Date: 2010 02 17
Docket: S-0001-DV-2007103827

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ANNE-MARIE GIROUX

Petitioner

- and -

TIMOTHY Q. PANILOO

Respondent

MEMORANDUM OF JUDGMENT

[1] On January 28, 2010, I ordered that the Respondent pay increased child support in the sum of $1,040.00 per month for the three children of the marriage, boys ages 9 and 11 and a girl, age 12 based on an imputed income of $49,946 commencing January 1, 2010. As well, I ordered that he pay his proportionate share of special and extraordinary expenses in the sum of $162.00 per month until August 1, 2011, when the amount will be reduced to $75.00 per month. The issue of whether these payments should be retroactive was adjourned for further argument to February 11, 2010. Although duly served, the Respondent did not appear on either return date.

Background

[2] The parties were married at Spence Bay in the Northwest Territories (now Taloyoak in Nunavut) in 1995 and separated in 2000 after which time the Applicant moved to Yellowknife. In November of 2001, the Respondent was ordered to pay child support in the sum of $200.00 per month.

[3] On April 1, 2005 the Applicant was granted a Decree Nisi for Divorce and corollary relief whereby the Respondent was ordered to pay increased child support in the sum of $759.00 per month based on imputed income of $39,328.00. Both parties were represented by counsel on the motion.

[4] The Applicant stated in her affidavit filed February 11, 2005, that the Respondent's payment of child support obligations had been inconsistent, that he had been employed sporadically as a heavy equipment operator and that based on his employment at a mine in the summer of 2004, he had the ability to make $54,600.00 per year and was intentionally underemployed. Nevertheless, as noted above, either counsel reached agreement on the appropriate level of income or the court decided that it was more appropriate to impute income based on the average for males in Taloyoak in 2001 as published by Statistics Canada, since the imputed amount formed the basis for the child support Order of April 1st.

[5] The next step in this matter occurred on May 4, 2009, with the filing by the Applicant and subsequent service of a Notice to Disclose financial information. The Respondent has not complied with this Notice to the present day.

[6] The Applicant filed the within application for increased child support and s.7 expenses on December 2, 2009. The Respondent, as noted, has not appeared.

Analysis

[7] It seems to me the appropriate starting point here is April 1, 2005 when the previous Court Order was made. Both parties were represented and an order for child support was granted. The Applicant did not apply for an order for s.7 expenses and no such order was made.

[8] I note that, up to that point in time, the Respondent had not complied with the Notice to provide financial information served on him with the Divorce Petition in 2001. He did file an Answer in 2002 in which he claimed he was indigent and on income support.

[9] On the motion, the Respondent did not file any affidavit material or financial information. He was, however, represented by counsel.

[10] Subsequent to 2005, the Respondent's payment of child support was sporadic. It appears that many substantial amounts may have been received as a

result of garnishment proceedings. As of May, 2009, child support arrears exceeded $11,000.00.

[11] The Applicant says that since 2005 she has spoken to the Respondent almost monthly about making his child support payments on time, reducing the arrears and increasing his support payments to cover special and extraordinary expenses.

[12] The Applicant cites *DBS v. SBS* [2006] S.C.J. No. 37 in support of her argument that for the last 4 years she consistently had put the Respondent on notice of her need for increased child support, that his conduct has been blameworthy and that he should pay both child support and his proportionate share of s.7 expenses retroactive to January 1, 2006. It was pointed out that the imputed income of the Respondent increased by almost 25% when the Guidelines were amended on May 1, 2006.

[13] Regardless of whether the Respondent was punctual with his payments or always a willing payor, dating from the Order of April 2005, he was entitled to expect a measure of certainty for a reasonable period of time, absent a significant change in circumstances.

[14] However, the Respondent has never provided evidence of his income or employment. From all of the affidavit evidence, I conclude that his work record is spotty and that the most lucrative work is seasonal only. It is difficult, if not impossible, to ascertain whether the Respondent's imputed income is more or less that he actually earns. The answer to this question would impact upon any assessment of blameworthiness.

[15] In examining this issue, it is useful to review some of the considerations the court took into account in DBS where Bastarache J stated at paras.107 and 108:

> "No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might sill be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A.(J.)* v. *A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; *Chrintz*.
>
> On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I

> would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.

[16] I agree with counsel's submission that in most cases, the appropriate date for retroactive support is that when the payee parent first gave notice of the need or desire for it to the payor spouse. And that, although these orders ought not extend back more than three years, the court has a discretion and should exercise it in appropriate circumstances.

[17] The Respondent's blameworthy conduct consists of failing to voluntarily make timely child support payments and failing to provide financial information. This conduct, sadly, is commonplace but is still unacceptable.

[18] In *Wright v. Gully*, [2008] N.W.T.T.C. 8, Gorin J. ordered that child support be paid retroactive to the date of separation, some 8 years earlier. The Respondent there had quit his job after separation to avoid having to pay child support and had contributed next to nothing over the ensuing years. His conduct was, understandably, found to be highly blameworthy.

[19] Similarly, in *Eliuk v. Grymaloski*, [2008] N.W.T.T.C. 13, Gorin J. again made a child support order retroactive to the date of separation. In doing so, he remarked that the Respondent had completely failed to honour his moral and legal obligation to support his children for 6 years.

[20] I do not consider the conduct of the Respondent, although blameworthy, to be on the same level of seriousness as the payor parents in these cases.

Conclusion

[21] Here, child support has been paid, after a fashion, pursuant to a court order. However, I cannot ignore the fact that the Respondent has effectively chosen not to respond to requests for financial information or to appear on this motion. It is he, and not his children, who will bear the consequences of his inaction and I will make a retroactive order for child support. This is not to be construed as finding that in all cases where the payor parent fails to provide financial information, a retroactive order will be made. Each case will turn on its own merits.

[22] Making a retroactive order for special and extraordinary expenses is not as straightforward.

[23] Neither in the Divorce Petition nor on the motion in 2005 did the applicant formally request this relief. Unlike child support which is virtually a legal entitlement based on the payor parent's income, when seeking s. 7 expenses the Applicant is required to justify the claim. Specifically, a court must consider whether extracurricular expenses for sports-related activities and bus fares, as listed here, are "extras" or if they should be considered as covered by the child support payments. Further, courts are to consider, in part, the necessity of the expense and the reasonableness of it in relation to the means of the parents.

[24] However, the amount requested, being a proportionate share of $1,500.00 annually, is modest and amounts to $75.00 per month. I have no difficulty in finding that any parent would consider him or herself fortunate if the extent of the obligation to provide "extra" money to get your children to school and to help them engage in healthy, extracurricular activities was limited to this figure. So, I will also make the payment of s.7 expenses retroactive.

[25] The Applicant requests that the orders be made retroactive to January 1, 2006. Other than it being the first day of a year, I see no logic or rationale for selecting this date.

[26] Balancing the rights of the children to an appropriate level of financial support, the Respondent's reasonable expectation of some certainty and taking into account that the Guidelines were amended on May 1, 2006, I will order that both

child support in the sum of $1,040.00 and child care expenses of $75.00 per month be made retroactive to May 1, 2007.

[27] For greater clarity, in addition to the amount of $759.00 the Respondent was previously ordered to pay, he shall be responsible for payment of the additional sum of $281.00 each and every month commencing May 1, 2007 up to and including December 1, 2009 as well as $75.00 each month during the same period for child care expenses.

D.M. Cooper
J.S.C.

Dated this 17th day of February, 2010.

Counsel for the Petitioner: Donald P. Large, Q.C.
No one for the Respondent.

S-1-DV 6101-103344

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