Date: 2009 03 18
Docket: S-0001-FM-2009000008

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BENJAMIN JOHN ANDERSON

Applicant

- and -

DEBBIE ANGASUK

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant and Respondent began living together in Inuvik in January 2006 and a child was born of the relationship on March 2, 2007, namely, Sara Elizabeth Anderson.

[2] There was a great deal of conflict between the parties and the relationshipended on November 17, 2007.

[3] The issues before the court include custody, access, quantum of child support, retroactivity of child support and child care expenses.

[4] The parties have settled all issues save for quantum of child support, the date to which it should be retroactive, and whether, when exercising his 7 day periods of access, the Applicant should have an extra "transition day" added on. The Applicant will be travelling from Yellowknife to Inuvik to pick up Sara and the Applicant suggests it is impractical and unsettling for all if he had virtually no time "on the ground" in Inuvik to pick Sara up and return to the airport.

Retroactivity

[5] There is conflictingevidence on how much the Applicantcontributed financially to the support of the child after separation. The Respondent says in her in her affidavit that she asked him on several occasions to buy things like diapers but he refused. The Applicant says that he contributed to Sara's well being financially by giving the Respondent money when asked to do so and buying various items including diapers. Perhaps the best evidence on this issue is contained in Exhibit"G" of the Respondent's affidavit sworn January 17, 2009. Here it is disclosed that the Applicant made two payments to the Respondent in March of 2008 and one payment in April, totalling $550.00, although it is unclear on the evidence whether this money was for child care or specific other expenses or both. Since August of 2008 the Respondent has been paying one half of the day care costs or $350.00 per month.

[6] When considering the issue of retroactivity the court must balance the interests of certainty and predictability with the need for fairness and flexibility. Speaking for the majority, in *D.B.S.* v. *S.R.G* et al, 2006 SCC 37, Bastarache J. set out a number of factors to be considered. These include the reason for the recipient's delay in seeking child support, the conduct of the payor parent, the past and present circumstances of the child and the hardship that might be imposed on the payor spouse by a retroactive award.

[7] It is now settled law that, if retroactive support is to be paid, the most appropriate date for it to begin is that upon which the recipient spouse gave effective notice to the payor spouse that child support was required. This notice can be given informally. [See *D.B.S.* v. *S.R.G.* , supra] (emphasis mine).

[8] The parties here are from different ethnic and cultural backgrounds, the Respondent being Inuvialuit and the Applicant non-aboriginal. For a brief period, the parties lived with the Respondent's parents in Inuvik. The relationshipwas short-lived and Sara was only 7 months old when the parties separated and 9 months old when the Applicant left Inuvik. Given these circumstances, it is entirely conceivable that the Respondent may have made a conscious decision initially to cut all ties with the Applicant or not seek child support from him. When she began asking the Respondent to buy diapers and other items it became clear that she wanted help but it was seemingly of a limited nature.

[9] In her email of April 2, 2008 to the Applicant the Respondent wrote:

> ... Ben i [sic] have no money to pay a babysitter just to clean my house and you know i have to pay someone to watch her. I wish you would understand that she is your kid to [sic] and you have to start taking care of her just as much as i do ben...

I have little doubt that the Respondent was asking for assistance but her request was somewhat ambiguous in that she appears to have been asking for the Applicant's personal involvement in Sara's life and for money specifically for child care. While the notice can be informal, in my view, it should be clear to be effective. Therefore, I have some hesitation in finding that the appropriate retroactive date is April 1, 2008. However, there is no doubt that, as the parties engaged in further discussions in the ensuing months, the Applicant became fully apprised of the Respondent's need and desire for child support. Given all of the evidence and taking into consideration the factors outlined in *D.B.S.*, I am satisfied that the date to which child support should be made retroactive is August 1, 2008.

Child Support

[10] When living in Inuvik, the Applicant held a good job with Aurora Expediting Service and his income for 2007 was $64,576.00.

[11] The Applicant began working with North-Wright Airlinesas a line pilot in 2004 but subsequently stopped flying. His license was due to expire in August 2008 if he did not resume flying. He wanted to keep his licence and in light of the ongoing conflict between him and the Respondent he left Inuvik to resume working for North-Wright in March of 2008 and relocated to Norman Wells. It appears he worked for Braden Burry Expediting for the first 2 months of 2008 and earned $10,766.26 and then for North-Wright where he earned $19,597.59 for the balance of the year, the total being $30,363.85. The Applicant suggests that while his anticipated earnings in 2009 will be less than in 2008 he is content that the figure of $30,363.85 be accepted and argues that quantum of child support should be based on this figure.

[12] The Respondent says the proper quantum of child support should be based on the Applicant's 2007 income or an average of his 2007 and 2008 incomes and cites s.17 (1) of the *Child Support Guidelines* as authority that requires me to have regard to the pattern of earnings over a 3 year or shorter period. This section provides:

> 17. (1) If the court is of the opinion that the determination of a parent's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receiptof a non-recurringam ount during those years.

[13] As I read this section, I am not required to look solely at a pattern of income but can determine an amount that is fair and reasonable in light of any "fluctuation" in income. There is no suggestion that income should be imputedto the Applicantor that he is intentionally underemployed. For reasons that I consider entirely valid and reasonable, he left Inuvik to resume flying for North-Wright Airways. The level of his earnings as a pilot is based on the number of hours he flies and the kind of aircraft he pilots. It is therefore difficult, if not impossible, to determine what his 2009 income will be with any precision. I should add that if the court might be tempted to infer that the Applicant's income should be higher in 2009 than it was in 2008, I can take judicial notice of the fact that we are in the midst of a global financial crisis that has affected and will likely continue to affect the north in a negative way and that the Applicant is employed in an industry that can be sensitive to economic upturns and downturns.

[14] The Applicant's income has fluctuated from the level it was at in 2007 for understandable reasons. Unlike many payor spouses litigating before our courts, the Applicant has made full and timely disclosure of his financial records. There is no suggestion that he is hiding anything or that he will fail to provide financial information to the Applicant as the year progresses.

[15] In the result, I am of the view that it is fair and reasonable in light of the Applicant's current employment and fluctuation in income to order that child support be based on income of $30,363.85.

Access

[16] I find the request that there be a transition day added to the 7 days of access by the Applicant every 6 weeks is fair and reasonable and therefore make that order.

[17] Neither party spoke to costs but given the mixed result, there shall be no order as to costs.

Conclusion

[18] It is therefore ordered as follows:

1. The Applicant shall pay support for the child, Sara Elizabeth Anderson, born March 2, 2007, based on income of $30,363.00 commencing March 1, 2009 and remaining payable on the first day of each and every month thereafter until further order of the Court.

2. The Applicant shall pay child support retroactive to August 1, 2008, in such periodic amounts as the parties may agree and, failing agreement, at the rate of $100.00 per month until paid in full.

3. The Applicant shall pay his proportionate share of child care expenses commencing March 1, 2009 and payable on the first day or each and every month thereafter until further order of the Court

4. At the beginning of the Applicant's access period in Inuvik of seven days every six weeks, there shall be added an eighth transitionday.

5. There shall be no order as to costs.

[19] I would ask counsel for the Applicant to prepare the Order reflecting the areas of agreement between the parties as well as the decision of the Court as set out in this Memorandum.

D.M. Cooper
J.S.C.

Dated this 18th day of March, 2009.

Counsel for the Applicant: Sarah A.E. Kay
Counsel for the Respondent: Charlene Doolittle

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