*Gon* v *Lafferty*, 2016 NWTSC 53

Date: 2016 09 16

Docket: S-1-CV-1998-007584

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TONY GON

Applicant

(Respondent)

- and -

MONIQUE LAFFERTY

 Respondent

(Applicant)

MEMORANDUM OF JUDGMENT

1. This is an application by the Respondent Monique Lafferty to vary an Order made on February 16, 2007. The Respondent is seeking to terminate child support, to rescind some or all of the arrears of child support payable by the Respondent, and to equalize family property.

**BACKGROUND**

1. This action was commenced when the Applicant Tony Gon filed an Originating Notice on March 6, 1998 seeking sole custody of the parties’ children and exclusive possession of the matrimonial home. In March 1998, an Order was made granting the parties joint custody of the six children, granting the Applicant and Respondent each day to day care and control of three of the children, granting reasonable access to the parties and giving the Applicant exclusive possession of the matrimonial home until further order of the Court.
2. A Consent Order was entered on August 19, 1998, varying the March 1998 Order and granting the Applicant day to day care and control of all of the children. The Respondent was also granted reasonable access to the children.
3. On January 10, 2007, the Applicant filed a Notice of Motion seeking that the Respondent pay child support retroactive to 1998, pay her proportionate share of childcare expenses, equalization of the net family property, an unequal division of property, and exclusive possession of the family home.
4. The Respondent was served with the application by priority courier which was successfully delivered on January 18, 2007.
5. The matter was heard on February 16, 2007 in Chambers and the Respondent did not appear. An Order was made deeming the Respondent to have an annual income of $31,218.00 and requiring her to pay child support of $983.00 per month commencing March 1, 2007. The Respondent was also required to pay her proportionate share of childcare expenses within 15 days of notification by the Applicant. The remaining relief sought in the Notice of Motion was adjourned *sine die*.
6. The Respondent now seeks to vary the Order of February 16, 2007 requesting that the total amount, or a portion of, the arrears be rescinded or adjusted in accordance with the Respondent’s actual income, and equalization of the family property.
7. At the hearing before me, counsel made submissions about whether both the child support and family property issues should proceed before me or whether just the child support issue should be addressed. I ruled that while the two issues were linked, the equalization of the family property could be affected by the child support ruling and the property issue was not ready to proceed. As such, only the child support issue was argued before me.
8. The Respondent argues that there has been a change of circumstances and child support should terminate for each of the children as they have turned 19 years old. In addition, the Respondent claims that she is not able to pay the arrears because she has never made the income that was imputed to her in 2007. She is seeking a rescission or reduction of the child support arrears.

**ANALYSIS**

1. The *Children's Law Act*, S.N.W.T. 1997, c.14 (the *“Act”*) and the *Child Support Guidelines,* R-138-98 (the *“Guidelines”*) govern the determination and calculation of child support.
2. Section 61(2) of the *Act* permits a Court to vary a child support order where evidence that was not previously available is now available or where there has been a change in circumstances as contemplated in the *Guidelines*.
3. Once a change in circumstances has been established, the Court can vary a child support order and can also relieve a parent from the payment of some or all of child support arrears. The *Guidelines* establish what constitutes a change in circumstances:

14.      For the purposes of subsection 61(2) of the Act, any one of the following constitutes a change in circumstances that gives rise to the making of a variation order in respect of a child support order:

(a)       where the amount of child support sought to be varied includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or provision of the child support order;

(b)       where the amount of child support sought to be varied does not include a determination made in accordance with an applicable table, any change in the condition, means, needs or other circumstances of a parent or of any child who is entitled to support;

(c)       where the order was made before the Act came into force, the coming into force of the Act.

1. In this case, the Respondent is arguing that all of the children are now over the age of majority and this constitutes a change of circumstances. The Respondent argues that the 2007 Order should be varied so that the child support payable is adjusted as each child reached the age of majority.
2. It is well established that a parent has an obligation to provide financial support to their children until they reach the age of majority which is 19 years old in the Northwest Territories. Children who are over the age of majority can still require support where they are unable to withdraw from a parent’s charge by reason of illness, disability, pursuit of reasonable education or other legitimate causes: s. 57 of the *Act.*
3. In this case, when the Order was made in February 2007, the Respondent was required to pay child support of $983.00 per month which is the *Guidelines* amount for six children based upon an imputed income of $31,218.00. At that time, five of the six children were under the age of majority. The eldest child, B.G., was over the age of majority but included in the Order, presumably on the basis of a disability and his resulting inability to withdraw from the Applicant’s charge. All of the children are now over 19 years old and the issue is whether they are still considered children for child support purposes.
4. The Applicant says that all of the children still live with him and he continues to support them however he can. The Applicant has provided an estimate of the costs associated with providing housing, food and clothing for the children on a monthly basis and he has provided some information about the current status of each child.
5. B.G. was over the age of 19 at the time of the 2007 Order. The evidence in the Applicant’s affidavit, at the time, was that B.G. suffered from fetal alcohol syndrome and was unable to look after himself. The Applicant’s most recent affidavit indicates that B.G. has special needs and will never be able to leave home. The onus is on the Applicant to demonstrate that B.G. is unable to withdraw from his parent’s charge. However, no other evidence has been provided which would substantiate this information or provide particulars of B.G.’s condition such as whether he is capable of engaging in some form of employment or to contribute to his support. As such, I must conclude that B.G. is no longer a child for the purposes of the *Act.*
6. It is difficult to determine when B.G. ceased to be a child for the purposes of the *Act.* In 2007, the Court accepted that B.G. was in need of child support. The Respondent, in effect, acquiesced to this finding by her failure to respond to the application or to seek a variation of the Order until she filed her application in April of 2015. In the circumstances, I am satisfied that the determination that B.G. is no longer a child for the purposes of the *Act* should be effective as of April 2015.
7. E.G. was 18 at the time the Order was made and turned 19 a few months later, on November 10, 2007. The Applicant advised that she was unemployed but was intending to go back to school. No other information was provided about E.G.’s activities since she turned 19. As such, I conclude that E.G. ceased to be a child for the purposes of the *Act* when she turned 19 on November 10, 2007.
8. C.G. was 15 at the time the Order was made and turned 19 on April 19, 2010. The Applicant advised that she was entering her fourth year of a Bachelor of Education program at Aurora College. An acknowledgement from Aurora College that C.G. is a full time student entering her fourth year was included with the Applicant’s affidavit. It is reasonable to conclude that C.G. has continued with her education in the period since she turned 19 and remains a child for child support purposes.
9. J.G. (the parties’ son) was 15 at the time the Order was made and turned 19 on January 24, 2011. The Applicant advised that he was recovering from injuries in a motor vehicle accident and was not attending school. No other information was provided about J.G.’s activities since he turned 19. As such, I conclude that J.G. ceased to be a child for the purposes of the *Act* when he turned 19 on January 24, 2011.
10. J.G. (the parties’ daughter) was 13 at the time the Order was made and turned 19 on June 30, 2012. The Applicant advises that she has been accepted to Grande Prairie College which commenced in the fall of 2015. Included was a copy of her acceptance letter from Grande Prairie Regional College. No other information was provided about J.G.’s activities since she turned 19. As such, I conclude that J.G. ceased to be a child for the purposes of the *Act* when she turned 19 on June 30, 2012 but that she became eligible again when she resumed her education in the fall of 2015.
11. A.G. was 12 at the time the Order was made and turned 19 on September 18, 2013. The Applicant advises that he is working as a cashier at the Northern store. No other information was provided about A.G.’s activities since he turned 19. As such, I conclude that A.G. ceased to be a child for the purposes of the *Act* when he turned 19 on September 18, 2013.
12. I have found that several of the children have ceased to be children, pursuant to the *Act¸* which constitutes a change in circumstances and permits the Court to vary the Order made on February 16, 2007.
13. The Respondent is asking that her child support obligation be reduced to zero and that her arrears also be reduced or eliminated. The Respondent was ordered to pay child support in the amount for $983.00 per month based upon her imputed income. The Respondent says that she has never made the income that has been imputed to her.
14. Since the Order was made, the Maintenance Enforcement Program Debtor Financial Report shows that the Respondent has never made a voluntary payment. Since 2007, $2000.00 has been paid in child support by the Tłįchǫ Government as the Respondent is a Tłįchǫ beneficiary. The arrears have accumulated to $75,657.00 as of January 21, 2015.
15. The Respondent’s child support obligation was set in accordance with the *Guidelines* amount for six children for a payor with an imputed income of $31,218.00. In support of the application, the Applicant filed an affidavit indicating that he was unaware of whether the Respondent was employed. Another affidavit was filed attaching statistical information regarding the average income of females in the Northwest Territories in 2001. It indicated that the average income for females in Colville Lake, where the Respondent lived, was unavailable but that the average income for adult females in the Northwest Territories was $31,218.00.
16. The use of statistical information provides the Court with an evidential basis upon which to impute income and frequently occurs when a Respondent parent does not disclose financial information: *Zoe* v. *Fish*, 2013 NWTSC 51 at para. 37. The invariable result is that an income is imputed to the Respondent parent which is not in accordance with their actual earnings. Sometimes the parent earns more than the imputed income, often it is less.
17. The information provided by the Respondent indicates that she has not been employed steadily since 2007 and that her highest income from Line 150 of her Income Tax Return was $1,800.00 in 2008. On that basis, the Respondent’s income has consistently been lower than the minimum annual income required to pay any child support as set out in the *Guidelines.* The result is that the Respondent has been required to pay child support since 2007 in an amount higher than she would have otherwise been ordered to pay. This is an unfortunate situation but ultimately, it is the Respondent who bears a great deal of responsibility for the income imputed to her and the consequent arrears that have accumulated.
18. The Respondent has not provided an explanation for why she did not respond to the application brought in 2007. The Respondent became aware of her obligation to pay child support on February 27, 2007 when the Order was successfully delivered by Xpresspost. The Respondent’s financial situation has been virtually the same since 2007, yet the Notice of Motion seeking variation of child support was not filed until April 2015. The Respondent has not provided an explanation for the significant delay in seeking variation of the 2007 Order.
19. Using the Respondent’s actual income, the Respondent has calculated that there would be no child support payable in any year since 2007 as the Respondent never earned the minimum income required to pay child support pursuant to the *Guidelines.*
20. The evidence demonstrates that the Respondent’s income since 2007 has never reached a level near the income that was imputed to her. Had the Respondent applied to have the child support payments varied at any point since the Order was made,it is likely she would have been at least partly successful. The Respondent would have had to demonstrate that she was employed to the best of her capabilities and could not have earned a higher income.
21. The Respondent says that she had been unsuccessful in attempting to secure employment. She has a grade three education, is not literate and speaks only a little English. She has no formal training in any vocation or trade and has never had a formal job. She says she has never developed any employable skills. While she and the Applicant were together, she stayed at home to raise the children.
22. After the parties split, that Respondent was homeless until she met her husband Richard Kochon. They live in Colville Lake, a small community with limited employment prospects. The Respondent says she had applied for a janitorial job but was not successful because she does not speak English and is not able to complete a resume. The Respondent stays at home and takes care of her husband’s niece who they adopted.
23. The Respondent says that she has tried to support her children in other ways, by offering them dry meat and dry fish and giving them what little money she had.
24. The *Act* is clear that a parent has an obligation to support her child when she is capable of doing so: s. 58. It is apparent that the Respondent’s lack of employment skills, her limited facility in the English language, her inability to read or write and the limited employment prospects in the small community where she lives have severely hindered her ability to secure employment. However, there is limited evidence regarding the Respondent’s attempts to secure employment and no evidence that the Respondent has made any attempt to improve her education or take training in any vocation or trade.
25. The Respondent has been living a simple and traditional lifestyle with her spouse in Colville Lake. The situation is similar to that in *Drygeese* v. *Nitah,* 2014 NWTSC 70 at para. 24, where I stated: “While this may have been a way of life familiar to Nitah, there is no evidence that this was a viable lifestyle choice for someone who had an obligation to support a child.” As in *Drygeese,* the Respondent’s primary obligation was to support her six children.
26. This Court has enforced child support obligations, including arrears where the evidence demonstrates that a parent’s financial obligations to their child have not been a priority for the parent: *Edgi* v. *Grandjambe*, 2004 NWTSC 11 at para. 15. In this case, the Respondent’s obligation to support her children does not appear to have been her priority.
27. For these reasons, it is inappropriate to reduce the Respondent’s child support in accordance with her actual income earned for each year from 2007. This would result in the Respondent not being required to pay any child support for her children. While the Respondent has been living a simple and traditional lifestyle, the Applicant has borne the costs of supporting their six children with minimal financial assistance from the Respondent.
28. Instead, the arrears should be adjusted in accordance with a reasonable level of income that the Respondent might have been expected to earn had she made the financial support of the children her primary obligation. The evidence demonstrates that the Respondent has never really held a job, nor has she pursued education or vocational training to improve her employment prospects. It is hard to say, as in *Tybring* v. *Tybring,* 2003 NWTSC 67 at para. 19, that the Respondent has made a “sincere effort to effect a permanent improvement in [her] employability.”
29. At the same time, it is important not to lose sight of the Respondent’s personal circumstances. She is a 52 year old woman who speaks limited English, is illiterate and has a grade three education. She has no formal training in any vocation or trade, has limited employable skills and resides in a community with limited employment opportunities.
30. Counsel for the Respondent suggested that if income were to be imputed to the Respondent, an option could be to impute the amount that was used in *Drygeese*. In that case, Mr. Nitah was imputed to have an income of $17,500.00. However, that amount was based upon the highest income that Mr. Nitah had been able to earn in the years following the imposition of the child support order. There is no evidence that the Respondent has ever been able to earn $17,500.00 per year.
31. The Respondent has provided statistical information regarding the average income of persons residing in Colville Lake, the nearby community of Fort Good Hope and in the Northwest Territories in 2005. Unfortunately, there is no income information for Colville Lake. The median income for females over 15 years old in Fort Good Hope was $15,872.00 and for the Northwest Territories was $30,489.00.
32. Fort Good Hope is a larger community than Colville Lake and I expect the employment opportunities and income are somewhat higher than could be expected to be earned in Colville Lake. Taking that into account, as well as the Respondent’s personal circumstances referred to above, I conclude that it would be fair to impute an income to the Respondent of $13,000.00 per year. This would result in a monthly child support obligation of $164.00 for six children. Calculating what should have been paid and deducting the $2000.00 child support which was paid over the years results in child support arrears of $13,677.00.
33. I therefore set the arrears, as of August 1, 2015, in the amount of $13,677.00. As to ongoing child support, I have found that as of September 1, 2015, C.G. and J.G. (daughter) are full-time students and are still considered children for the purposes of the *Act.* Therefore, there will be ongoing child support in the amount of $142.00 per month for C.G. and J.G., so long as they are full-time students.
34. The variation that I have ordered will reduce the child support arrears, but I have not cancelled them. The issue of whether the Respondent can now, or will at any time in the future, be able to pay the child support arrears may depend, in part, on the equalization of family property. The Respondent may be entitled to a share of the family property and the value of her share could be put towards the child support arrears. This will be a factor in determining whether the Respondent has the ability to pay the arrears. As such, whether the arrears should be cancelled will be decided in conjunction with the equalization of family property issue.

**CONCLUSION**

1. For these reasons, B.G. ceased to be a child pursuant to the *Act* on April 1, 2015; E.G. ceased to be a child pursuant to the *Act* on November 10, 2007; C.G. continues to be a child pursuant to the *Act* while she is a full time student; J.G. (son) ceased to be a child pursuant to the *Act* on January 24, 2011; J.G. (daughter) ceased to be a child pursuant to the *Act* on June 30, 2012 but became a child pursuant to the *Act* again in September 2015 and will remain so while she is a full time student; and A.G. ceased to be a child pursuant to the *Act* on September 18, 2013.
2. In addition, a reasonable level of income for the Respondent to have earned was $13,000.00 per year. Therefore, the Respondent’s child support arrears will be set at $13,677.00. The Respondent’s child support, as of September 1, 2015 will be varied to $142.00 per month for so long as C.G and J.G. (daughter) remain full time students.
3. The issue of the cancellation of arrears is adjourned to be heard with the equalization of family property issue. The issue of costs will be addressed at that time.

 S.H. Smallwood

 J.S.C.

Dated at Yellowknife, NT

This 16th day of September, 2016

Counsel for the Applicant (Respondent): Adam Vivian

Counsel for the Respondent (Applicant): Paul Parker

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