McInness v. *Hamilton,* 2013 NWTSC 58

Date: 2013 08 20
Docket: S-1-FM-2013 000061

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SANDRA MCINNES

Applicant

- and -

JEFF STEWART HAMILTON

Respondent

MEMORANDUM OF JUDGMENT

I) INTRODUCTION AND BACKGROUND

[1] This Application is brought pursuant to the *Interjurisdictional Support Orders Act*, S.N.W.T. 2002, c. 19. The mother seeks a variation of a child support Order made by the Court of Queen's Bench of Alberta on February 16, 2000 ("the 2000 Order"). She now lives in British Columbia. The father lives in Yellowknife.

[2] The Application was forwarded to the Designated Authority for the Northwest Territories, in accordance with the provisions of the *Act*. The Designated Authority filed an Originating Notice commencing proceedings in this Court, and arranged for the father to be served.

[3] The mother seeks an increase of the basic amount of child support to reflect the increase in the father's current income since the 2000 Order was made. She also seeks an order requiring him to pay a proportionate share of special expenses. The father does not dispute the adjustment of the basic amount of child support. He does dispute the claim for special expenses.

[4] When the matter was heard in Family Chambers on July 25, 2013, counsel for the Designated Authority advised that the father was in the process of adding the child to the health care plan he has through his work, and that the only issues left to be decided by the Court were the claims for special expenses related to clothing and to the child's dietary needs. Counsel referred to some cases but did not have copies of the cases with her in Court. The father had not been provided a copy of the cases. I reserved my decision to have an opportunity to review the cases, and to give the father an opportunity to file written submissions addressing those cases if he wished.

[5] I have now had an opportunity to review the cases that were referred to by counsel for the Designated Authority (*M.E.P.* v. *S.L.F.*, 2011 BCPC 6 and *M.F.B.* v. *T.J.W.*, 2010 BCPC 368). I have also reviewed written submissions that the father sent in a letter dated July 29, 2013 to the Court Registry. The father's letter includes submissions about the claims for clothing, special dietary needs, and the proposed orthodontic treatment. While I had understood, during the July 25 hearing, that the question of orthodontic treatment would be resolved once the child was added to the father's health plan, it is apparent from the father's written submissions that this is not the case: that claim remains a live issue.

II) ANALYSIS

a) Basic amount of child support

[6] Child support is based on the payor parent's income, and generally speaking, determined by the *Child Support Guidelines*, R-138-98: the higher a parent's income is, the greater the amount that parent is required to pay for the support of his or her child.

[7] The 2000 Order was based on the father having an annual income of $50,332.00. The financial information that he has filed in his response to the Application shows that his income over the past three years has been considerably higher than that. The income tax returns he has provided show that his Line 101 income was $99,713.19 in 2010; $112,966.67 in 2011; and $104,945.83 in 2012. As for the current year, he has filed a Statement of Earnings and Deductions which shows total gross earnings of $49,459.92, as of June 20. If this trend continues, the father's income for 2013 will be a little less than it was in 2012, but in a similar range.

[8] In the Financial Statement he has filed with the Court, the father states that he expects his income for 2013 to be $84,718.40. But based on the information about his income over the past three years, and the Year to Date information for

2013, I conclude that for child support purposes, his income should be set at $100,000.00. Under the *Guidelines*, this means, for one child, monthly payments of $919.00.

[9] Although in her Application, the mother does not specifically ask that the variation of child support apply retroactively, she does seek a variation in the amount of child support and "such other provisions as courts deem appropriate in regards to child support payments". This, in my view, includes a determination of whether the variation should be prospective only, or whether it should also have a retroactive effect.

[10] The principles that govern the making of retroactive orders dealing with child support were set out 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 SCC 37. In deciding whether a retroactive order should be made, the factors to consider are whether there is a reasonable excuse for the recipient parent not having made an earlier application; the conduct of the payor parent; the circumstances of the children; and any hardship that would result from a retroactive award. This Court's recent decision in *Sanderson* v. *Pennycook*, 2013 NWTSC 48 is an excellent illustration of the interplay of these factors and how they must be weighed. I find considerable guidance in that decision.

[11] Here, I have limited information against which to examine these factors. The emails attached to the Application show that the mother was asking the father, as early as 2008 and 2009, to add the child to his dental plan, and that she was communicating with him about the need for orthodontic treatment. But there is no indication that she raised any issue about increases in his income or asked him to increase his child support payments during those years. In her Application, which is dated March 20, 2013, she states that she believes that the father has had several wage increases since the original support order was made. There is no explanation for why she waited until the year 2013 to seek a variation of the support order.

[12] While it seems clear from some of the email messages that the relationship and communication between the parties has been strained, there is no specific allegation of conduct on the father's part that would have compromised the mother's ability to seek a variation in the child support earlier. The mother did in fact communicate with the father about other matters regarding the child.

[13] The father did comply with the 2000 Order, and that has to be taken into account. I also recognize that the 2000 Order did not require the parties to share their income information from year to year, as court orders providing for child support often do. At the same time, the father ought to have known that if his

salary had more than doubled since the 2000 Order was made, this necessarily had a bearing on how much he should be paying for the support of his child.

[14] The bottom line is that since at least the year 2010, this child has not had the benefit of the level of financial support that corresponds, under the *Guidelines*, to his father's income. That is unfortunate. I conclude, as did the Court in *Sanderson* v. *Pennycook*, *supra*, that both parties share some responsibility for that state of affairs. In my view, the variation should be retroactive to some degree. But given the father's compliance with the 2000 Order, the lack of explanation for the mother's failure to seek a variation earlier on, and given that the variation I am granting as part of this Order is a significant one, its retroactive effect will be limited to the current year. It will be effective January 1, 2013.

b) Special expenses

[15] With respect to special or extraordinary expenses, the *Guidelines* provide 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.

(1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

[16] The party who seeks an order regarding special expenses bears the burden of establishing that the expense fits within the parameters set out in the *Guidelines*, which includes establishing that the expense is both necessary and reasonable. *Bosgra* v. *Squires*, 2001 NWTSC 58, at para. 41. *M.E.P.* v. *S.L.F.*, *supra*, at para. 33.

[17] The mother is claiming the following, on a yearly basis, as special expenses: orthodontic treatment for the child ($6,600.00), costs arising from the child's special dietary needs ($1,200.00), clothing ($1,200.00), and an item identified as "Blue Cross" ($1,560.00). I will deal with each of these items in turn.

[18] In his written response to the Application, the father questions whether the proposed orthodontic treatment is medically required or being proposed for cosmetic reasons only. In the letter he sent to the Court following the hearing, he states that his health plan covers basic dental care only, and not orthodontic treatment. He reiterates that there is no evidence that orthodontic treatment is

medically required for this child. He notes that this was one of the reasons the claim for this type of expense was denied in *M.E.P.* v. *S.L.P.*, *supra*.

[19] As part of her Application, the mother has included a document dated May 13, 2009, which appears to be an estimate provided to her by an orthodontics clinic. The estimate sets out two possible treatment plans, both at a cost of approximately $6,600.00. This document does not indicate the reasons why the treatment is required.

[20] The details of the father's health care plan are not before the Court. He has indicated that he is willing to add the child to his plan. He should do so. There is no doubt it is in the best interest of his child to benefit from this coverage, be it for basic dental care or other benefits. There is no good reason why the child should continue to be deprived of the benefit of that coverage.

[21] But with regards to the orthodontic treatment, there is insufficient evidence before the Court to assess whether the proposed expenses meet the definition of special expenses pursuant to the *Guidelines*, bearing in mind the principles set out above at Paragraphs 15 and 16. Orthodontic treatment can be contemplated in a wide range of circumstances. At one end of the spectrum, it may be absolutely required for medical reasons. At the other end of the spectrum, it may be desirable, but purely for cosmetic reasons.

[22] To assess whether the proposed treatment constitutes a special expense within the meaning of the *Guidelines*, and to assess its necessity and its reasonableness, the Court needs evidence about why the treatment is being contemplated and the consequences should the child not receive it. The evidence adduced here is simply insufficient to enable the Court to make that determination. For those reasons, I am unable to grant this aspect of the Application.

[23] As for the claim with respect to clothing and food, generally those costs are considered basic necessities that the regular amount of child support is intended to cover. As a starting point, they do not constitute a special expense. But additional costs arising from special dietary needs may, in certain circumstances, constitute a special expense, as recognized in *M.F.B.* v. *T.J.W.*, *supra*, at para 21.

[24] It is not disputed that the child suffers from autism. In her Application, the mother claims that a gluten-free diet is one of the things that is beneficial to him because of his condition. The father disputes that assertion and argues that the research about the links between autism and diet is inconclusive.

[25] The father has attached two documents to his written submissions. The first appears to be a print-out taken from a blog dealing with issues related to psychology. The other is a print-out which appears to originate from a website of the Mayo Clinic. For her part, the mother relies on a letter from a Dr. M. Lund, which reads as follows:

> [the child] has autism with a number of autistic symptoms including stereotypical movements, tics, which are very common in autism, sensory defensiveness and behavioural dis-regulation. In keeping with some aspects of the autism literature, his mother has found him to be sensitive to certain foods which can trigger dis-regulated behaviour and tics. He benefits from a gluten-free diet, the avoidance of foods high in simple sugars and low in additives and dyes.

[26] As mentioned above at Paragraph 16, the party who claims special expenses has the burden of establishing that the expense fits within the parameters of the *Guidelines*. Here, the parties disagree on a fundamental question: whether a gluten-free diet is of benefit to a child who suffers from autism, and of benefit to this child in particular. This is not a subject matter on which the Court can accept opinions from lay people. It is the type of question that, if contested, must be answered through opinion evidence by a duly qualified expert.

[27] The Court cannot attach any weight to the print-outs filed by the father. There is no evidence of the qualifications of persons who authored the comments, or of the basis for the opinions expressed.

[28] As for the letter signed by Dr. Lund, I tend to agree with the father's submission: that letter does not proffer a medical opinion. Rather, it seems to refer to the observations reported by the mother herself.

[29] As a result, I am left with minimal evidence on this controversial topic. When there are shortcomings in the evidence, those shortcomings are to the detriment of the party who bears the burden of establishing a contested fact. In this case, that party is the mother.

[30] I conclude that the evidence falls short of establishing that the expenses associated with giving this child a gluten-free diet constitute a special expense within the meaning of the *Guidelines*. A further problem with this item is that there is also no evidence to support the monthly amount of $1,200.00 claimed for it. This would make it impossible for the Court to assess the reasonableness of the expense in any event.

[31] Finally, there is no evidence to establish that the claim for Blue Cross coverage is a special expense within the parameters of the *Guidelines*. The only

evidence related to this claim is a July 2012 letter where the mother requests the termination of the coverage. There is no evidence that this coverage was for the child, or what it entailed. This claim cannot be granted either.

III) CONCLUSION

[32] For the foregoing reasons, the mother's application for an increase in child support is granted, but her claim for an order that the father pay a proportionate share of the expenses that she has identified in her Application is dismissed. Pursuant to section 32 of the *Interjurisdictional Support Orders Act*, I make the following Order:

1. The Order made by the Court of the Queen's Bench of Alberta on February 16, 2000, is hereby varied as follows:

   a) effective January 1, 2013, the father's income, for child support purposes, is set at $100,000.00 per year;

   b) effective January 1, 2013, the father's child support obligations are increased to $919.00 per month, payable on the 1st day of each month;

   c) commencing in June 2014, the father will provide the mother, no later than June 30 of each year, a copy of his income tax return for the previous taxation year.

[33] I direct the Designated Authority to prepare a Formal Order to this effect for my review. I also direct the Designated Authority to ensure that section 34 of the *Act* is complied with and that the necessary materials are forwarded to the Province of British-Columbia, where the mother resides, and to the Province of Alberta, where the original child support order was made.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
20th day of August, 2013

K. Simpson, Student-at-Law, on behalf of the Designated Authority
The Respondent represented himself

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MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU