Mulders v. *Mulders*, 2014 NWTSC 50

Date: 2014 07 22
Docket: S-1-DV-2011104136

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DONNA MULDERS

Petitioner

- and -

ROBERT MULDERS

Respondent

MEMORANDUM OF JUDGMENT

[1] On this application, which came before me on July 17, 2014, the Petitioner seeks interim child support for the parties' two daughters for the summer months while they reside with her in Yellowknife. Both daughters have been attending university outside the Northwest Territories.

[2] The parties have been separated since 2009, when their daughters were 17 and 15 years of age. These divorce proceedings were commenced in 2011. Although no child support order has been made, it appears that the Respondent has been paying child support since sometime in 2010. It is not clear to me from the file what the current status of his support payments are, although the Petitioner says that he transferred a sum of just over $1000.00 into her account for A. at the end of May. It is not clear how he calculated the amount. He and the Petitioner earn roughly equivalent salaries.

[3] Apart from a short period of time just after the parties separated, when the eldest daughter lived with the Respondent, the daughters have resided with the Petitioner.

[4] The evidence before me in relation to each of the two daughters is as follows.

T., the eldest daughter

[5] T. is 22 years old. She has been attending university in Ontario for the past few years and has achieved a Bachelor's degree in Science. She returned to Yellowknife in June and is residing with the Petitioner. While she was at university, she had a full course load and did not work part time. She has worked during the summers. She has a full time job in Yellowknife until October. The Petitioner states in her affidavit that T. intends to return to university for a Master's degree,"but may work throughout the year" to save money for her post graduate studies. The field in which T. wishes to do post graduate studies is not specified.

[6] The Respondent has provided a copy of a T4 slip in T.'s name, showing that in 2013 she received employment income of $14,618.48 from the Government of the Northwest Territories ("GNWT"). He has also provided a T4A slip in T.'s name, showing that in 2013 she also received bursaries, scholarships, grants or prizes in the amount of $6175.12. He deposes that before T. returned to Yellowknife, he gave her the sum of $5143.27, which was the balance in a RESP account he held in her name, and at that time T. told him that she still has $10,000.00.

A., the younger daughter

[7] The younger daughter, A., will be 20 years old this month. She has completed the second year of a five year program in Engineering and Applied Science at the same university her sister attends in Ontario. The Petitioner deposes that A. has a full course load and does not work during the school year. She returned to Yellowknife in April and is living with the Petitioner for the summer. A. has a summer job, but no details of it were provided.

[8] In his affidavit, the Respondent provides a T4A slip showing that in 2013, A. received the sum of $6114.55 in bursaries, scholarships, grants or prizes. He also deposes that in 2012, A. was awarded a scholarship in the amount of $60,000.00 to attend the university in Ontario and in recognition of her superior academic achievements.

Governing Legislation

[9] This matter is governed by the *Divorce Act*. Since both daughters have reached the age of majority, which in the Northwest Territories is 19 years, the

question is whether either is to be considered a "child of the marriage". For any child who falls within the *Divorce Act's* definition of "child of the marriage", there is an obligation on the part of the parents to provide support.

[10] Section 2(1) of the *Divorce Act* states as follows:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

[11] In this case, both daughters being over the age of majority, the issue is whether either is unable, by reason of "other cause", to withdraw from their parents' charge or to obtain the necessaries of life. Pursuing post-secondary education is generally considered to be "other cause": *Large v. Large*, 2007 NWTSC 57.

[12] Where a child who has reached the age of majority is found to come within s. 2(1)(b) and is therefore a "child of the marriage", s. 3(2) of the federal *Child Support Guidelines* is relevant to the amount of support to be paid:

> 3.(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers this approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Positions of the parties

[13] On this interim application, the Petitioner seeks child support only for the summer months while the children are living with her. She seeks support for both daughters for June, July and August in the monthly sum of $1846.00, based on the Respondent's 2013 income of $127,630.00. She also seeks support for A. alone for the month of May in the amount of $1154.00. She is content that any order made be on a without prejudice basis for the issue of future support.

[14] The Petitioner submits that T., the eldest daughter, cannot reasonably become self-supporting within a short time of graduating from university and is therefore still a "child of the marriage". She also submits that any income earned by the daughters should go to their expenses while at university rather than their living expenses during the summer.

[15] The Respondent takes the position that T., the eldest, is no longer a "child of the marriage" because she has graduated from university and is working full time. He points out that in the spring she told him that she still has $10,000.00 available to her. This would be after her 2013 summer employment income, bursaries, etc. and the money he gave her from the RESP account he maintained for her.

[16] With respect to A., the Respondent agrees that she still falls within the definition of "child of the marriage". He submits, however, that in light of the income she has earned and is earning, along with bursaries and scholarships, the Guidelines amount of support is inappropriate in her case. He submits that there is insufficient evidence in relation to A.'s expenses and earnings to allow the Court to calculate an appropriate amount under s. 3(2)(b) of the Guidelines.

Is T. a "child of the marriage"?

[17] The onus to prove that a child falls within the definition of "child of the marriage" is on the party who seeks support for a child over the age of majority: *Olson v. Olson*, 2003 ABCA 56; *Large v. Large*.

[18] In *Olson*, the Alberta Court of Appeal pointed out that cases have recognized that post-secondary education can be generally beneficial to children and that, in some circumstances, children of separated families should continue to receive financial support while pursuing that education. The Court made the observation that, "This is notwithstanding the fact that parents in non-separated families do not have a legal obligation to support their adult children while they pursue post-secondary education. Some parents do so willingly; others do not": *Olson*, paragraph 16.

[19] In *Olson*, the Court listed a number of factors that have been taken into account in determining whether adult children should be supported during their post-secondary studies. Put another way, these factors are relevant to the question whether the child is able to pursue a reasonable course of post-secondary education without the direct or indirect financial assistance of her parents. The factors are similar to those listed in *Geran v. Geran*, 2011 SKCA 55, a case submitted by the Respondent. As set out in *Olson* at paragraph 18, these non-exclusive factors are:

> (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
> (2) whether or not the child has applied for, or is eligible for, student loans or other financial assistance;
> (3) the career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to so;
> (4) the ability of the child to contribute to his own support through part-time employment;
> (5) the age of the child;
> (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
> (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
> (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

[20] One of the factors is the plans, if any, the parents had for the education of the children. In this case, it is evident from their affidavits that both parents support their daughters' educational endeavours. Education is obviously an important and valued pursuit in this family. On one aspect, the parents seem to have somewhat different views. The Respondent says that he believes the children should also

make a significant financial contribution, whereas, according to him, the Petitioner is more inclined for them to rely on parental support. The fact that the daughters have accessed bursaries and scholarships and have been employed during the summers between university terms indicates that there is in this family an expectation on the part of both parents and children that the children will contribute financially to their education.

[21] T. has achieved one post-secondary degree. She is currently employed full-time. There is no evidence as to what her current expenses are or whether she is expected to contribute anything to the Petitioner's expenses while living with the Petitioner. There is no evidence as to whether T. has any debts from the past few years at university.

[22] There is also no evidence as to whether T. has actually enrolled in a Master's program or, if so, what expenses she is likely to incur while pursuing it. The statement in the Petitioner's affidavit that T. may work throughout the year is ambiguous. It may mean that T. may work for a year instead of going straight into a Master's program or that she may work full or part time while taking the program.

[23] There is also no evidence as to what T.'s present income is or what it is likely to be over the next year, or what bursaries or other financial assistance may be available to her in pursuing a Master's degree.

[24] Another factor that is important is that T. has completed her first degree. Although there is no rule that child support will not continue so that a second or third degree may be obtained, there is also no legal obligation on parents to provide for adult children indefinitely. Some cases say that in the absence of an agreement between the parties, a logical and reasonable cut off point is either the date on which a first degree is obtained or the date when the child reaches the age of 25, when independent borrowing is more readily available: *McCrae v. McCrae*, [2005] O.J. No. 50 (S.C.J.), quoted in *Large v. Large*.

[25] I bear in mind that on this application the Petitioner is seeking support only for the summer months while T. lives with her. That means that the case for support is based on a 22 year old who has completed one degree and is working full time, with no evidence of any debt or what her expenses and income are.

[26] In the circumstances, and for the reasons set out above, the Petitioner has not satisfied the onus of proving that T. is unable to withdraw from her parents' charge and is therefore a "child of the marriage". Accordingly, the application for interim child support for T. is dismissed.

What amount of child support should the Respondent pay for A.?

[27] The Respondent concedes that A. is still a child of the marriage. The first question is therefore whether s. 3(2)(a) or (b) of the Guidelines applies in relation to support for her.

[28] In *Geran*, the Saskatchewan Court of Appeal said that the key to employing one or the other of s. 3(2)(a) and (b) lies in determining whether (a) is "inappropriate", in which event an "appropriate" amount is to be determined under (b): paragraph 56. The Court also said that the fact that a child over the age of majority is earning a substantial income serves to move the circumstances of the child away from those of a child under the age of majority, thus making it more likely that the usual Guideline approach, under 3(2)(a), will be inappropriate. Thus, the Court said, s. 3(2)(b) should apply and instead of determining child support based on the presumed needs, means and circumstances of the child, as is the approach with the Guideline amounts, the Court determines the amount of child support with reference to the actual needs, means and circumstances of the particular child and the actual ability of each parent to contribute. *Geran* emphasizes that this is the logical approach to determining the amount of support in relation to a healthy, able-bodied adult child pursuing a post-secondary education.

[29] A recent case that was not cited by counsel, and came to my attention after the Chambers hearing, is *Leis v. Leis*, 2014 ABCA 36. Decisions of the Alberta Court of Appeal are, of course, persuasive in this Court because the Northwest Territories Court of Appeal is composed mainly of judges of the Alberta Court of Appeal.

[30] In *Leis*, the Court said that there is a presumption in favour of ordering the applicable table amount under the Guidelines even when a child attains the age of majority, and this presumption will only be rebutted by clear and compelling evidence that the table amount is inappropriate, in which event the court will determine an appropriate amount having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to the support of the child (at paragraph 35).

[31] In my view, the decisions in *Geran* and *Leis* come down to the same thing. Where the parent from whom support is sought presents evidence that the child has income and other resources available to him or her, that may rebut the presumption that the Guideline amount is appropriate. This assumes, of course, that the child has been found to be a "child of the marriage".

[32] In A.'s case, the evidence is that she will be 20 years old later this month. She has income for the summer months, however there is no evidence as to how much. If she works for the GNWT as does her sister, then she may earn summer income in the range of $14,000.00. She also has significant resources in the form of the $60,000.00 scholarship; there is no evidence as to how much of that remains unused. She also had bursaries and other financial assistance in the amount of just over $6000.00 last year and may have access to other such assistance in the coming year, as well as the RESP maintained for her by the Respondent. If the $60,000.00 scholarship is divided over five years, that would give her $12,000.00 per year. When bursaries and potential summer earnings are added to that, she may have as much as $32,000.00 for the year. Or she may not have that much, but the evidence indicates a likelihood that she does have significant resources which should have an impact on the amount of child support that would be appropriate, even if only for the summer months. To use the Guideline amount simply because the claim is for only a few months, which is essentially what the Petitioner submits, seems arbitrary in circumstances where there is evidence that the child has significant resources available to her.

[33] There is also no evidence as to what debt A. may have or what her expenses are.

[34] Since A. does not live with the Respondent, I do not know whether he has access to all the information that is relevant to the issues outlined above. Since he has provided some information, it may be that he does not have access to it all. Since A. is living with the Petitioner for the summer, the Petitioner does likely have access to the information.

[35] Although the Respondent has not provided all the necessary information, he has provided enough to demonstrate that there is a serious question whether the presumption referred to in *Leis v. Leis* should apply or whether some amount less than the Guideline amount is appropriate. So that the parties may obtain the

required information, I will adjourn the application with leave to the Petitioner to bring it back on with more evidence if the parties are unable to agree on a suitable amount of support for A. If the application is brought back before the Court, it may be heard by any judge of the Court; I do not consider that I am seized of it.

[36] The application for child support in relation to A. is accordingly adjourned sine die, returnable on 5 days notice.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
22nd day of July 2014

Counsel for the Petitioner: Margo L. Nightingale
Counsel for the Respondent: D. Jane Olson

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