

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Maintenance
Orders (Facilities for Enforcement) Act*,
R.S.N.W.T. 1988, c.M-3

BETWEEN:

CHARLENE MARLENE PAUL

Applicant

- and -

IAN PATRICK GAFFNEY

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter came on before me in Chambers as an application to confirm a provisional order for child support made in the Ontario Superior Court of Justice on July 2, 2002.

[2] The provisional order provides that the Respondent pay child support for his son, born September 3, 1990, in the amount of \$454.00 per month, based on his income of \$52,977.00 per year. The Respondent does not contest that part of the provisional order.

[3] The provisional order also provides that support is retroactive to July 2, 1999 and the arrears are to be paid at \$150.00 per month. The Respondent takes issue with this part of the order and says that if retroactive support is to be ordered at all, it should go back only to the date when he was served with notice of the application for the provisional order (May 21, 2002) or, at the very earliest, when he became aware of the Applicant's intention to bring the application, which was in February 2002.

[4] In his affidavit, the Respondent says that he and the Applicant had a brief relationship and only after their separation did he learn that she was pregnant. He says they had an agreement that he would not contest custody of the child and she would not ask for child support.

[5] In 2001 he responded to contact from the Ontario Department of Social Services and learned that they wanted him to pay child support because the Applicant was on social assistance. He paid for a DNA test and heard nothing further until February 2002 when the Applicant told him that her government assistance was being suspended and she would have to apply for child support. He wanted to settle the matter but asserts that the Applicant would not accept payment to her because of the court action and he was unable to confirm which government department to send the money to. He was served with notice of the court application on May 21, 2002.

[6] It appears that the Applicant became disabled and unable to work, although it is not clear from the material provided by her when that occurred. The only reference to her request for retroactive child support is the following statement in the application she filed with the Ontario court: “As I am in receipt of a pension from the O.D.S.P. I must also request retroactive child support for the last three years”.

[7] From the material filed, I understand “O.D.S.P.” to be the Ontario Disability Support Program.

[8] The transcript that was forwarded by the Ontario Court contains only the Judge’s order and no evidence, if any, taken or submissions made. No reasons are provided for making the support retroactive and there is nothing in the material to indicate why the three year time frame was proposed or ordered. The only significance of the July 2, 1999 date appears to be that it is three years prior to the date of the order.

[9] Counsel for the Respondent argued that I should have regard to s.5(5) of Ontario’s *Reciprocal Enforcement of Support Orders Act*, R.S.O. 1997, c.R-7, which provides:

5.(5) Where the court makes a confirmation order for periodic support payments, the court may direct that the payments begin from a date not earlier than the date of the provisional order.

[10] Counsel interprets s.5(5) as precluding the Court making a confirmation order from ordering support payments retroactive to a date earlier than the date of the provisional

order being confirmed. I do not have to decide whether that interpretation is correct because in any event, that legislation applies only to an Ontario court confirming a provisional order made in a reciprocating state. The legislation which governs this confirmation proceeding is the *Maintenance Orders (Facilities for Enforcement) Act*, R.S.N.W.T. 1988, c.M-3 and it does not contain a provision similar to s.5(5) of the Ontario statute. I know of no basis upon which the Ontario statute could be said to apply.

[11] Counsel also pointed out the lack of any basis in the material for the order for three years' retroactive payments. If it is simply a matter of government policy based on the Applicant's receipt of disability or other benefits, he argues that it is not sufficient. I agree. An order for retroactive support prior to the date of the application is not the norm and if it is to be made, it should be based on statutory authority and take into account factors such as those set out in *S. (L) v. P.(E.)*, [1999] 12 W.W.R. 718 (B.C.C.A.), which I referred to in *Stewart v. Jones*, [2001] N.W.T.J. No.70.

[12] Ontario's *Family Law Act*, R.S.O. 1990, c.F.3 provides that a court may make an order requiring that support be paid in respect of any period before the date of the order [s.34(1)(f)] or requiring payment to certain social services agencies of an amount in reimbursement for a benefit or assistance under the Ontario Disability Support Program, including a benefit or assistance provided before the date of the order [s.34(1)(g)]. The provisional order in this case does not, however, require support be paid to an agency.

[13] The result is that I am left not knowing on exactly what grounds the three year retroactive payments were ordered. There is an onus on the Applicant to establish the grounds for retroactive support and there are factors in this case that may weigh against support going back that far, specifically the agreement alleged by the Respondent that no support would be paid, relying on which he would have made other choices as to the use of his income. The real problem is that it is not possible to determine whether the retroactive support as ordered should be confirmed without knowing why it was ordered and having more information about the circumstances.

[14] Counsel for the Respondent also submitted that any retroactive support should be paid into a trust for the child rather than to the Ontario government.

[15] The provisional order does not direct payment to the government or any agency, and although it does not specify that payment is to be made to the Applicant, I infer that it is. Whatever arrangements she may have with a government agency are not clear on the material and I decline to make an order as suggested by counsel.

[16] Having said all that, I do think support retroactive to February of 2002 is appropriate. That is when the Respondent became aware that the Applicant was seeking support. He was prepared to pay it at that time.

[17] Accordingly, the order made by the Honourable Justice Maranger of the Ontario Superior Court of Justice dated July 2, 2002 is confirmed, but with the modification that the support is retroactive only to February 1, 2002.

[18] Once counsel has filed the order reflecting the above, the Clerk is directed to forward the order, a copy of this Memorandum and a copy of the Respondent's affidavit to the Ontario Court.

[19] Finally, I note that in this case, s.5(1)(c) of the *Maintenance Orders (Facilities for Enforcement) Act* was not complied with as a statement of the grounds on which the order might have been opposed was not provided. The Respondent waived that requirement so it was not an issue in this case, but it should in future be complied with before this type of application is filed with this Court.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT this
21st day of February 2003

No one appearing for the Applicant
Counsel for the Respondent: James D. Brydon

S-001 CV 2002 000368

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