CITATION: H. v. Y., 2014 ONSC 18
OSHAWA COURT FILE NO.: FC-11-892-00
DATE: 2014-01-02

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN

S.H.

Applicant

-and-

T.Y.

Respondent

COUNSEL:
John P. Schuman, for the applicant
T.Y., acting in person

HEARD: November 13, 14 and 15,2013

Nelson J.

REASONS FOR JUDGMENT

Introduction

[1] This trial was about child support, both retroactive and ongoing. As part of those issues, this court was also asked to decide the respondent father's income and to detennine the issue of contributions towards extraordinary expenses.

[2] The parties, who never married, met in 2004. They had a child, Tia, who was born on June 22, 2005. Just prior to Tia's birth, the parties moved in together to a home that was purchased in Ajax, Ontario. Tia is now eight years old.

[3] While the respondent contributed more money to the acquisition of this home than did the applicant, the property, nonetheless, was registered jointly.

[4] The parties began to quarrel mainly over their contributions to household finances. Their relationship terminated towards the end of November 2007.

[5] The applicant and the child moved to her current residence in Pickering, but not until July 9, 2008.

[6] The applicant now has legal custody of Tia and the respondent exercises frequent and regular access.

Retroactive Child Support

[7] The applicant seeks retroactive child support in the amount of $54,607.00, together with interest on that amount of $4,600.17. The retroactive child support amount is determined by calculating the respondent's income on a year-to-year basis, going back to the date of separation, and then applying the *Federal Child Support Guidelines* (Ontario), amount.[1] From that amount, the respondent is given credit for the actual support he has already paid for Tia.

[8] The evidence discloses that the applicant remained in the Ajax home until her move in July 2008. The applicant testified that, prior to the move she calculated what she would require to meet her budgetary requirements after the move. That amount was $700.00 a month. The respondent testified that he and the applicant looked at the child support *Guidelines* and used an income level of about $48,000.00 per year to calculate child support. The amount set out in the *Guidelines* was $444.00 per month. Added to that was an amount for Tia's daycare, which brought the total to $700.00 per month.

[1] *Federal ChHd Support Guidelines* (Ontario), O. Reg. 39!197. *[Guidelines]*

[9] The difficulty with the respondent's explanation is that his income from the adult video business he used to own and operate amounted to around $80,000.00 annually, in the years 2007 and 2008. Nonetheless, because the applicant was aware of his income at the time, I am satisfied that the parties agreed that, based on the applicant's needs, the sum of$700.00 per month would be the amount that should be paid.

[10] It is clear that, as the years passed, the applicant began to understand that the respondent was not paying his fair share of expenses for Tia; however, it would be wrong now to vitiate or rescind the agreement that the patties arrived at prior to the applicant's move to Pickering. The parties negotiated an agreement and relied upon it. for a number of years. Even though the amount negotiated may have been less than should otherwise have been paid, effective notice of a request for an increase was not given until shortly before the applicant initiated (issued) her application in 2011. To award child support retroactive to 2007 in the face of the parties' negotiated agreement would not only be unfair but also inappropriate, as it would place too great a burden of payment on the respondent.

[11] Unfortunately for the respondent, however, the evidence indicates that, even though he had made a rather good financial arrangement, from his perspective, he did not always live up to the agreement. There were many missed payments, and there was a period of time when, irked by the nanny/daycare arrangement the mother had made, he unilaterally reduced his payments to $444.00 per month.

[12] The respondent testified that he assisted the applicant with renovations to her new home in Pickering; however, no monetary amount was suggested by him for the value of his work and I cannot quantity an amount without evidence. He also suggested that because he paid the applicant $50,000.00, representing her share of the Ajax home, she should be content with the child support payments made.

[13] He is incorrect in taking this approach because, as a joint owner of the Ajax property, she was entitled to the amount she received and in all likelihood even more as there was more than $100,000.00 equity in the Ajax property.

[14] In summary then, with respect to retroactive child support, the respondent should have paid the applicant $700.00 per month for each and every month from July 1, 2008, which was the date when she moved with Tia to Pickering, until August 1, 2011, when she asked him to pay more support and he refused. That was the date of effective notice. I accept her evidence with respect to the amounts the respondent paid between July 1, 2008 and August 1, 2011.

[15] I would ask counsel to recalculate the amount moved, together with interest on that amount (see Exhibit 5).

Retroactive Section 7 Expenses

Income of Applicant

[16] The issue of the respondent's share of section 7 expenses (special and extraordinary), as and from August 1, 2011, which I fix from the day of effective notice, will be calculated based on the applicant's income of $84,000 per year. She is employed by the Scotiabank as a senior project manager; for the last few years her income seems to have ranged from approximately $82,000.00 to $84,000.00, including a bonus and a small amount of rental income she receives from renting a room in her home.

Calculation of Respondent's Income

[17] The respondent's income determination is far more problematic.

[18] As stated above, the respondent owned and operated an adult video store. During the first part of the decade beginning in the year 2000 he did very well. The applicant testified that she saw his income tax returns which indicated an income of around $80,000.00 per year. I accept that evidence.

[19] The respondent's evidence, however, was so vague as to be unacceptable. The fact that he ran into financial difficulty in selling video does make some sense. That he sold his business in or around 2009, for the cost of the inventory only, also has the ring of truth to it. Beyond that, he was not at all helpful in providing any reliable evidence to prove his income. Some examples of this are:

1. His two sworn financial statements in the matter make no sense at all. He shows a very low income of under $10,000.00 a year, with extremely high expenses and no increase in debt. These statements are clearly false.

2. He has failed to disclose relevant financial information for 2012 and 2013 to date, even though this information was requested by the applicant and ordered by the court.

3. He has failed to explain adequately cash deposits to his bank in 2010 and 2011 when he was running a construction business called Hardcore Construction. His explanations made very little sense. He testified that cash deposits came from loans from his parents, American Express withdrawals, other credit cards, and, once his new business started-up, from some of his jobs. These deposits in 2010 were close to $74,000.00 and around $135,000.00 in 2011. He did not set out the loans from his parents as debts in his financial statements. He provided no documentation whatsoever with respect to these alleged loans. He was unable to provide the court with any information about the amounts of

the loans and, finally, he did not call his parents to testify or provide any explanation as to why they could not testify. He did not provide any information or documentation about his American Express card. His explanation, which I find unsatisfactory, was that the American Express card request was not part of any disclosure order. His explanation that he borrowed cash from one card to put down on others was effectively dealt with by Mr. Schuman during cross-examination. It became very clear that there was no link between monies borrowed from one card to deposit in another.

4. The respondent testified that his clients in his construction business expected him to do cash deals and that is what he did. Some invoices were supplied, while others were not.

5. When asked directly by the court to indicate what his yearly income amounted to, he was unable or unwilling to state an amount, leaving it to the applicant and the court to estimate.

6. The respondent was not impressive as a witness. He himself indicated on numerous occasions that he rarely kept records. He has yet to complete his 2012 income tax return. Throughout his testimony he indicated that he was trying to do the best he could, but failed to be specific. When confronted on cross-examination about the deposits he made to his various accounts in 2011 and 2012 he provided explanations that made little sense. He said that he borrowed from one credit card to pay another but the amounts and dates rarely matched. The respondent failed to provide any documentation for the year 2013 although this information has been requested.

[20] Given the nature of the respondent's new business, the court must impute income to him. His income tax returns for 2010 and 2011 are unreliable as are his sworn financial statements, as he admits to taking cash for jobs. It is clear that he is not reporting cash income he receives.

[21] Exhibit 28, tab 9 is his mm1gage application, which was completed for the purchase of his new home in Whitby.

[22] In that application, he sets out his yearly income as $95,500.00. That, therefore, is the income I find for the years 2011 and 2012. Counsel for the applicant urges me to impute an income of $142,565.00. I have not done so for the following reasons:

1. I am satisfied that the respondent, through 2009 and 2010, was having considerable financial difficulty as competition with Internet services affected his sales. His video store had to be closed. I accept that fact that it was sold for the cost of the inventory.

2. As well, during 2010, he started a new construction business. He is a one-man operation. He has no employees. It often takes some time for start-up businesses to become successful. To attribute income of $142,565.00 based on the computer model printout presented by Mr. Schuman, as set out at tab A of his opening submissions, would, in my view, be imputing income (by using a gross-up) of too high an amount.

3. The difficulty, of course, is that trials must be decided based on the evidence presented. The respondent presented little credible evidence about his income. The court is, therefore, left dependant on the facts elicited by the applicant during her testimony and the cross-examination of the respondent.

[23] The applicant's request for a contribution to the child's section 7 expenses, which include daycare, sports, dance, French lessons and some medical and dental expenses, shall be from August 1, 2011, based upon the proportionate share of the parties' income, which for 2011 shall be $84,000.00 for the applicant and $95,500.00 for the respondent.

[24] The proportionate share of special expenses for 2012 shall be the same as set out above.

[25] I accept the evidence presented by the applicant about the costs of Tia's special expenses which are found in Exhibit 4.

[26] The proportionate share for 2013, however, shall be based the applicant's income of $84,000.00 and the respondent's income of $142,565.00. I have, following the case of *Reil v. Holland*, accepted the method used by the applicant's counsel for calculating the income of the respondent. That method is set out both in tab A of the applicant's amended opening statement and tab 2 of the applicant's document entitled Final Support and Section 7 Calculations and used in her counsel's closing submissions.

[27] I have chosen this higher income because I have no other figures from the respondent to reply upon. In addition, the respondent has now run his construction company for well over two years. It can no longer be described as a start-up.

[28) Retroactive child support shall be calculated based on the figure of $700.00 a month up to and including July 31, 2011. From that time forward to December 31,2012, retroactive child support shall be based on the *Guidelines*, using an imputed income level for the respondent of $95,500.00 and from January 1, 2013, an income level of $142,565.00.

[29] From January **1,** 2014 and continuing forward, the amount of child support to be paid shall be $1,207.00 per month, which is the *Guidelines'* amount for an income of $142,565.00.

[30] Should the respondent wish to have his child support payments changed, based on a material change in his circumstances, he shall have to produce a true copy of his 2013 Income Tax Return with copies of all attachments together with his 2013 Notice of Assessment and a sworn updated financial statement.

[31] A support deduction order shall issue.

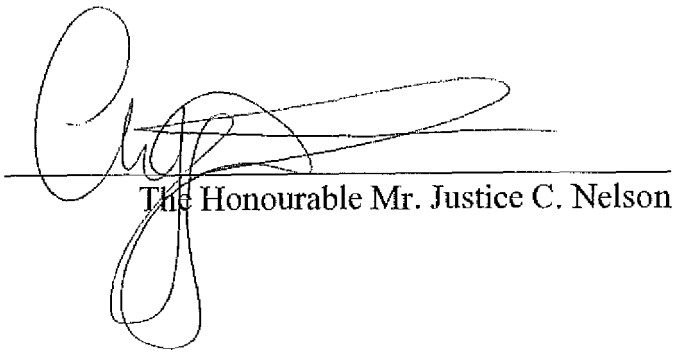
[32]. Unless the support order is withdrawn from the office of the Director of the Family Responsibility Office, it shall be enforced by the Director, and amounts owing under the support order shall be paid to the Director, who shall pay them to the person to whom they are owed.

[33] The order shall bear post-judgment interest at the prescribed interest rate effective from the date of this order. Where there is a default in payment, the payment in default shall bear interest only from the date of default.

[34] Counsel should provide a draft order. Approval of that order by the respondent is not necessary.

Costs

[35] If the parties cannot agree on costs, written cost submissions may be made. All submissions are restricted to 5 pages, exclusive of dockets and offers to settle, and are to be served and filed at the appropriate court office. Counsel for the applicant may serve and file cost submissions within 30 days of the release of this judgment. The respondent may serve and file a response within 15 days thereafter, and counsel for the applicant may serve and file a reply within 7 days thereafter.



The Honourable Mr. Justice C. Nelson

DATE RELEASED: January 2, 2014