning the issue of support and support applications. Subsection (1) of s. 18 empowers the Court to make support orders; s-ss. (2) and (3) determine who may make an application for support; s-s. (5) provides judicial guidelines for the determination of the quantum of support and s-s. (6) establishes the consideration to be given to conduct in the determination of the amount of support awarded. In light of this examination of s. 18 as a whole, it is my view that the only logical and harmonious way of construing the s. 18(4) power to interfere with contractual support provisions is that it was intended to be exercised within the context of a support application under s. 18. Furthermore, s. 19(1) of the Act appears to provide an exhaustive list of the types of orders which may be made "in an application under section 18" which presumably would also cover s. 18(4) applications. All of the possible orders in the list relate to forms of support orders. There is no specific mention of an order to set aside a contractual support provision.

[14] Accordingly, Mr. Beaulieu may not rely upon section 59.2 of the *Children's Law Act* to set aside the child support provisions of the agreement.

Setting Aside under Subsection 70(4)

[15] I turn now to consideration of whether or not the child support provisions in the agreement can be set aside under subsection 70(4). Unlike section 59.2, subsection 70(4) may be invoked by any party to a domestic contract.

[16] Subsection 70(4) provides:

> 70 (4) A court may, on application, set aside a provision in a domestic contract respecting a child
>
> (a) where a party failed to disclose to the other party significant assets or significant debts or other liabilities existing when the provision was made;
> (b) where a party did not understand the nature or consequences of the provision;
> or
> (c) otherwise in accordance with the law of contract

[17] By virtue of subsection 70(5), parties may not contract out of this provision.

[18] The analysis is a two-part process. First, the Court must determine if an applicant comes within one or more of the circumstances in subsection 70(4). If that is answered in the affirmative, then the Court can go on to consider if it is appropriate to exercise its discretion to set aside the agreement. *LeVan v. LeVan,* [2008] O.J. No. 1905 at paragraph 51. Mr. Beaulieu argues that he comes within subsection 70(4)(b): he did not understand the nature or the consequences of the agreement.

[19] It is useful to start with the meaning of "nature" and "consequences". The *Canadian Oxford Dictionary* 2nd ed. (Oxford University Press: 2004) defines "nature" as "a thing's or person's innate or essential qualities or character". "Consequence" is defined as "the result or effect of an action or condition". It is clear that Mr. Beaulieu understood the nature of the agreement when he signed it: he knew that, among other things, it was about custody and support. I am not

convinced, however, that Mr. Beaulieu understood the *consequences* of the agreement. The consequences or results of the agreement were not simply that Mr. Beaulieu was agreeing to pay $500.00 a month, but rather, that he was undertaking to pay almost twice what was required of him by law.

[20] There is no evidence to explain why the agreement provided for an amount so much higher than required by the guidelines. At the time of the initial child support application, and immediately preceding the agreement, Ms. Benwell, who had lived with Mr. Beaulieu, estimated that he earned roughly $30,000.00 a year. In this application, Mr. Beaulieu estimates that he was earning $19.00 an hour while in Fort McMurray at the time the agreement was signed, which, had he remained in his job, would have amounted to about $39,000.00 a year. In the affidavit she filed in response to this application, Ms. Benwell indicated that Mr. Beaulieu told her about extensive casino winnings and excessive spending during the brief period of time he was living in Fort McMurray, but, again, there is nothing to indicate what these winnings and expenses were, nor any evidence that the $500.00 amount was predicated on this. To be obliged to pay $500.00 a month in child support under the Child Support Guidelines, Mr. Beaulieu would have had to earn approximately $54,000.00 a year. He has never made this much money.

[21] Mr. Beaulieu may have become aware of the consequences his commitment - and how that differed from his obligations under the law - had he consulted a lawyer, but he did not. As noted, Mr. Beaulieu signed a waiver respecting legal advice in which he acknowledged, among other things, that he was aware that he "*may* be giving up, prejudicing or limiting certain of my legal rights" (emphasis added). Mr. Beaulieu says he did not consult a lawyer because he could not afford one and he "did not want to fight about it". In the circumstances, his position is understandable.

[22] I am struck by the fact that neither the waiver, nor the agreement itself, make any reference to the Child Support Guidelines, Mr. Beaulieu's income, or the fact that he would be paying so much more than what was required by the guidelines. A lawyer would have recognized that the amount of child support proposed was inconsistent with the guidelines and beyond Mr. Beaulieu's means, but a lay person, unless they were aware of the existence of the Child Support Guidelines and where to find them, might not. With nothing on the face of the agreement to indicate that the amount of child support proposed was nearly double what was required by the

guidelines, it is reasonable to conclude that Mr. Beaulieu simply saw no reason to try and retain a lawyer, particularly if he could not afford one. Thus, he remained uninformed of the consequences of the agreement and did not understand what, exactly, he was " . . .giving up, prejudicing or limiting . . ." in signing it.

[23] The Child Support Guidelines bring certainty and consistency to child support issues. They clarify expectations to both paying and recipient parents, as well as to their lawyers. This is embodied in objectives of the Child Support Guidelines, which are set out in the *Children's Law Act* regulations, R-138-98, as amended:

> 1. The objectives of these guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they benefit from the financial means of each parent;
> (b) to reduce conflict and tension between parents by making the calculation of support for children more objective;
> (c) to improve the efficiency of the legal process by giving courts, parents and other parties to a support application guidance in setting the levels of support for children and encouraging settlement; and
> (d) to ensure consistent treatment of parents and children who are in similar circumstances

[24] The importance that the legislators placed on adherence to these guidelines is reflected in subsection 59(4), which provides that when making a support order, the " . . . court *shall* do so in accordance with the applicable guidelines" (emphasis added), unless the case falls into the exceptions set out in section 59.1, which are not present here.

[25] In the circumstances, I find it appropriate to exercise my discretion and set the child support provisions of the agreement aside under subsection 70(4).

What Should be the Amount of Ongoing Support?

[26] Counsel indicated that Mr. Beaulieu is currently employed as a construction worker and earns $16.00 an hour, or approximately $33,280.00 a year. This level of income is consistent with what he has appeared capable of earning in the past and there is nothing to suggest that he is intentionally underemployed. The guideline amount for this level of income for one child was $304.00 up to December 31, 2011.

New guidelines have now been brought into force and the amount as of January 1, 2012 for this level of income is $299.

Should Arrears be Reduced?

[27] Mr. Beaulieu has made some support payments, but as of November, 2011, the arrears of maintenance were $13,291.00.

[28] The financial information that Mr. Beaulieu tendered shows that his income has been low for the past number of years. This is partially explained by the fact that he was incarcerated for significant periods of time in 2010 (January to November) and in 2011 (February to July) and was therefore unable to make a living. The latter period was incarceration for an assault on Ms. Benwell and Mr. Beaulieu conceded in argument that no reduction in arrears should be available for that time.

[29] As Mr. Beaulieu's counsel pointed out, the test the Court must apply in considering rescission of arrears is that set out *Lavoie v. Tisserand*, 2005 NWTSC 7: In the absence of special circumstances, arrears should not be rescinded unless the payor establishes that he or she could not pay the support in the past, cannot pay them now, and will not be able to pay them at any time in the future.

[30] Mr. Beaulieu has not met this test. Other than the periods of incarceration, there is no explanation offered as to why Mr. Beaulieu was not employed and earning an income. His reasons for leaving his employment in Fort McMurray in 2008 - that he missed his family and found the cost of living high - demonstrate that he did not appreciate that his financial responsibilities to his daughter must be a priority. Moreover, there is no explanation offered as to why he was unemployed when he returned to Fort Smith and not earning an income similar to what he was earning before he left.

[31] It is not, in my view, appropriate to reduce the arrears for either period of incarceration. While it is true that Mr. Beaulieu could not earn much of an income during either period of incarceration, he is once again employed and there is no reason that he should not be able to pay arrears in the future.

[32] I do find, however, that there are special circumstances that justify an overall reduction in arrears. These circumstances are that Mr. Beaulieu entered into an

agreement that required him to pay significantly more than what was required by the guidelines and this agreement has now been set aside. It would be illogical and unfair to require Mr. Beaulieu to pay arrears accumulated at the rate set out in that agreement. Arrears should be recalculated using the appropriate guideline amount and based on what Mr. Beaulieu's income could have been expected to be had he made reasonable efforts to find work. For the purpose of that calculation, I impute an income to him of $31,200.00 annually for the years 2008 to November 30, 2011. Therefore, arrears shall be set as follows:

A. Total Amount of Support Owing According to Guidelines:

April 1 - December 31, 2008	9 months x $284.00	=$2556.00
2009	12 months x $284.00	=$3408.00
2010	12 months x $284.00	=$3408.00
January 1- November, 30 2011	11 months x $284.00	=$3124.00
December, 2011	1 month x $304.00	=$ 304.00
January - February 2012	2 months x 299.00	=$ 598.00
TOTAL SUPPORT OWED		$13,398.00

B. Less Total Amount Paid to November 8, 2011 ($8708.30)

C. Total Arrears to February 29, 2012 **$4689.70**

Other Matters

[33] During argument and in her affidavit, Ms. Benwell raised the prospect of seeking additional support for extraordinary and unusual expenses for the child. I declined to hear this, as there was no application before the Court for this relief and Mr. Beaulieu would not be in a position to respond. Should Ms. Benwell wish to

pursue that additional relief, she should do so in the manner provided by the *Rules of the Supreme Court of the Northwest Territories.*

Order

[34] I order the following:

1. Paragraph 4.01 of the domestic agreement between Crystal Benwell and William Paul Beaulieu, dated April 9, 2008, be and is hereby set aside.

2. William Paul Beaulieu's income is deemed to be $33,280.00 a year, as of December 1, 2011.

3. William Paul Beaulieu shall pay $304.00 to Crystal Benwell for the support of Angel Benwell, born October 1, 2004, for the month of December, 2011.

4. Commencing on January 1, 2012, and continuing on the first day of each and every month thereafter, William Paul Beaulieu shall pay $299.00 in accordance with the Child Support Guidelines to Crystal Benwell for the support of Angel Benwell.

5. Arrears of support are set at $4689.70 as of February 29, 2012, subject to deductions for any amounts that have been paid since November 8, 2011.

6. Leave is hereby granted to William Paul Beaulieu to obtain DNA testing on blood samples in respect to the child, Angel Benwell. Mr. Beaulieu shall pay all costs related to such testing.

7. No costs will be payable by either party in relation to this application.

K. Shaner

J.S.C.

Dated at Yellowknife, NT, this
2nd day of March 2012

Counsel for the Applicant/Respondent: Jeremy Walsh
Counsel for the Respondent/Applicant: Self

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MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE K. SHANER