Date: 2014 03 13
Docket: S 1 DV 2000 103256

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOYCE JUDY DESJARLAIS

Petitioner/Respondent

-and-

JAMES MARLOWE

Applicant/Respondent

MEMORANDUM OF JUDGMENT

[1] Mr. Marlowe seeks to vary the amount of child support he is required to pay, both on an ongoing basis and retroactively. He also wants to enforce access.

[2] I heard arguments from Mr. Marlowe in Chambers on December 12, 2013 and I reserved my decision. Ms. Desjarlais did not appear before the Court at that time, but shortly after the matter was heard she contacted the registry and explained she did not attend due to an error she made about the date. As access and child support orders will invariably have an impact on children it is important that all parties have a reasonable opportunity to make submissions. This matter was adjourned to January 9, 2014 and Ms. Desjarlais appeared at the time.

[3] Ms. Desjarlais confirmed that she had no evidence or submissions for the Court respecting this application; however, that, in and of itself, will not lead the Court to grant the relief Mr. Marlowe seeks. The Court requires there be both a legal and evidentiary basis to vary a child support order.

[4] Enforcement of the current order was stayed pending determination of this application.

[5] Ms. Desjarlais and Mr. Marlowe divorced in 2003. They have four children, three of whom are now adults. This application concerns the two youngest children, namely Thiadene, born in 1993 and Chize, born in 1998.

[6] At the same time it granted the Divorce Judgment, this Court issued a Corollary Relief Order directing that Ms. Desjarlais would have sole custody and day to day care and control of Thiadene and Chize. Living arrangements for the two older children would be as agreed between the parents. No child support was ordered.

[7] The Corollary Relief Order also addressed access. Specifically, each parent was entitled to reasonable access to the child or children in the other's day to day care. Each parent was to have access to all school, recreational and medical records for each of the children as well as the right to communicate directly with any educational, health or care provider without restriction.

[8] In 2007, Ms. Desjarlais brought a variation application to require Mr. Marlowe to pay child support. Both Ms. Desjarlais and Mr. Marlowe were represented by lawyers.

[9] There were two appearances in relation to the variation application: one on July 13, 2007 and one on September 13, 2007. The Clerk's notes reflect that at the July appearance, Mr. Marlowe's lawyer attempted to file affidavit material but this was not permitted by the presiding judge. The Court made an interim order in which Mr. Marlowe was imputed an annual income of $57,265.00 and ordered to pay support in the amount of $865.00 per month. The amount of income imputed to Mr. Marlowe was based on information from Statistics Canada respecting earnings for adult males in Lutselk'e at that time.

[10] Mr. Marlowe was directed to provide financial information by August 10, 2007 and the next appearance was scheduled for September 13, 2007.

[11] Mr. Marlowe filed an affidavit attaching Notices of Assessment for the 2003, 2004, 2005 and 2006 taxation years on September 12, 2007, approximately one month later than what the Court directed the previous July and the day before the next scheduled court appearance. These reflected an annual income of $39,580.00, $9,299.00, $33,575.00 and $3,725.00 respectively.

[12] Ms. Desjarlais responded to the affidavit the same day. She disputed the completeness and accuracy of the information Mr. Marlowe provided. In particular, she claimed that Mr. Marlowe had a number of sources of income that were not disclosed through either his affidavit material or his income tax returns.

[13] Upon noting the conflicting nature of the affidavit evidence, this Court granted an interim order on September 13, 2007 continuing the payments of $865.00 per month, being the amount required for two children under the *Federal Child Support Guidelines*, SOR/97-175, as amended, at that time, based on an imputed income of $57,265.00.

[14] The Order also granted leave to both parties to apply for further variation once further information was available. The Clerk's notes state the parties intended to conduct cross-examinations on each other's affidavits, but it appears that, until now, nothing else happened in relation to the application. The September 13, 2007 remains in place. As of November 19, 2013 Mr. Marlowe has arrears of $2,257.38.

[15] Mr. Marlowe's explanation for the delay in coming forward with this application is that he applied for assistance through the Legal Services Board but his application was denied. It took some time to get to this point, he says, because he had to represent himself.

[16] In support of this present application, Mr. Marlowe provided evidence about his income for the years 2007 to 2012 inclusive. These amounts are, respectively, $13,850.00, $15,350.00, $20,100.00, $24,564.00, $23,931.00 and $44,450.00.

[17] Of the two children to whom the September 13, 2007 order applies and who are the subject of this application, only the youngest remains a child of the marriage. Thiadene turned 19 on April 26, 2012 and is currently employed full time at a diamond mine. There is no evidence that he remained dependent on his parents subsequent to attaining the age of majority.

[18] Mr. Marlowe claims Ms. Desjarlais will not permit either of the two younger children to have contact with him.

[19] Mr. Marlowe argues that ongoing support should be adjusted to reflect his actual income, which appears to never have been as high at the imputed $57,265.00 per year. He also argues that he should not have had to pay support for Thiadene after he reached the age of majority in 2012 and that ongoing support for Chize should be varied to reflect his actual income.

[20] I will deal with the issue of access first. This issue is relevant only with respect to the youngest child, Chize.

[21] Maximum contact between parents and children is a key principle underlying the *Divorce Act*, RSC 1985, c.3 (2nd Supp) and modern family law in general. The law recognizes that children have a right to the benefit of the love and guidance of both parents (*Popoff v. Popoff*, 2001 NWTSC 14, at para 22). Parents, in turn, have a responsibility to do what they can to foster the relationship between the other parent and child or children.

[22] If parents fail to honour the terms of access and custody orders, steps can be taken to enforce those orders. The Court has a number of tools at its disposal for this purpose. These include citing the offending parent in contempt and changing the terms of access. The appropriate remedy will depend on a number of factors, such as the age of the child, the child's views, where appropriate, the general family dynamics, the history of the child's relationship with the parent seeking to enforce the order and any explanation the offending parent has to offer. This is not an exhaustive list. Each case will require consideration of its own particular circumstances.

[23] The remedies I noted above will have serious legal consequences for the party found to have committed the breach and practical consequences for the child or children. Thus, the Court must proceed carefully. In cases where, as here, what has been ordered is "reasonable access", the Court will require more than the general assertions that access has been denied. At a minimum, the Court will need to know when the alleged breaches occurred and what specific efforts the non-custodial parent has made to exercise access. In short, it will require convincing evidence that there has, in fact, been a breach.

[24] There is very little evidence respecting what specific problems Mr. Marlowe has experienced exercising access to Chize. As noted, Mr. Marlowe complains that Ms. Desjarlais does not allow the children to have contact with him or to see him when they visit his home community of Lutselk'e. This is, however, a very general statement, which lacks specific information about how often the children may have visited Lutselk'e, for what reason and for what time period. Similarly, there is no evidence about how often Mr. Marlowe has attempted to exercise access to Chize, in what form and whether those efforts have been frustrated.

[25] Mr. Marlowe says at one point, Thiadene was in hospital and Mr. Marlowe was prevented by hospital staff from visiting him. There could be many explanations for this and it may have had nothing to do with Ms. Desjarlais.

[26] In summary, this evidence is insufficient to permit the Court to make an order to enforce access and therefore, this portion of the application is dismissed.

[27] I now turn to the question of child support.

[28] Child support is determined in accordance with the *Federal Child Support Guidelines* (the "*Guidelines"*), made under the *Divorce Act*. The basis for the amount of support is the paying parent's income and the number of children. The amount varies by jurisdiction, each of which is assigned a table of amounts of child support to be paid depending on the paying parent's income (the "table amount").

[29] Parental income is determined first by what is reported as "Total Income" in the T1 General form issued by the Canada Revenue Agency: *Guidelines,* s. 16. Sometimes, though, determining income this way may not yield a fair result. In that case, s. 17 of the *Guidelines* allows the Court to look at the payer's income over the last three years to determine what is fair in the circumstances.

[30] Mr. Marlowe's income for 2012 was $44,450.00. This is somewhat higher than what his income has been in years prior; however, he asks that his ongoing child support obligation be varied to reflect his current income and he does not ask the Court to attribute a lower amount to him. Similarly, he does not claim it would be unfair to use what was reported for 2012. The Northwest Territories table amount for one child based on Mr. Marlowe's 2012 income of $44,450.00 is $405.00.

[31] Mr. Marlowe wants the amount of support he is to pay to be varied retroactively to the point when Thiadene reached the age of 19.

[32] Section 17(1)(a) of the *Divorce Act* allows the Court to vary child support retroactively. Section 17(4) of the *Act* provides that before doing so, the Court must be satisfied that there has been a change of circumstances since the last order or variation. What constitutes a "change of circumstances" for the purposes of s. 17(4) is set out in s. 14 of the *Guidelines* and includes any change in circumstances that would result in a different amount of child support being ordered where support has been determined using the applicable table amount (s. 14(a)).

[33] Mr. Marlowe's case falls into this category. The amount he was required to pay as a result of the September 13, 2007 variation order was determined using the tables in the *Guidelines* and an imputed income. There has been a change in circumstances since 2007 in that Thiadene attained the age of majority on April 26, 2012. Ms. Desjarlais does not claim that he was unable to withdraw from her care or that he required ongoing support for post-secondary education. She does not dispute Mr. Marlowe's evidence that Thiadene is self-supporting.

[34] Despite Thiadene turning 19 almost two years ago, Mr. Marlowe has continued to pay support in a table amount for two children in the amount of $865.00 a month.

[35] Varying Mr. Marlowe's support obligation retroactively to when Thiadene reached adulthood raises two issues. First, it will put Mr. Marlowe in a credit position. As a result, Ms. Desjarlais will not have money coming in to her hands for Chize until Mr. Marlowe's credit is exhausted.

[36] The second issue is that Mr. Marlowe's support obligation was based on imputed income derived from statistical information provided to the Court. It is now apparent that the imputed income was and still is significantly higher than what Mr. Marlowe's actual income has been each year since 2007. Consequently, the table amount of support was higher than it otherwise would have been.

[37] Charbonneau, J., dealt with both of these issues in *Zoe v. Fish*, 2013 NWTSC 51:

> [37] At the same time, the imputation of income based on statistical information is almost invariably the result of the respondent parent having failed to disclose financial information. Given this, I would be extremely reluctant to grant a retroactive variation that would have the effect of creating a credit on the payor parent's maintenance enforcement account, thereby relieving that parent from making child support payments for a period of time. A parent who has obtained a child support order and who has received payments in accordance with that order should be able to plan and manage the family finances accordingly. That being so, a retroactive adjustment that would have the effect of depriving the recipient parent from ongoing payments for a period of time would, in my view, be very unfair.

[38] Mr. Marlowe bears a great deal of responsibility for the amount of income imputed to him and the consequences flowing from that. One of those consequences is Ms. Desjarlais' reliance on the higher amount of support. It has been approximately seven years since the income was imputed to him, but he did

not file this motion until late November of 2013. I have considered Mr. Marlowe's reasons for not bringing this forward earlier, specifically, that he was unable to retain a lawyer. That is not an acceptable reason for the delay. While having a lawyer is preferable, people can and do represent themselves very ably in court proceedings. The information Mr. Marlowe had about his income has been available to him for a significant period of time. Until he brought that application and put Ms. Desjarlais on notice about what his actual income was, she was entitled to rely on what the September 13, 2007 court order said respecting his income.

[39] Nevertheless, it would be unfair to deny Mr. Marlowe some relief with respect to the payments he made for Thiadene once Thiadene turned 19. Parents are not required to support independent adult children. It would be naïve for any parent to think they could continue to rely on child support payments for a child who is legally an adult and who is apparently self-supporting. This is entirely foreseeable and parents can and should plan accordingly.

[40] In the circumstances, Mr. Marlowe's support obligation should be varied retroactively to May 1, 2012, being the first day following the month when Thiadene reached the age of 19. That variation will be based on an imputed income of $57,265.00 for the period of May 1, 2012 to November 30, 2013, resulting in a table amount of $528.00 a month. For the period of December 1, 2013 onward, Mr. Marlowe's child support obligation will be based on an annual income of $44,450.00, resulting in a table amount of $405.00 per month.

[41] As both parties are self-represented, I direct the Clerk to prepare an order with the following terms:

1. It is declared that Thiadene Desjarlais, born April 26, 1993, is no longer a child of the marriage within the meaning of the *Divorce Act*, RSC 1985, c.3 (2nd Supp) as of April 26, 2012 and no child support is payable for him by James Marlowe as of April 30, 2012.

2. It is ordered that the Order of this Honourable Court dated September 13, 2007 be and is varied retroactively and prospectively as follows:

    a. For the period of May 1, 2012 to November 30, 2013 James Marlowe shall pay child support in the amount of $528.00 per month for support of the child Chize Desjarlais, born November 15, 1998;

b. Beginning December 1, 2013, James Marlowe shall pay child support in the amount of $405.00 per month for the support of the said child;

c. Child support shall be payable on the first day of each month and shall continue until Chize Desjarlais is no longer a child of the marriage within the meaning of the *Divorce Act*; and

d. Credit arising from this variation shall be applied first to any outstanding arrears and then to ongoing support obligations.

[42] Finally, I direct that a copy of these reasons be provided to the Maintenance Enforcement Administrator for the Northwest Territories.

K. Shaner
J.S.C.

Dated at Yellowknife, NT
this 13th day of March, 2014.

James Marlowe – Self-represented
Joyce Judy Desjarlais – Self-represented

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