Evans v. Martin, 2008 NWTSC 22 Date: 2008 03 31
Docket: S-0001-CV 2004000228

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARLENE EVANS and EARL EVANS

Applicants

-and-

DEREK PAUL MARTIN

Respondent

Application for custody, access and child support.

Heard at Fort Smith: December 3rd and 4th, 2007.

Reasons filed: March 31, 2008

REASONS FOR JUDGMENT
THE HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Applicants: Katherine R. Peterson, Q.C.
Counsel for the Respondent: James D. Brydon

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REASONS FOR JUDGMENT

[1] This case is about custody and access with respect to T., a child who is now five years old. He has been in the care of the Applicants, Marlene and Earl Evans, since shortly after his birth in July of 2002. The Respondent, Derek Martin, is T.'s father. Mr. Martin wants joint custody of T. He also seeks significant increase to his accessto T. He wants the access to be more frequent and its duration progressively increased. He also wants the access regime to include overnight access. The Evans want sole custody of T. and resist any change to the access regime at this time. They want to be able to decide, as time goes by, how Mr. Martin's access should increase and on what terms. The Evans also seek child support from Mr. Martin. Mr. Martin agrees he should pay some support, but the amount of the support that should be ordered, and the extent to which it should be ordered retroactively, are in issue.

A) Background

[2] The birth of a child is often a happy time for a family. Tragically, in this case, only 11 days after T.'s birth, his mother Eleanor, the Evans' daughter, was diagnosed with a very aggressive form of cancer. In the months that followed she was hospitalized in Edmonton several times. Very soon after her diagnosisher parentstook over T.'s care. Eleanor died on April 23, 2003.

[3] Eleanor's relationship with Mr. Martin had started in 2000. The Evans liked Mr. Martin. They thought he was a good match for their daughter. But an event occurred during their daughter's illness that was devastating to their relationship with Mr. Martin. During one of Eleanor's stays in the hospital in Edmonton, she wanted to write her will and deal, among other things, with the question of who would be T.'s guardian. There was a discussion about this in her hospital room. Eleanor asked Mr. Martin if he would look after T. There is some conflict in the evidence adduced at trial about exactly what transpired that day, but it is clear that Mr. Martin did not agree to look after T. and that Eleanor was very upset by this. She asked Ms. Evans if she would look after T. Ms. Evans agreed to do so.

[4] For the first year after Eleanor's death, Mr. Martin had very little contactwith T. At some point during the year 2004, the Evans decided they wanted to custom adopt T. Mr. Evans went to see Mr. Martin and brought documents for him to sign for this purpose. Mr. Martin refused to sign the documents. The Evans commenced these proceedings in June 2004.

[5] Two Orders were later issued dealingwith access. They were issued on consent. The first Order issued in February 2006, and included the following access clause:

> 2. IT IS FURTHER ORDERED that the Respondentis entitledover a two month trial period to exercise access to the child on the following terms and conditions:
>
> > (a) the Respondent is entitled to exercise access to the child within the community of Fort Smith each Tuesday and Thursday, between the hours of 3:30PM and 7:00PM;
> >
> > (b) the Respondent shall exercise the access and not permit others to have care of the child during his access periods;
> >
> > (c) the Respondent shall not be under the influence of alcohol or drugs during any period of time that he is exercising access to the child;
> >
> > (d) the Respondent shall be entitled to exercise access without interruption or interference by the Applicants;
> >
> > (e) if the access is consistently and successfully exercised by the Respondent during this two month period, which commences February 9, 2006, the

> parties shall review the access arrangements with a view to expanding the Respondent's access over a further trial period.

[6] As it turned out, Mr. Martin's access was not expanded. On the contrary, it got scaled back. The Evans took steps to get the access varied because they felt the visits were upsetting to T. The second Order dealing with access was issued on August 29, 2006, reducing the frequency of the visits to once a week. That Order reads:

> IT IS HEREBY ORDERED that the Respondent may exercise access to the child, [T.], on Tuesday afternoons of each week, provided that he has given notice of his intention to do so to the Applicants no later than 6:00PM the immediately preceding Monday.

[7] Mr. Martin exercised his access sporadically in 2006. Part of the reason for this was that his job often required him to travel outside the community. On other occasions, he attempted to exercise his access but the Evans were out of town. The Evans were not particularly inclined to modify their plans or adjust their schedule to facilitate Mr. Martin's access. On the other hand, during this period, Mr. Martin did not make any consistent effort to advise the Evans as to whether he intended on exercising his access or not.

[8] Between May 2007 and the trial in December 2007, Mr. Martin exercised his access more consistently.

[9] The Evans consider T. to be their son. They have not taken any particular steps to involve Mr. Martin in his life to any degree, to include Mr. Martin in making decisions about his upbringing, or to inform Mr. Martin about significant events in his life. They do not consider that they have any obligation to do so. Ms. Evans was very candid about her views: she considers that Mr. Martin gave up his opportunity to be a significant part of T.'s life the day the question of T.'s care was discussed in Eleanor's hospital room.

[10] It is not disputed that so far in his young life, T. has grown to be a happy, well adjusted child. The Evans have provided him with a safe, healthy and happy home environment. They have been married for 36 years and have raised two other children. Ms. Evans is 53 years old, Mr. Evans is 56. They are both healthy and active.

Spending time out on the land has been part of their lifestyle for many years and T. has had much exposure to that lifestyle.

[11] Mr. Martin has a common law spouse, Sherri Stewart. At the time of the trial they had been together for two and a half years. Ms. Stewart has a daughter who is 7 years old. T. gets along with her. Mr. Martin has a daughter from an earlier relationship. She is 16 years old and also lives with him and Ms. Stewart. Spending time on the land in the summer and winter is very much a part of their family's lifestyle.

It is not disputed that T. enjoys his visits with Mr. Martin. He enjoys playing with Ms. Stewart's daughter. There is no evidence that T.'s safety or well-being is at risk when he spends time with Mr. Martin.

[12] Mr. Martin acknowledges that his involvement in T.'s life was very limited in the first years of T.'s life. He also acknowledges that he did not make any particularly consistent effort to spend more time with T., although he says he wanted to. On the interpretation of the evidence most generous to Mr. Martin, he adopteda rather passive approach to the situation.

[13] Mr. Martin says that he now wants an opportunity to get to know T. better and to become a greater part of his life. He wants to spend more time with him. He wants to be able to take T. on trips, among other reasons, so T. can meet Mr. Martin's family. Many of Mr. Martin's family members live in Fort Chipewyan. Mr. Martin is Chipewyan, and wants T. to get to know that part of his cultural heritage.

[14] Mr. Martin does not dispute that the Evans have provided well for T. He believes that they should remain a part of his life but that their role should be the role of grandparents, not parents. Mr. Martin acknowledges that any change in custodyand access has to be implemented progressively, but his goal, as I understood his testimony, is to work his way towards assuming a full parental role towards T. and to become his main caregiver.

B) ANALYSIS

1. Custody and Access

a. Legal Framework

[15] The overarching consideration in deciding issues of custody and access is what is in the best interests of the child. Section 17 of the *Children's Law Act*, S.N.W.T. 1997, c. 14 makes that very clear. That provision also sets out a number of factors that must be taken into consideration in determining what the best interests of the child are.

[16] Issues of custody and access must viewed from the perspective of the child. They must not be analyzed through a framework that puts the emphasison the rights of the parties seeking custody. As this Court said in *G.D.* v. *G.M.* [1999] N.W.T.J. No.38, at para. 60:

> With respect to access, I think it is fair to say that it, like custody, is viewed from the child's perspective. As such, there is no point in talking about a "right" to access. Generally speaking, when it comes to adults and children, the adults have responsibilities, not rights. All rights of custody and access exist only to the extent that they permit the custodial or access parent to act in the best interests of the children.

[17] As a result, the analysis on issues of custody and access has nothing to do with rewarding individuals who acted meritoriously or punishing others for their failings, actual or perceived. The conduct of the parties is only relevant to the extent that it is has a bearing on their abilities as parents and on the determination of what the child's best interests are. The determination of a child's best interests in the context of custody and access demands an analysis that is more complex and more nuancedthan a mere "rating" of the conduct or merit of the parties.

[18] While the biological connection to the child is a relevant factor, and one that may in some cases carry significant weight, it is not determinative. This is because,

again, the inquiry must at all times be focused on the child’s interests and not on parental rights. *Kalaserk* v. *Nelson* [2005] N.W.T.J. No.3, at para.37.

b. Application of Legal Framework

[19] A number of facts that are relevant to the determination of custody and access are not contested in this case. The Evans have raised T., for all intents and purposes, since his birth. They have cared and nurtured him and have made all the decisions that parents make when they raise a child. They have provided T. with a stable, loving home, have taken care of his needs. By all accounts, they have done very well raising him.

[20] It is also clear that the relationship between T. and Mr. Martin has only recently begun to develop. This was abundantly clear during Mr. Martin’s Examination for Discovery in August 2006: he acknowledged at that point in time that he had not seen T. for approximately six months.

[21] What is very much in issue between the parties is the reason why Mr. Martin did not develop a stronger relationship with T. The Evans’ position is that Mr. Martin showed no interest in T. and made no real effort to be a part of his life. Mr. Martin’s position is that the Evans prevented him from developing a relationship with T. Simply put, he argues that the situation was one where the Evans alienated him from his son.

[22] This major difference between the parties’ respective characterizations of the situation must be examined carefully in light of the evidence. It is highly relevant to the decisions that I must make about custody and access. If Mr. Martin did not develop a relationship with T. until recently because he chose not to, that is one thing. But if he wanted to be involved in his son’s life, tried to do so, and was frustrated in those efforts by deliberate actions on the part of the Evans, that is another thing altogether.

[23] The first important fact that bears on this issue is how the Evans came to become T.'s primary caregivers in the first place. As I have already mentioned, there is a conflict in the evidence about what Mr. Martin's response was when Eleanor asked him if he would look after their child. Ms. Evans testified that Mr. Martin's response was that he would not look after T. because he was already taking care of his daughter. Mr. Martin's evidence was that he said he could not take care of T. right away but maybe would a few months down the road.

[24] Mr. Martin's trial evidence is in sharp contrast with his evidence at his Examination for Discovery, where his evidence was that he did not recall Eleanor asking him whether he would be prepared to take care of T. For example, during Mr. Martin's cross-examination at trial, he was reminded of the following question and answer from the Examination for Discovery:

> Q. Okay, so either just before or at the time she was writing it, do you remember her asking you whether she, you would look after [T.]?
>
> A. I don't remember that, no.

[25] Then, in reference to whether Eleanor had asked him to look after T., Mr. Martin was reminded about a further exchange that took place at the Examination for Discovery:

> Q. You would have remembered that? So you're very certain that, that didn't happen?
>
> A. Yes.
>
> Q. How certain are you? A 100% certain?
>
> A. Yeah.
>
> Q. A 100 percent certain?
>
> A. Uh hmm.

[26] Faced with those excerpts of his Examinationfor Discovery,and asked if he lied under oath in those proceedings, Mr. Martin answeredthat he remembered being angry during that process and that he just wanted the questions to stop. He eventually acknowledged that he did not tell the truth at the Examination for Discovery. He maintained that his trial evidence about his recollection of what happened in Eleanor's hospital room was true.

[27] I have concerns about the inconsistencies, in this area and in a few others, between Mr. Martin's trial testimony and his answers under oath at his Examination for Discovery. I accept that neither the trial nor the Examination for Discovery were pleasant experiences for him. I am sure that he was asked many questions that brought back painful memories, and that many of those questions were about things that were difficult to think and talk about. But some of the inconsistencies betweenMr. Martin's trial evidence and his answers at the Examination for Discovery are glaring and disturbing. They have a significant bearing on his credibility and the reliability of his trial testimony.

[28] Therefore, on the specific issue of the conversation that took place in Eleanor's hospital room, I find that events unfolded as described by Ms. Evans, and that Mr. Martin refused to take responsibility for T.'s care. There were probably many reasons for this. Mr. Martin testified he was scared and emotional around this time, and I accept that. But that does not change the fact that the primary reason the Evans took over T.'s care was because Mr. Martin would not.

[29] With respect to what transpired after Eleanor's death, Mr. Martin claimsthat he wanted, all along, to have more contact with T. But there is very little evidence that he took any steps to make this happen. In fact, the evidence is that he made no real effort towards this. Some of Mr. Martin's evidence at his Examination for

Discovery, entered as evidence at the trial, makes this plain:

Q. In the first year after Ellie died do you know how often you saw [T.]?

A. No.

Q. Did you feel it was often enough, however often it was?

A. No

Q. Why wasn't it enough?

A. Because it wasn't enough.

Q. How often did you want to see him?

A. Every day I wanted to see him.

Q. Okay, so what efforts did you make to see him every day?

A. Not very much effort.

Q. Why not?

A. I don't know.

Q. Did you talk to Mr. And Ms. Evans about spending time with [T.]?

A. Not much, no.

(...)

[30] Later on in the Examination, Mr. Martin was asked questions about how much time he had spent with T. in 2006:

Q. And what efforts have you made to see him since March?

A. Drove by.

Q. You drove by?

A. Yes.

Q. And what did you do after April to see [T.]

A. Not much.

Q. Did you make any efforts?

A. No.

(...)

[31] Finally, he was asked questions specifically about whether the Evans ever prevented him from seeing T.:

Q. Have there been times when you asked to visit with [T.] and you were refused?

A. I don't recall, no.

Q. So when you have asked to see [T.] you've been able to? If everybody was in town?

A. I'm pretty sure, yeah.

Q. So if the Evans were in town and you were in town, [T.] wasn't kept from you if you asked to see him, is that right?

A. Yeah, when I was able to go see him, yeah.

Q. So you were able to see him when you wanted to?

A. Yeah.

[32] Asked about why he did not take any steps to spend more time with T., Mr. Martin said that the Evans were mean to him, that it was not pleasant to spend time there, so he just preferred to avoid them. As I have already stated, I do not doubt that, especially considering the grief that everyone was going through at that time, the

interactions between these people must have been tensed, sad and very difficult for all involved. But my assessment of the whole of the evidence is that what transpired during those first few years cannot be characterized as an effort by the Evans to prevent Mr. Martin from being a part of T.'s life. For whatever reason, and probably for a number of reasons having to do with his personal circumstances and his own grief, Mr. Martin did not make any meaningful attempt or effort to be a part of T.'s life. He may well regret those choices now, but he cannot blame the Evans for them.

[33] While I do not doubt the relationship between Mr. Martin and the Evans was strained after Eleanor's death, that is not sufficient to make out a claim of alienation. I accept Mr. Evans' evidence that for a number of weeks after Eleanor's death, he brought T. to Mr. Martin's house regularly. Some of those times Mr. Martin was not home. Other times he was there and had short visits with T. By contrast, Mr. Martin, on his own admission, almost never came to the Evans' home, excepton one or two occasions. Mr. and Ms. Evans eventually concluded that Mr. Martin did not seem to be interested in spending time with T. That was not an unreasonable conclusion for them to reach under the circumstances.

[34] I am mindful of the testimony of Alice Martin, Mr. Martin's mother,who talked about her family's approach to dealing with people who are grieving. I understood her evidence to be to that her belief, and what she taught Mr. Martin, is to give space to people who are grieving, and leave them the initiative to renew contact with others when they are ready. She also said Mr. Martin was not an assertive person. These factors may in part explain Mr. Martin's behavior, but they do not change the fact that by and large, his failure to spend any significant time with T. was the result of his own choices, as opposed to something that was the Evans' doing.

[35] It is also helpful to examine the evidence about Mr. Martin's actions after the Orders giving him access were in place. For a period of time, he exercised that access very sporadically. To be fair to Mr. Martin, the Evans' attitude was that they would not change their plans or reorganize their lives to facilitate Mr. Martin's access. That accounts for some of the times access was not exercised, but, on the evidence, not for the majority of those times. On many other occasions access was not exercised because Mr. Martin was away from the community because of his work. The evidence

also showed that Mr. Martin did very little to inform the Evans as to whether he was planning on exercising his access or not.

[36] It is clear that between May 2007 and the trial in December 2007, Mr. Martin exercised his access more regularly. In that period of time he did more to start developing a relationship with T. and to be a part of his life in a more consistent way. But in proportion to T's life, it is still a relatively recent development. At the time of trial, Mr. Martin had not yet demonstrated, over a significant period of time, his willingness or ability to be consistently involved in T.'s life.

[37] Similarly, the relationship that Mr. Martin has established with Ms. Stewart is relatively recent. I accept that Ms. Stewart is supportive of Mr. Martin's desire to have a greater role in T.'s life. I also accept her evidence describing their family life, the time they spend on the land, and Mr. Martin's behavior and contribution to their family unit. As I have already mentioned, it is not suggested that this is a home where it is unhealthy or dangerous for T. to spend time in.

[38] As for Ms. Martin, she acknowledges that she does not know T. very well, although she would like to get to know him better. While her evidence was of assistance in understanding some of Mr. Martin's actions, her knowledge of T. is so limited that her testimony is not particularly helpful in assessing what T.'s best interests are. Clearly, Ms. Martin is supportive of her son's wish to have a closer relationship with his son. That is understandable. My impression,from her testimony, was that she appeared to view the issues in this case from the perspective of Mr. Martin's parental rights, and perhaps this is understandable as well. But as I have already stated, the decisions I must make have to be based on T.'s bests interests, not on anyone's parental rights.

[39] Mr. Martin may well be very sincere in his current intentions. But the stability in his life, and his commitment to being involved in T.'s life, are recent developments. That is a factor that cannot be overlooked in assessing what is in T.'s best interests.

[40] As I have already stated, while Mr. Martin's biological connection to T. is a factor, it is not determinative. The focus of my assessment has to be T.'s best interests, not Mr. Martin parental rights, nor, for that matter, any rights that the Evans may feel they have acquired through assuming a parental role to T. over the last five years.

[41] In my view, it is not in T.'s best interests to change the custodial regime that has existed, in fact, since his birth. The Evans' home is the home he knows as his own. They are the people who have raised him and cared for him on a day to day basis, and they have raised him well. They want to continue doing so, and there is no suggestion they are not able to. I am satisfied that it is in T.'s best interests to be in the sole custody of the Evans.

[42] The question of access is more difficult. It is not disputedthat T. enjoys the time he spends with Mr. Martin. I find that it is in T.'s best interests to be able to continue to develop a relationship with Mr. Martin, so long as Mr. Martin is committed to making that a priority in consistent way. The relationship can only develop through Mr. Martin and T. spending time together. If it is to grow, access should be expanded, but the difficult question is to what extent and at what rate. Mr. Martin acknowledges that changes in the access regime should be implemented progressively.

[43] T.'s best interests are the sole consideration in the pace at which things should change. Unfortunately, it is very difficult to project into the future and assess how Mr. Martin's relationship with T. will evolve, and consequently at which pace it would be appropriate for the access regime to expand. It goes without saying that the best case scenario would be for the people involved to be able to put their differences aside, and be able to cooperatively make this assessment and adjust the access regime accordingly. However, given the evidence I heard about how much strain there is in the relationship between the parties, I do not think that is a realistic option. While it would be in T.'s best interests for there to be as little tension as possible between the various people who care for him, that is not something that this Court has any control over, and under the circumstances, it may well be that the relationships will never be restored.

[44] Given the evidence I have heard and what I have been able to observe during this trial, I am of the view that leaving changes in access to be agreed upon betweenthe parties could well lead to more tension and more conflicts between them. That would not be in T.'s best interests. A rigid and regimented access regime is far from ideal, but under the circumstances it appears to be the only viable option for the time being.

[45] In his submissions, counsel for Mr. Martin suggested that the Court set out an access regime over the course of the next few years, with specific suggestions for an incremental increase in duration and the introduction of overnight access. I agree that any increase to Mr. Martin's access must be based on an incremental approach. However, given the fact that at this point Mr. Martin is really only beginning to get to know T., I am not satisfied that it is appropriate to go as far as counsel suggested as far as the pace and extent to which access should be expanded.

[46] I understand that the parties would like to avoid further Court proceedings to deal with these issues. It was obvious during the trial that these proceedings were painful for all involved. However, under the circumstances, there are limits to the extent I am able to deal with access issues for the future, because what may or may not be appropriate will depend on how the relationship between Mr. Martin and T. will develop.

[47] While I am of the view that Mr. Martin's access should be increasedto a degree, I am not persuaded that overnight access should be introduced until other forms of access have been consistently and successfully exercised over a significant period of time. I am also of the view that when overnight access is introduced, it should be exercised in Fort Smith for a period of time before any consideration is given to having this type of access exercised outside of that community.

[48] I have concluded that Mr. Martin's access should be expanded in the following way. In an initial phase, it will be increased to two day time visits per week. In the next phase, the access will also include, once a month, a full day of access during the week-end. Next, the access will be expanded further to include, once a month, day

time access during both week-end days. The next phase will include access for a full week-end, once a month, including overnight access on the Saturday night, with the proviso that this week-end access will take place in Fort Smith.

[49] This will be a slow and incremental increase to Mr. Martin's access, over a significant time period commencing on April 14, 2008 and ending in December2009. I have concluded that it would be unwise to attempt to project into the future beyond that point, in light of the evidence I have heard. There is always an element of uncertainty when attempting to map out an access regime for a significant period of time, but in the circumstances of this case, and in particular given that Mr. Martin's relationship with T. is still in early stages of development, I do not think it would be in T.'s best interests for me to venture too far in speculating about how that relationship will evolve over time.

[50] I emphasize again that in my view, T.'s best interests would be better served if those who care about him are able to reach a point where they can deal with access issues cooperatively, no matter how they might feel about each other. Arrangements agreed upon by the parties can often be more flexible and work better than something that is imposed by the Court and that, by definition, cannot take into account the evolution of the situation from month to month. If the parties are not able, by December 2009, to agree on terms of access, there will be no alternative but for them to make application to the Court to have the issue dealt with again. It is my sincere hope, for everyone's sake, that this will not be necessary.

[51] I agree that Mr. Martin should be provided some information on a regular basis about how T. is doing in school, his extra-curricular activities, and issues having to do with his health. The Evans will have sole custody of T., which means they will continue to be responsible for making decisions about his care and upbringing. But it is also in T.'s best interests that Mr. Martin have as much informationas possibleabout his life, as this will assist Mr. Martin in developinga meaningfulrelationship with him. The Evans must learn to accept this and share information about T. with Mr. Martin.

[52] On the other hand, I also agree that the Evans should have reasonable notice as to whether Mr. Martin will exercise his access. They need this information to plan their lives and schedules accordingly. In addition, and this is an important matter, it is in T.'s best interests to not be left in uncertainty about whether he will have his visits

with Mr. Martin or not. For this reason, there will be an onus on Mr. Martin to be consistent about communicating to the Evans whether he will exercise his access or not.

2. Child Support

a) Ongoing child support

[53] The legal principles that govern the issue of child support are set out at Part IV of the *Children's Law Act*, S.N.W.T. 1997, c.14. Parents have the legal obligation to support their children when they are capable of doing so. This obligation exists independently from the existence of a court order. The obligation is proportionate to the parent's income. Generally, the amount of support is determined on the basis of the parent's income, as set out in Tables that form part of the *Child Support Guidelines*, R-138-98.

[54] The *Guidelines* provide that the Court has the discretion to order an amount of support different from what is set out in the Tables, if the Court is satisfied that to do otherwise would create undue hardship for the payor parent. *Child Support Guidelines*, *supra*, s. 12.

[55] In the Originating Notice filed in 2004, the Evans did not claim child support from Mr. Martin. Mr. Martin never filed an Application raising the issue of undue hardship. Nevertheless, Mr. Martin is not suggesting that child support issues should not be dealt with by this Court, and the Evans do not strongly object that the issue of hardship be considered in setting out the amount of child support. Those are reasonable positions under the circumstances of this case. I have approached the issue of child support using the Tables as a starting point, but also taking into account Mr. Martin's situation, in particular the fact that he is supporting other children and his spouse, who at the time of trial was taking a teacher's course and was largely financially dependent on him.

[56] I do not recall there being specific evidence adduced at trial about Mr. Martin's income, but it seems to be common ground between the parties that his income at the time of the trial was in the range of $33,000.00. Pursuant to the Tables, this would correspond to monthly support in the range of $300.00 for one child.

[57] Taking into account the fact that Mr. Martin supports two other children, his overall circumstances, and Mr. Evans' income, which is substantially higher than Mr. Martin's, I have concluded that Mr. Martin's child support obligations should be assessed at an amount somewhat lower than the Table amount. I conclude that the monthly support should be set at $230.00.

b) Retroactive support

[58] Mr. Martin has never provided any financial assistance to the Evans for raising T. My understanding of his trial submissions is that he acknowledges that it is appropriate for a retroactive child support order to be made. The dispute between the parties on this issue has to do with the date of retroactivity. The Evans argue this date should be the date when they first took over T.'s care. Mr. Martin argues that the retroactivity date should be the date when the topic of child support was first raised, which he says was February 2006.

[59] The question of when the topic of child support was first raised is not apparent from the record of the proceedings. I do not recall there being any clear evidence on this topic at trial, nor can I find any such clear indication from the Pleadings or the Record. However, I did not hear any submissions from the Evans disputing that February 2006 can be considered to be the date of effective notice.

[60] The law regarding retroactive child support orders was comprehensively reviewed and to a large extent clarified by the Supreme Court of Canada in *D.B.S.* v. *S.R.G.*; *L.J.W.* v. *T.A.R.*; *Henry* v. *Henry*; *Hiemstra* v. *Hiemstra*, 2006 SCC 37. The Court considered various aspects of applications for retroactive support, including the factors to be considered in determining whether such an award should be made, how the quantum should be determined, and how the date of retroactivity should be

identified. As already mentioned, in this case, the appropriateness of a retroactive award is not disputed. The only issue is the date of retroactivity.

[61] After having outlined the various possibilities for determining the date of retroactivity, the Supreme Court of Canada found that generally, the date of effective notice should be used. However, the Court recognized that there are circumstances where the date where the support obligation arose will be more appropriate, in particular if the payor parent has engaged in blameworthy conduct such as failing to disclose relevant information about income, or engaging in intimidating conduct towards the other party. *D.B.S.* v. *S.R.G.*; *L.J.W.* v. *T.A.R.*; *Henry* v. *Henry*; *Hiemstra* v. *Hiemstra*, *supra*, at paras 118-121.

[62] There is no suggestion that Mr. Martin engaged in intimidating conduct or did anything to mislead the Evans as to his financial situation. On the other hand, it is clear that Mr. Martin did not make any effort, at any point, to discharge his obligations to support his child. It is undisputed that received a sum of approximately $12,000.00 that was raised by community members in Fort Smith during Eleanor's illnessand that he did not set any of that money aside for T.'s benefit, nor did he share any of that money with the Evans. Although Mr. Martin testified that he spent the money on some of the trips that they had to take to Edmonton for Eleanor's medical care, the only details Mr. Martin was able to provide on cross-examination was that the money was spent on food. Mr. Martin acknowledged that in this period of time he spent considerable amounts of moneyat the casino in Edmonton,although he maintainedthat he did not spend any of the money raised by the community at the casino.

[63] I do not find it necessary to make a specific finding as to how the money raised by the community of Fort Smith was spent, but I do find that not all of it was spent on food and travel expenses associated to Eleanor's medical travels to Edmonton. I find that some of that money could and should have been set aside to assist with T.'s care, and I find that this is a relevant factor in determining what the date of retroactivity should be with respect to Mr. Martin's child support obligations.

[64] I have concluded that the date of effective notice, assuming it was February 2006, is not the date that should be used, in the circumstances of this case, to set the extent of Mr. Martin's retroactive obligations. It is true that the Evans did not ask Mr. Martin to provide financial support to them for raising T., but Mr. Martin's obligation existed independently from any such request or any court action. Child support is the right of the child, and parents cannot simply ignore their obligations in this regard.

[65] In *D.B.S.* v. *S.R.G.*; *L.J.W.* v. *T.A.R.*; *Henry* v. *Henry*; *Hiemstra* v. *Hiemstra*, *supra*, the Court stated that it would usually be inappropriate to make a support award retroactive to more than three years before formal notice was given to the payor parent. This is not an absolute rule, and blameworthy conduct on the part of the payor spouse may be a reason to push the date of retroactivity beyond three years.

[66] As already mentioned, no Application for child support was filed in this case. When the Certificate of Readiness was filed on August 31st, 2007, it did list child support as one of the issues in the action. Under the circumstances, I will treat that date as the date of formal notice.

[67] I do have some concerns about Mr. Martin's conduct, some of the choices he made, and his complete disregard for his legal obligation to support this child. At the same time, I recognize that the circumstances of this case are somewhat unusual. I am not convinced that Mr. Martin's conduct is such that the date of retroactivity should be pushed back as far as 2002, when the Evans first started looking after T. I am also not convinced it should be pushed back as far as three years before the date of formal notice.

[68] I have concluded that the date of retroactivity should be set at two and a half years before the date of formal notice, that is, to March 1, 2005. The total amount due in retroactive child support, from March 1, 2005 to April 1, 2008 (37 months @ $230.00 per month), is $8,510.00.

C) CONCLUSION

[69] For those Reasons, there will be an Order as follows:

1. The Applicants shall have sole custody of the child, T., born July 19, 2002.

2. The Applicants shall share with the Respondent, on a regular basis but no less than once a month, information about T.'s progress in school, his extra curricularactivities, as well as information about his general health and any significant medical issue that may arise. The Applicants shall also give the Respondent reasonable notice about dates of special school events, or special extra-curricular events involving T., so that the Respondent may be able to attend such events.

3. The Respondent shall pay the Applicants monthly child support in the amount of $230.00 starting April 1, 2008.

4. The Respondent shall pay the Applicants $8,510.00 in retroactive child support, at a rate of no less than $170.00 per month.

5.The Respondent shall have access to the child as will be agreed from time to time between the parties, and in the absence of such agreement, on the following terms:

a) Starting April 14, 2008, and until September 7, 2008, every Tuesday and Thursday between the hours of 3:30PM and 7:00PM.

b) Starting September 8, 2008 and until January 4, 2009, every Tuesday and Thursday between the hours of 3:30PM and 7:00PM as well as Saturdays September 13, 2008, October 18, 2008, November 15, 2008 and December 13, 2008, between the hours of 9:30AM and 7:00PM.

c) Starting January 5, 2009 and until June 31, 2009, every Tuesday and Thursday between the hours of 3:30PM and 7:00PM as well as the following Saturdays and Sundays between the hours of 9:30AM and 7:00PM each day:

- January 17 and 18, 2009;
- February 14 and 15, 2009;
- March 14 and 15, 2009;
- April 18 and 19, 2009;

- May 16 and 17, 2009;
- June 13 and 14, 2009.

d) Starting July 1, 2009 and until December 31, 2009, every Tuesday and Thursday between the hours of 3:30PM and 7:00PM, and the following week-ends, with the week-end access to take place in the community of Fort Smith:

- from July 18th, 2009 at 9:30AM to July 19th, 2009 at 5:30PM;
- from August 22, 2009 at 9:30AM to August 23, 2009 at 5:30PM;
- from September 26, 2009 at 9:30AM to September 27, 2009, at 5:30PM;
- from October 24, 2009 at 9:30AM to October 25, 2009 at 5:30PM;
- from November 21, 2009 at 9:30AM to November 22, 2009 at 5:30PM;
- from December 19, 2009 at 9:30AM to December 20, 2009 at 5:30PM.

6. The Respondent shall advise the Applicantsno later than 7:00PM each Mondayas to whether he intends on exercising his access during the course of the following week, including the week-end access where applicable.

[70] The parties asked for an opportunity to make submissions as to costs once my decision on the substantive issues was rendered. If counsel wish to make submissions as to costs, I am prepared to entertain those submissions either orally or by way of written submissions. Within 14 days of the filing of these Reasons for Judgment, counsel should notify the Clerk of the Court as to how they want to proceed. If either party wants to present oral submissions, counselshould provide their availabledates so that date can be set for this purpose. If both parties agree to make costs submissions in writing, I will set time lines for the filing of those submissions.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT this
31st day of March, 2008.

Counsel for the Applicants: Katherine R. Peterson, Q.C.
Counsel for the Respondent: James D. Brydon

S-0001-CV 2004000228

IN THE SUPREME COURT OF THE

NORTHWEST TERRITORIES

BETWEEN:

MARLENE EVANS and EARL EVANS
Applicants

-and-

DEREK PAUL MARTIN
Respondent

REASONS FOR JUDGMENT
THE HONOURABLE JUSTICE
L.A. CHARBONNEAU