Powless-Jones v. Jones, 2015 NWTSC 63

Date: 2015 12 08
Docket: S-1-FM-2013-000026

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARINA POWLESS-JONES

Applicant

- and -

GARRET JONES

Respondent

MEMORANDUM OF JUDGMENT

[1] The parties were married in 2008 and separated in 2011. They have two sons, who are now 6 and 8 years old. Since their separation, they have been involved in a dispute regarding custody, access and child support relating to their children.

[2] On July 25, 2013, the parties entered into an Interim Order which, among other things, granted the Applicant day to day care and control of the children, granted the Respondent reasonable and generous access to the children, subject to several terms, prohibited either parent from removing the children from the Northwest Territories, and ordered the Respondent to pay child support to the Applicant.

[3] The Applicant filed a Notice of Motion on November 10, 2014 seeking sole custody of the children, K.W.M.P-J. and C.G.E.P-J., granting the Respondent conditional access to the children, varying the monthly child support payable to the Applicant to reflect the Respondent's current income, directing the Respondent pay retroactive child support and directing the Respondent pay a proportionate share of daycare arrears.

[4] The application was first in court on December 18, 2014 at which time someone appeared on the Respondent's behalf and it was adjourned so that the Respondent could seek counsel. On January 22, 2015, the Respondent appeared by telephone and requested another adjournment in order to seek counsel.

[5] On February 5, 2015, the matter was in Court again and the Respondent sought another adjournment to seek counsel. The matter was adjourned to March 5, 2015. On that date, the Respondent advised that he would be representing himself and sought an adjournment to negotiate with the Applicant. The matter was adjourned to March 19, 2015 and the Respondent was advised that if he wished to present evidence, that he needed to file an affidavit prior to March 19, 2015.

[6] On March 19, 2015, the matter was adjourned to April 23, 2015 as the parties were in negotiations and the Respondent was in the process of retaining counsel. On April 23, 2015, the Respondent advised that he was unsuccessful in retaining counsel and would be representing himself. He sought another adjournment in order to file an affidavit. This adjournment request was opposed by the Applicant. The matter was adjourned for one week to permit the Respondent to file an affidavit. The Respondent was warned by the Chambers Judge that the matter would proceed on the next date. The Respondent was directed to file and serve his affidavit by April 28, 2015. The matter was adjourned to April 30, 2015.

[7] On April 30, 2015, the parties appeared before me in Regular Family Chambers. The Respondent had been unable to file an affidavit despite his attempts to do so. He had attempted to file an affidavit but it had not been accepted by the Clerk. The hearing proceeded and the parties made submissions based upon the evidence that was properly filed with the Court.

[8] The Applicant is seeking relief including interim and permanent sole custody, that the Respondent have conditional access to the children upon reasonable notice to the Applicant, varying child support, seeking retroactive child support and that the Respondent pay his proportionate share of the daycare arrears.

[9] The parties entered into an Interim Order on July 25, 2013 following a Memorandum of Judgment which was issued on August 14, 2013. It is clear from that decision that the parties disagreed about many issues. The Chambers Judge noted at para. 2:

> As far as the circumstances of the relationship, the events surrounding their separation, and what has transpired since, the parties agree on very little. They have each filed lengthy affidavits. Virtually every matter of significance to the issues in this litigation is the subject of diametrically opposed accounts of events. The conflict in the evidence is such that barring the parties being able to resolve matters, there will certainly need to be a hearing with *viva voce* evidence so that a Court can assess the evidence, make factual findings, and dispose of the issues raised in this matter in accordance with those findings.

[10] There continue to be disagreements regarding many of the facts and it is difficult for the Court to make findings whether there is a disagreement based upon affidavit evidence. Where there is disagreement and the parties are not able to resolve the issues between themselves, a hearing with *viva voce* evidence continues to be required.

[11] To succeed on this application, the Applicant must satisfy the Court that there has been a change of circumstances since the 2013 Order was made in the sense of a change in condition, means, needs or other circumstances: s. 61(2) of the *Children's Law Act*, S.N.W.T. 1997, c. 14, and s. 14 of the *Child Support Guidelines* made under the *Act*.

[12] Child support has been payable since May 23, 2013, based upon the Respondent's income being $80,946.00 per year. Accordingly, the Respondent was ordered to pay child support of $1225.00 per month. The Applicant has filed an affidavit indicating that the Respondent's annual income for 2013 from his Notice of Assessment provided by the Canada Revenue Agency was $92,032.00. The Applicant has also included a pay stub from July 15, 2014 which indicates that to date, the Respondent had earned $51,149.37. This would equate to an approximate annual income of $87,684.63 for 2014, assuming that he earned income in the same amount for the latter half of 2014. In any event, it is apparent that the Respondent's income has increased since the May 23, 2013 Order which is a change in circumstances that can justify a variation of the Order.

CUSTODY

[13] The Applicant is seeking interim and permanent sole custody of the children of the relationship. The children have been living with the Applicant since the parties separated. The Order of July 25, 2013, grants the Applicant day to day care and control of the children. The Applicant seeks sole custody because the children have resided with her since the separation and she has found it difficult to consult with the Respondent regarding decisions affecting the children. It is apparent that there continues to be disagreements between the parties and that their

communication remains difficult. In his submissions, the Respondent did not oppose the Applicant having sole custody; his concerns were instead surrounding access. Therefore, the Applicant will be granted sole custody of the children, K.W.M.P-J. and C.G.E.P-J.

ACCESS

[14] The Applicant is seeking that the Respondent have reasonable and generous access to the children subject to several terms which were also included in the Order of July 25, 2013. The terms were that the Respondent was not to consume drugs or alcohol when exercising access, that access was to occur in Yellowknife, and that the Respondent provide a telephone number and itinerary of where he would be with the children.

[15] The Respondent does not agree with the term requiring access to occur in Yellowknife. He resides in Hay River with his new partner and their family. He claims that he cannot financially afford to exercise access in Yellowknife. He would like to exercise access in Hay River and claims that it is not unsafe for the children to be with him in Hay River.

[16] According to the Applicant's affidavit, the Respondent has exercised minimal access to the children since 2013. The Respondent does not deny that he has exercised minimal access but claims that the costs of exercising access in Yellowknife are such that he cannot afford to exercise access frequently.

[17] A number of concerns were identified in the Applicant's previous affidavits with respect to previous incidents that were referred to in the Memorandum of Judgment dated August 14, 2013. There is no evidence establishing that those issues or concerns have been addressed. Where there are conflicts in the evidence, regarding access and what has transpired in the past, a hearing would be required to address these issues and make findings. In the circumstances, I am not prepared to order that access occur in Hay River at this time.

REMOVING CHILDREN FROM THE NORTHWEST TERRITORIES

[18] The Applicant seeks the removal of the clause prohibiting either party from removing the children from the Northwest Territories without leave of the Court or the written consent of the other party, except in cases of medical emergency. The Applicant argues that this clause is restricting and that she has difficulties communicating with the Respondent or receiving a response to her inquiries and she has not been able to leave the Northwest Territories to visit family.

[19] Since I have granted the Applicant sole custody of the children, it makes sense that she be permitted to travel outside of the jurisdiction with the children. Therefore, the clause in the July 25, 2013 Order will be removed restricting the ability of the parents to remove the children from the Northwest Territories.

CHILD SUPPORT

[20] The Applicant has provided financial information with respect to the Respondent's income demonstrating that his income has changed from when the Order was made on July 25, 2013. The Respondent's annual income for 2013 from his Notice of Assessment provided by the Canada Revenue Agency was $92,032.00. A pay stub from July 15, 2014 indicates by that date, the Respondent had earned $51,149.37. This would equate to an approximate annual income of $87,684.63 for 2014, assuming that he earned income in the same amount for the latter half of 2014.

[21] The Respondent does not dispute that his income has changed but claims hardship because he is the sole supporter of his household. Unfortunately, his Affidavit was not properly filed and could not be considered on the application. Based upon his 2013 income, his child support obligation would be $1374.43 per month. Therefore, I am ordering that effective December 1, 2014, the Respondent pay child support of $1374.43 per month on the 1st day of the month and continuing of the 1st day of each month thereafter until further order of the Court. If the Respondent wishes to pursue a hardship application, he should file and serve a Notice of Motion upon the Applicant and provide affidavit evidence to demonstrate that paying this amount of child support would cause undue hardship to him.

CHILD SUPPORT ARREARS

[22] The Applicant is seeking arrears of child support from the date of separation until June 2013, when child support was ordered. The Applicant deposes that the Respondent paid a total of approximately $20,457.00 in child support which she argues was not in accordance with his income and what would have been ordered under the *Child Support Guidelines*. The Applicant has provided different numbers for the child support she received as some payments were repayments of equity from the matrimonial home which the Respondent kept and some were for gifts to the children. I have accepted the amount of $20,547.00 as the Applicant was unsure whether an amount was for a gift or child support and so I have credited it towards the Respondent's child support obligation.

[23] The Respondent acknowledged that the child support that he paid was not in accordance with his income but claimed that he negotiated this with the Applicant and that he paid what he could. As previously stated, the Respondent has not filed materials with respect to a hardship application. If he wishes to do so, he can seek to have the arrears reduced or eliminated by bringing an application on notice to the Applicant.

[24] The Respondent had previously filed Notices of Assessment for the 2011 and 2012 taxation years. They demonstrate that he earned $108,338.00 in 2011 and $72,849.00 in 2012. Based upon his income, he would have been obligated to pay child support in the amount of $1591.60 per month in 2011 and $1108.40 per month in 2012. This equates to child support being payable as follows:

March 2011 to December 2011 :	$1591.60	x 10 =	$15,916.00
January 2012 to December 2012 :	$1108.40	x 12 =	$13,300.80
January 2013 to May 2013 :	$1374.43	x 5 =	$ 6,872.15
	Total Payable		$36,088.95
	Less Paid		$20,547.00
	Arrears Owing		$15,541.95

[25] Therefore, there will be an Order requiring the Respondent to pay the Applicant $15,541.95 in arrears of child support for the period of March 2011 to May 2013.

CHILDCARE ARREARS

[26] The Applicant is claiming that there are childcare arrears outstanding. She claims that she spent $1,988.00 in 2011 towards daycare expenses and $2,283.00 in 2012. She claims that she paid most of the daycare expenses and that the Respondent paid $500.00 towards these expenses.

[27] The Applicant has provided her Notices of Assessment for 2011 and 2012 which indicate that her income was $5,285.00 and $12,457.00. Based upon the parties' annual income in 2011 and 2012, the Respondent's proportionate share of child care expenses for 2011 would be $1,894.56 and in 2012 would be $1,911.25 for a total of $3,805.81. As the Respondent contributed $500.00 towards childcare, the arrears owing would be $3,305.81. Therefore, there will be an Order that the

Respondent shall pay the Applicant $3,305.81 for his proportionate share of daycare arrears.

[28] For the reasons stated, the Order of July 25, 2013 will be replaced and there will be an Order that:

1. The Applicant shall have sole custody and day to day care and control of the children;

2. The Respondent shall have reasonable and generous access to the children, subject to the following terms:

   a) The Respondent shall not consume drugs or alcohol when exercising access;
   b) Access shall take place in Yellowknife; and
   c) The Respondent shall provide a telephone number and an itinerary of where he will be with the children.

3. The Respondent shall pay $1374.43 per month in child support to the Applicant, starting December 1, 2014 and continuing on the 1st day of each month thereafter until further order of the Court;

4. The Respondent shall pay to the Applicant the sum of $15,541.95 in child support arrears for the period of March 2011 – May 2013;

5. The Respondent shall pay to the Applicant the sum of $3,305.81 for his proportionate share of childcare expenses in 2011 and 2012; and,

6. The matter is adjourned *sine die.*

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
8th day of December 2015

Counsel for Applicant: Hayley Smith
The Respondent: was self-represented

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THE HONOURABLE JUSTICE S.H. SMALLWOOD