Date: 1999 08 17
Docket: CV 08345

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Children's Law Act,* S.N.W.T. 1997
c. 14

BETWEEN:

VALERIE FRISE

Applicant

-and-

FLOYD MOSES

Respondent

MEMORANDUM OF JUDGMENT

[1] When this matter came before me in Chambers on August 13, 1999, the Respondent did not appear, despite having been served with notice.

[2] On the basis of the contents of the Applicant's affidavit, I granted a declaration that the Respondent is the father of the child Ashlie. That declaration was made pursuant to s.5(2) of the *Children's Law Act,* S.N.W.T. 1997, c.14.

[3] Based on the information provided by the Applicant and in the absence of any response from the Respondent to the notice regarding financial disclosure served on him pursuant to the *Child Support Guidelines* under the *Children's Law Act*, I imputed to the Respondent annual income of $60,000.00. I accordingly ordered that he pay the *Guideline* amount for that income, which is $539.00 per month, commencing September 1, 1999.

[4] The Originating Notice filed by the Applicant and served on the Respondent includes a request for child support retroactive to the time when the Respondent acknowledged paternity or, alternatively, to the time he agreed to pay child support, which is said to be October of 1997. I reserved on that aspect of the application and this memorandum constitutes my ruling on it.

[5] The child was born on March 4, 1982, approximately 8 months after the Applicant and Respondent concluded their relationship. The Applicant says that she did not initially tell the Respondent that Ashlie was his child because she had lost touch with him.

[6] Paragraphs 5, 6 and 7 of the Applicant's affidavit read as follows:

> 5. THAT in 1991 I began a recovery program for alcoholism, and as part of my recovery, in 1993 I found the Respondent and advised him that Ashlie was his daughter.
>
> 6. THAT the Respondent accepted that he was Ashlie's father and in October, 1997 verbally agreed to pay me child support in the amount of $200.00 per month.
>
> 7. THAT the Respondent made a few payments and has sent other sums from time to time when requested, but has failed to live up to his commitment to support Ashlie on a consistent basis.

[7] In arguing that retroactive support should be ordered, counsel for the Applicant relied on s.60(1)(e) of the *Children's Law Act,* which reads as follows:

> 60(1) In an application under section 59, the court may, in accordance with any guidelines that may be made under subsection 85(1) or (2), make an order.
>
> (e) requiring that support be paid in respect of any period before the date of the order;

[8] Section 59 is the section pertaining to applications for child support. The guidelines referred to are the *Child Support Guidelines*.

[9] Section 60(l)(e) is clearly discretionary. The court may make a retroactive order but is not obliged to do so.

[10] The rationale for an award of retroactive support is generally the obligation of both parents to support the child from birth. This applies equally to children of married and unmarried parents: see *T.W. v. D.C.,* [1999] A.J. No. 16 (S.C.) and the reference therein to *MacMinn v. MacMinn* (1995), 174 A.R. 261 (C.A.).

[11] Counsel for the Applicant argued that child support could be ordered retroactive to 1993, when it is said that the Applicant advised the Respondent that the child was his and he acknowledged paternity. However paragraph 6 of the Applicant's affidavit, quoted above, suggests that the acknowledgement was made in 1997, when the Respondent agreed to pay child support. This is also suggested by paragraph 13(c) of the affidavit, which refers to "the time the Respondent acknowledged paternity and agreed to pay child support (October, 1997)". At the very least, paragraphs 5 and 6 are ambiguous on that point.

[12] Even if it could be said that there was an acknowledgement of paternity in 1993, there is not sufficient evidence to allow me to calculate a quantum of support for the period before May 1, 1997, when the federal *Child Support Guidelines* came into effect and began to be followed in non-*Divorce Act* cases as well. The Alberta Court of Appeal has ruled that the *Child Support Guidelines* do not have retroactive effect, particularly since they are based on a different income tax treatment than formerly was the case: *Cavanaugh v. Ziegler* [1998] A.J. No. 1423 (C.A.).

[13] There is no evidence before me that would permit me to do a Levesque calculation or any other calculation based on the costs to the Applicant of raising the child for the period before May 1, 1997, as there was in *T.W. v. D.C.*

[14] The alternative submitted by the Applicant is that child support be awarded retroactive to October, 1997. The difficulty with that is the lack of information as to the child support payments that were made by the Respondent. They have not been detailed beyond what is set out in paragraph 7 of the Applicant's affidavit. Obviously some credit would have to be given for these payments but there is no way of knowing how much. It is also not clear whether the $200.00 per month was an amount agreed to between the parties and if so, why that was the amount agreed upon. Nor is there any explanation in the material as to why the application for child support is being brought only now. All of these factors may be relevant and should be placed before the court when a retroactive order is sought.

[15] Although the Respondent's failure to respond to this application does permit me to draw certain inferences against him, the fact remains that the Applicant has not placed sufficient information before the court.

[16] In the circumstances, child support will be payable retroactive only to the date the Respondent was served with notice of this application, that being July 1, 1999, in the amount of $539.00 per month. As ordered in Chambers, the Applicant will have her costs.

V. A. Schuler
J.S.C.

Heard at Yellowknife, Northwest Territories
the 13th day of August, 1999.

Counsel for the Applicant: Elaine Keenan-Bengts
No One Appearing for the Respondent.