Date: 2008 09 29
Docket: S-0001-FM-2008000062

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ERIN CRAN

Applicant

- and -

LONG HAI HUYNH

Respondent

MEMORANDUM OF JUDGMENT

[1] The parties are parents of the child, K.R.C. aged 2. They commenced a relationship in October, 1995 and separated on August 26, 2007 after the Applicant, Cran, was assaulted by the Respondent. Over the past year, the Respondent has been incarcerated for several months and effectively prevented from earning income.

[2] The Applicant filed an Originating Notice of Motion on April 18, 2008 seeking, among other things, child support, retroactive child support and a proportionate share of extraordinary expenses.

[3] An Interim Order was granted by Mr. Justice Richard on May 22, 2008 in which these issues were set over to September 18, 2008 to be dealt with, presumably because it was anticipated the Respondent would have completed a term of imprisonment he was serving at that time. The Respondent was sentenced on April 4, 2008 to a term of 6 months imprisonment and 2 years probation for having assaulted the Applicant on August 26, 2007 and for a conviction on another charge. He was released from jail on August 1, 2008.

[4] Counsel have advised the Court that dates for Examinations For Discovery have been reserved for November and the trial is expected to proceed early next year.

[5] On this motion there are two areas of contention. First, there is disagreement on what the Respondent's current income is and how it should be calculated. Second, the parties disagree on the date to which child support should be made retroactive.

The Facts

[6] The Respondent, over the past 3 years, when not incarcerated, has worked in his mother's retail business, Northern Transitions. The Canada Revenue Agency assessed his income in 2006 at $32,400.00 and at $27,000.00 in 2007. The decline is not explained. Subsequent to his release on August 1st of this year, the Respondent commenced working for his mother in the same job he held before. He says in his affidavit that he is earning $12.98 per hour. No pay stub was produced. There is no evidence of the number of hours he is expected to work, whether he is required to work overtime, whether he might receive bonuses and so on. The information is threadbare.

[7] The Applicant estimated in her Affidavit filed April 19, 2008 that the Respondent "takes home $1,200.00 every two weeks." For 26 pay periods, this amounts to $31,200.00 per annum. The phrase "take home" generally refers to net and not gross income which would be somewhat higher. By Affidavit filed September 17th, the Respondent produced a Financial Statement in which he lists his monthly income at $2,076.80.

[8] The evidence discloses the Respondent lives in an apartment located over his father's business, YK Auto Repair. The building is owned by his parents. The Applicant says she does not believe the Respondent pays rent. In the Financial Statement, the Respondent listed his rent at $500.00 per month while in his Affidavit sworn May 16, 2008 he said he was paying his parents $900.00 per month for rent.

[9] The Applicant's day care costs are $1,000.00 per month. She is currently working in two different divisions at Stanton Hospital earning $26.25 per hour at one job. She is uncertain of the level of pay in the other job but I will assume it would be comparable. It is not certain that full time employment will be available

to her in future. In any event, counsel for the Respondent asserted and counsel for the Applicant did not disagree - at least for purposes of calculating a proportionate share of child care expenses - that the parties levels of income are similar.

Positions of the Parties

(a) The Respondent's Income

[10] Counsel for the Applicant urges the Court not to consider the Financial Statement which he advised was served on at him 4:40 p.m. on September 18, the day before this motion. He went on to submit that if the Court did decide to consider the document, it should treat as unreliable the information in it relating to the Respondent's current income level and should note that, even if true, the figure listed for rent ($500.00) is ridiculously low given local market conditions and evidence that the Respondent, with the assistance of his parents, is deliberately hiding or under-reporting income for tax and child support payment purposes. He says the monthly income listed in the Statement is highly suspect since, if true, the Respondent would be getting paid considerably less to do the same job he was doing 2 years ago. Accordingly, counsel asks the Court, having reference to s. 19 (1)(f) of the *Child Support Guidelines*, N.W.T. Reg. 138 - 98, to impute income to the Respondent based on the average male salary in Yellowknife of $69,165.00 per year as calculated by Statistics Canada.

[11] The Respondent's position is that he has provided financial information to the Court and that no inference can be drawn by the fact of his rent being $500.00. Counsel says there is evidence of income even if one relies on the CRA Assessments for prior years and that it would be unjustified and improper to impute income as requested by the Applicant. He further points out that using the figures provided by the Applicant, his client would be earning $31,200.00 (although this is a net figure) and that using the imputed income figure of close to $70,000.00 would be wrong. Finally, counsel for the Respondent stated that in his view the Applicant was making about the same as his client which would put his income in the low to mid thirty thousand dollar area annually.

(b) Retroactivity of Child Support

[12] The Applicant says child support should be paid retroactively to date of the child's birth or effectively June 1, 2006, and the fact the Respondent was in jail during this period should be irrelevant since the costs of supporting the child had to be borne and he, by his actions, put himself in jail. He is prepared to accept the average of the Respondent's income for 2006 and 2007 or a yearly income of $29,700.00 for retroactive payment purposes which would result in monthly payments of $270.00. Counsel suggests that payments for child care should be retroactive to June or July of 2008 but fairly conceded that the date of August 1 would be acceptable.

[13] The Respondents argues that payments should not be retroactive prior to his client's release from jail on August 1, 2008, but in any event not prior to the date of commencement of the action. He referred to the practice of this Court in not making awards retroactive beyond the date of commencement of proceedings. He did not argue that the sum requested for retroactive support was inappropriate.

[14] By way of rebuttal on this point, counsel for the applicant referred to *D.B.S. v. S.R.G.* [2006] 2 S.C.R. 231 and *Normandin v. Kovalench*, [2007] N.W.T.J. 105 as authorities that would allow for a retroactive order prior to commencement of an action.

Analysis

(a) Respondent's Income

[15] For the purposes of this application, I am not going to consider the Financial Statement filed by the Respondent. Pursuant to Rule 383(3), an affidavit to be relied upon in opposition to an application, shall be served no less than three clear days before the return date of the application. This is not a situation where the Court should consider exercising its discretion to consider the Statement. The document was served so late that counsel for the Applicant would not have had time to review it or do so properly with his client. Accordingly, the evidence before the Court is contained solely in two affidavits of the Applicant and two filed by the Respondent. Therefore, the only evidence we have of the Respondent's income is that contained in Canada Revenue Agency Notices of Assessment for 2006 and 2007, the statement in his affidavit that he is earning $12.98 per hour working for

this mother and the Applicant's estimate in her affidavit that he "takes home $1,200.00 every two weeks".

[16] I will accept the Applicant's submission that, if retroactive support is to be ordered, it should be in the sum of $270.00 per month based on the average of the Respondent's assessed income for 2007 and 2008. As for the Respondent's current level of income, based on the evidence before the Court, I have difficulty in imputing income to the Respondent in accordance with statistical data. The Respondent did provide the Court with some financial information. While there may be legitimate concerns that the Respondent is under-reporting income or lowering his income in exchange for an unreported taxable benefit, I am not persuaded that the case is clear enough that I should make any finding in this regard on a interim application and in circumstances where the parties have a date reserved for Discoveries in November of this year and anticipate going to trial early next year. In 2006, when the Respondent was not in jail and would have seemingly worked a full 12 months he earned $32,400.00 and counsel for the Applicant has pointed out that he is working in the same job he was then and it is unlikely he is earning less today. I accept that argument and will find that, on a go forward basis, the Respondent's yearly income will be $32,400.00. This would result in a monthly payment of $295.76.

(b) Child Care Expenses

[17] The Applicant has adduced evidence, which I accept , that these expenses are $1,000.00 per month and submits they should be split equally. The Respondent did not contest this submission and I therefore order the Respondent shall pay the sum of $500.00 in child care expenses.

(c) Retroactivity of Child Support and Child Care Expenses

[18] First, I am satisfied that this is a case in which retroactive support should be ordered. The Respondent did not present argument to the contrary.

[19] I am not aware that there was a practice of this Court of not making child support payments retroactive beyond the date an action was commenced as argued by counsel for the Respondent. If there was, it would have predated *D.B.S.* Counsel did not cite any authority in support of this submission. To support his

argument, counsel for the Applicant cited *Normandin (supra)* where Charbonneau J. ordered support paid back to the date it was first requested which was well beyond the date of the motion before the court. That case does not assist in the case at bar since, in *Normandin*, the application was to increase the amount payable pursuant to a previous court order as opposed to the date of commencement of the action as here.

[20] In *D.B.S*. the Supreme Court of Canada conducted an extensive examination of the policy, societal and legal considerations respecting retroactivity and decided, among other things, that it would not be in society's interest or, in most cases, the interests of children to lay down a rule which stipulated that no support would be payable retroactively for periods preceding the commencement of legal action. Such a rule would undermine early attempts at settlement and encourage early filing and litigation. Bastarache J. put it succinctly as follows:

> Disputes surrounding retroactive child support will generally arise when informal attempts at determining the proper amount of support have failed. Yet, this does not mean that formal recourse to the judicial system should have been sought earlier. To the contrary, litigation can be costly and hostile, with the ultimate result being that fewer resources - - both financial and emotional - - are available to help the children when they need them most. If parents are to be encouraged to resolve child support matters efficiently, courts must ensure that parents are not penalized for treating judicial recourse as a last resort. Accordingly, the first two start dates for retroactive awards - - i.e., the date of application to court and the date of formal notice - - ought not be used.

[21] The Court went on to say:

> Having established that a retroactive award is due, a court will have four choices for the date to which the award should be retroactive: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased. For the reasons that follow, I would adopt the date of effective notice as a general rule.

[22] In this case, perhaps because the Respondent was arrested and the Applicant was afraid of him, there was no notice given to him until formal proceedings were commenced. In *D.B.S*. the Court noted that, in some cases, the failure to ask for child support may be deliberate and that retroactivity ought not be presumed. Accordingly, the date of effective notice has been deemed to be the appropriate date as a general rule. The parties did not separate until August of 2007 so, absent something more, I would not order child support or special expenses payable prior to that date. In the circumstances, I am fixing the date of retroactivity for child support at May 1, 2008. I am cognizant of the fact the Respondent was in jail for several months this year. Despite this, he remained responsible for financially supporting his child and there would be a somewhat perverse result if a person could avoid his or her legal obligations to children by committing a crime and going to jail.

[23] With respect to retroactivity of s. 9 extraordinary expenses, Mr. Large initially asked they commence in "June or July" but later fairly conceded that the it would not
be inappropriate if they were to start August 1, 2008.

(d) Costs

[24] Neither party spoke to the issue of costs and given the mixed result, I would order that costs be in the cause.

Conclusion

[25] In the result, the Order of the Court is as follows:

> 1. The Respondent shall pay child support to the Applicant for the infant child, K.R.C., aged 2, in the amount of $295.76 commencing October 1, 2008 and payable on the first day of each and every month thereafter until further order of the Court;
>
> 2. The Respondent shall pay retroactive child support to the Applicant in the total amount of $1,350.00 for the infant child calculated at the rate of $270.00 per month for the period commencing May 1, 2008 and ending September 1, 2008; such retroactive child

support to be payable at the rate of $100.00 per month commencing October 1, 2008;

3. The Respondent shall pay the sum of $500.00 per month for the extraordinary expense of day care to the Applicant commencing October 1, 2008 and payable on the first day of each and every month thereafter until further order of the Court;

4. The amount payable pursuant to paragraph 3 shall be payable retroactively to August 1, 2008 and for each month thereafter to and including September 1, 2008 making a total of $1,000.00 and to be payable at the rate of $200.00 per month commencing October 1, 2008;

5. Costs shall be in the cause.

[26] I would ask Counsel for the Applicant to prepare the formal order.

D.M. Cooper
J.S.C.

Dated this 29th day of September, 2008.

Counsel for the Applicant: D. Large, Q.C.
Counsel for the Respondent: J. Scott

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