Date: 2014 08 14
Docket: S-1-FM-2012-000084

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

LORETTA RANSOM

Applicant

- and -

ROBERT DOUGLAS COULTER

Respondent

- and -

DAVID DOWE

Third Party

MEMORANDUM OF JUDGMENT

[1] This action commenced as an application for a custody order by Loretta Ransom respecting her son, Isaac, born on December 1, 2007. It is now an application for child support by Isaac's father, Robert Douglas Coulter. The third party to this proceeding, David Dowe, is in the position of a step-parent to Isaac.

[2] The issues here are (a) whether the custodial arrangement for Isaac's care satisfies the requirements for a "shared custody" arrangement pursuant to s.11 of the *Child Support Guidelines* enacted pursuant to the *Children's Law Act* of the Northwest Territories; and (b) the amount of support payable by Ransom to Coulter, both on an on-going basis and retroactively. Coulter is not seeking support from Dowe.

**Facts:**

[3] Ransom and Dowe are married but separated. They have three children, ages 16, 14 and 11. Coulter is the biological father of Isaac who was born while Ransom and Dowe were still living together. At first, Dowe thought he was

Isaac's natural father and treated him as his own child. He continues to this day to have a strong bond with the child.

[4] Ransom and Dowe separated in 2008. Isaac lived with Ransom primarily. For the first 18 months of Isaac's life, Coulter played no part in it. In June, 2009, Ransom and Coulter began to live together along with Isaac. Ransom and Coulter separated in February, 2010. In the summer of 2010 Ransom and Coulter commenced an arrangement whereby they shared care of Isaac on a week by week basis.

[5] Ransom and Dowe made special arrangements for the care of their three children. They purchased a 3 bedroom condominium where the children live. Then, one or the other parent would live there with the children on alternating weeks. When not in the condominium, the parent with the "off-week" would live in an apartment rented by the two of them. Isaac, during his week with his mother, would also live in the condominium and would spend some of that time with Dowe.

[6] The parties entered into mediation concerning Isaac's on-going care and custody. It is fair to say that the main point of contention was the question of how extensive a role Dowe should play in Isaac's life. Coulter viewed Dowe as simply a "care-giver" and not as a "parent".

[7] As between Ransom and Coulter, they continued alternating Isaac's care on a week by week basis. Coulter paid for all day care costs up until Isaac started school in 2012. He also collected the child tax benefit. When Isaac started school, Coulter paid the after-school day care costs the first year. In the past year, those costs were shared on a 50-50 basis between Coulter and Ransom. They have agreed to continue sharing those costs equally.

[8] In June, 2014, the three parties (Ransom, Coulter and Dowe) entered into a "Custody and Parenting Agreement" respecting the on-going care of Isaac. The provisions of this agreement will be discussed in detail but at this point it suffices to say that, by the agreement, Ransom and Coulter have joint custody and guardianship of Isaac on a week-by-week rotational parenting schedule with school vacations being evenly divided as well. The issue of support is not mentioned in the agreement.

[9] If that were all to this case, the question of whether this was a shared custody case would not be difficult to resolve. However, the evidence revealed other pertinent facts.

[10] With respect to the time that Isaac is with his mother, Ransom testified that the arrangement with Coulter is that Isaac is on a Friday to Friday rotation. Each Friday at noon he is transferred as between the two parents. For the Friday to Friday period that Ransom has the child, Isaac resides at the condominium with his siblings. However, Ransom and Dowe have an arrangement whereby Dowe lives in the condominium from Friday to Monday of that week and Ransom lives there from Monday to Friday. Hence there is an argument as to whether Ransom has custody on a 50/50 basis with Coulter or whether in fact her custody is something less than that (and less than the 40% threshold that s.11 of the Guidelines requires).

**Shared Custody:**

[11] Section 11 of the *Child Support Guidelines* sets out one of the few discretionary areas in awarding child support as opposed to the presumptive rule that support is based on the payor's income. It states:

> 11. Where a parent exercises an entitlement to access to, or has physical custody of, a child for not less than 40% of the time over the course of a year, the amount of support for the child must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the parents who exercises such access or custody;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the condition, means, needs and other circumstances of each parent and of the child for whom support is sought.

[12] This section replicates the wording in s.9 of the *Federal Child Support Guidelines* issued under the *Divorce Act* (Canada). Accordingly the jurisprudence that has considered s.9 will have application to cases under s.11 of the territorial Guidelines.

[13] The analysis under s.11 has two components. First, the court must be satisfied that the payor parent "exercises an entitlement to access to, or has physical custody of, a child for not less than 40% of the time over the course of a year". Second, and only if it determines that the threshold has been met, the court must calculate child support in accordance with the three factors enumerated in the section.

[14] It is I think an understatement to say that the imposition of the 40% threshold has been a contentious issue that has resulted in a proliferation of litigation over how to count that 40%. The predominant debate in the jurisprudence is whether the 40% should be considered in a holistic fashion, or if

the courts should engage in a detailed time accounting exercise. And the jurisprudence offers little to no consensus. There is certainly no guidance from the Supreme Court of Canada on the issue.

[15] In *Mehling* v. *Mehling*, [2008] M.J. No. 172 (C.A.), the Manitoba Court of Appeal reviewed reported decisions from across Canada and came to the conclusion that a flexible and holistic approach should be taken to calculating the 40% requirement. Speaking for a unanimous court, Hamilton J.A. wrote (at paras. 42 & 43):

> So, should the 40 per cent threshold analysis be a strictly mathematical calculation? I think not. Is there a mathematical component to the analysis? Of course, because the pattern of parenting must be analyzed and this will, by necessity, involve a consideration of the time the children are with their respective parents. In *Cabot*, this court specifically rejected a "minute-by-minute" calculation method. While I would not categorically rule out an assessment on the basis of hours, it seems to me that an assessment of the time that a parent is with, or responsible for the children and their needs, on the basis of days or weeks, or portions thereof, will be a more realistic approach to the analysis than an hourly accounting. That being said, the approach to be used for the assessment of time is within the judge's discretion to determine.
>
> In some cases, this assessment of time will lead to an obvious conclusion that the 40 per cent threshold has, or has not, been met. But when that result is not obvious, as was the case here, more will be required. The approach must remain flexible to enable the judge to take into account the varied circumstances of different families. By doing so, the assessment will be more realistic, and more holistic, than a strict mathematical calculation of the time with each parent. In my view, this is in keeping with the equitable goals of s.9.

[16] Similarly, appellate courts in British Columbia and Ontario have held that there is no universally accepted method for determining 40% but that it is necessary to avoid rigid calculations and consider whether parenting is truly shared: *Maultsaid* v. *Blaid* (2009) 78 R.F.L. (6th) 45 (B.C.C.A.); *Froom* v. *Froom* (2005), 11 R.F.L. (6th) 254 (Ont. C.A.).

[17] However, many other cases have emphasized the unassailable fact that a calculation must still be done since the legislature has decreed that, before the shared parenting calculation can be applied, the court must be satisfied that a child spends not less than 40% of his or her time with the payor parent. So, even though many cases accept that a flexible and holistic approach should be taken, they still undertake a precise mathematical calculation of not just days but the hours that the payor parent has the child in his or her care. This has resulted in situations where a parent was found to have custody of the child for 39.6% or 39.3% of the time over

the course of a year and therefore failing to meet the threshold: see for example, *Gauthier* v. *Hart* (2011), 100 R.F.L. (6th) 178 (Ont.S.C.J.); *Petterson* v. *Petterson* (2010), 92 R.F.L. (6th) 241 (Sask.Q.B.).

[18] The Alberta Court of Appeal has made clear that, however the time is calculated, there must still be a calculation: *L.C.* v. *R.O.C.*, 2007 ABCA 158. "Deeming" that the 40% threshold is met is not acceptable practice. As stated in that case (at para. 11): "For the purposes of calculating child support, the percentage allocation of custody time must conform to the actual evidence on this point".

[19] In this case, one must start the analysis by first looking at the "Custody and Parenting Agreement" and then examine the evidence given at trial.

[20] The agreement, which apparently came about as the result of extensive mediation sessions, has all three of Ransom (identified in the agreement as "Loretta"), Coulter ("Doug"), and Dowe ("David") as parties. It specifically recognizes Dowe as "the step-parent" of Isaac who "has acted in the role of a father to him at all material times since Isaac's birth".

[21] The primary aspect of the agreement is a joint custody arrangement as between Ransom and Coulter but with a recognition of Dowe's shared parenting role as well:

> 2.1 Loretta and Doug shall continue to have joint custody and guardianship of Isaac and will share his parenting on a one-week rotation, during which time Isaac will be in Doug's care for one week and *in the shared care of Loretta and David the following week.*
>
> 2.2 During their respective weeks, Loretta and Doug may make such arrangements for Isaac's care as they may choose, without interference from the other so long as Isaac is left in the care of a responsible adult at all relevant times. *Doug agrees that Loretta and David may share their parenting of Isaac at such times and in such manner as they deem appropriate and acknowledges that David will continue to have the right to act as a parent to Isaac.*
>
> (Emphasis added)

[22] The agreement provides that Ransom and Coulter will share information but also recognizes a role for Dowe:

> 2.4 Loretta and Doug agree that they will communicate and share information with each other on a regular basis, and that each of them has the right to obtain information directly from Isaac's teachers, counselors, doctors, dentists or other caregivers. *Doug acknowledges that Loretta will be at liberty to consult with*

> *David regarding any issue, and agrees to consider his input without being bound by it.*
>
> (Emphasis added)

[23] The decision-making with respect to Isaac's care, however, remains with the two parents:

> 2.5 In the event Loretta and Doug are unable to reach agreement regarding any major issue affecting Isaac's care, they agree to proceed to mediation before commencing litigation, and to make all reasonable efforts to cooperate in order to find a solution that will limit further conflict.

[24] So if I look simply at the agreement, and consider the history of the parenting arrangements since 2010, the clear intent of the two biological parents is to establish, as between the two of them, a 50/50 joint parenting regime. But the evidence as to what actually takes place casts a different light on the amount of time that Ransom "exercises an entitlement to access" or "has physical custody" (in the words of s.11 of the Guidelines).

[25] When asked to describe the arrangement she has with Dowe, Ransom testified that she and Dowe split up the week that Isaac is there with Dowe living at the condominium from Friday to Monday noon and then her living there from Monday noon until Friday noon when Isaac is returned to Coulter. But she described the arrangement as very flexible. She was asked about any additional contact with Isaac over the week-ends when Dowe was caring for Isaac and the other children at the condominium:

> Q And on the weekends then, Saturday, Sunday, do you have any contact with Isaac?
>
> A Yeah. Because we're - - David and I care for all the children together. We do a lot of things together on the weekends or evenings during the week or we take the children to do different things during the week whether or not we're with the children that week or that part of the week.
>
> Q Okay. Can you give an example of a typical weekend and the types of activities that would bring you into contact with the kids?
>
> A Birthdays for sure, because there's a lot of us there's a lot of birthdays. Even just outings. Camping or going to the beach or just going to other events, we see each other. Like I said, whether it's the weekend or during the week we spend time together.
>
> …

> Q Can you describe how often you see Isaac on weekends?
>
> A It's, I can't give you - - all I can say is that it's not scheduled, it's whenever, and if it's something going on on the weekend I'll come over and hang out if I'm not with the kids, or watch them for David if he has something to do.
>
> …
>
> Q And so what does that mean in terms of your contact with the children?
>
> A I will come over and stay with them for the night or the day or the afternoon.

[26] This whole arrangement is very admirable but does it meet the 40% threshold? I was given no precise information as to the number of times the child is in the care of Ransom during the week-end periods when he is in the *de facto* care of Dowe. I agree with the cases that say that a court may assess child-parent time as meeting the 40% criterion without a tight accounting of hours and days. But there must be evidence whereby a court can reasonably conclude that the child spends such a sizeable percentage of time with the paying parent that the 40% level is achieved.

[27] Coulter takes the position that the shared arrangement between Ransom and Dowe means that Ransom has custody of Isaac only 29% of the time (4/7 of 50%). Ransom argues, however, that the custody agreement gives her equal joint custody with Coulter and the spirit of her arrangement is such as to entitle her to be considered as an equal custodian thereby meeting the threshold. In addition, her counsel points to the fact that s.11 speaks of entitlement to access or physical custody. Under her arrangement with Dowe she has an entitlement to access even on the week-end days when Dowe is at the condominium and, by her evidence, exercises it.

[28] The difficulty is that, according to s.11, there must still be evidence that the payor parent (in this case Ransom) either actually exercises access or actually has custody for no less than 40% of the time over the course of a year. The entitlement to exercise access is not the same as actually exercising that entitlement.

[29] Here the evidence establishes that Ransom has custody of Isaac for a least 29% of the time. She also exercises access and occasionally has custody at other times but I do not have evidence as to how often and how long. As much as I think the spirit of the agreement between the parents is for an equal joint parenting arrangement, the reality is that the way Ransom has chosen to structure her time

with Isaac, as commendable as it is, does not meet the 40% threshold. As noted in *Fidyk* v. *Hutchison*, [2013] S.J. No. 56 (Q.B.), quoting from Payne & Payne, *Child Support Guidelines in Canada, 2012* (Toronto: Irwin Law, 2012), at para. 29 (in reference to the equivalent federal Guideline section):

> Although an existing order or agreement may be relevant, the court must consider the actual parenting arrangements. The 40% requirement under s. 9 of the *Guidelines* must be met, regardless of the spirit of the parenting arrangements.

[30] Counsel did not provide any case law dealing with similar situations as in this case but there are some parallel examples.

[31] In *Sirdevan* v. *Sirdevan*, [2009] O.J. No. 3796 (S.C.J.), the father claimed to meet the 40% threshold even though, when he had the children during work days, he would be away for 12 hours at his office each day. The children were cared for by a nanny who took the children to school and activities. The court held that the threshold was met. It concluded that the nanny acted under the father's direction and that he exercised a right of access to, or had physical custody of, the children during the periods they were nominally in his care whether they were in his immediate presence, in the care of the nanny he employed, or at school or any other activity while he was responsible for their well-being.

[32] In the present case, the parties agreed specifically that Ransom and Dowe may share their parenting of Isaac at such times and in such manner as they deem appropriate and that Dowe would continue to have the right to act as a parent to Isaac. By their practical arrangement, Ransom in effect agreed to transfer responsibility for Isaac's care to Dowe for part of the time that she was entitled to have custody of him.

[33] I think the present case is more analogous to that of *Rush* v. *Rush*, [2002] P.E.I.J. No. 29 (S.C.). There the parents agreed to joint custody. The father may have met the 40% criterion except that for much of the time that he had custody of the children he was away from home due to his work as a long-distance trucker. The children were at those times cared for by his common-law spouse. The court held that the father was not to be given credit for the time that he was not physically present with the children. Therefore it was not a shared custody arrangement for support purposes.

[34] In both *Rush* and the present case the payor parents chose to arrange their custody of the children so that for part of their "custody" time they did not have actual care of them. In the *Rush* case it was due to employment requirements. In this case, it was due to the very commendable desire to maximize the child's

interaction with someone who had acted as a "father" to him. But, in both cases, the payor parent fails to meet the strict requirement of the legislation.

[35] If this seems unfair then all I can say is that it is not the first time. Many of the cases on shared parenting have decried the deleterious effects of applying a strict 40% threshold. It creates perverse incentives for parents to increase or limit time with a child for financial gain; fails to accurately reflect the reality of children's lives in shared parenting arrangements in that children's needs are in a constant state of flux; creates an arbitrary "cliff effect" whereby two payors can be functionally similar but subject to different treatment by the law for support purposes (as in the situation where a parent has the child for 39% of the time and is subject to the strict presumptive rule for support and the parent who meets the 40% threshold but has the benefit of the discretionary application of several factors); and, as demonstrated by many cases, stimulates lengthy and costly litigation over hours and days.

[36] Based on the evidence before me, I conclude that Ransom has failed to meet the 40% threshold required by the Guidelines.

**Support:**

[37] I will first address on-going support for Isaac payable by Ransom. As I stated earlier, there is no claim for support from Dowe.

[38] Ransom is employed as a Senior Environmental Assessment Coordinator by the Government of Canada. Her income history is as follows:

| | |
|---|---|
| 2010 | $ 95,254.96 |
| 2011 | $100,126.19 |
| 2012 | $114,481.02 |
| 2013 | $145,216.68 |

The total income in 2013 included a severance payment of $19,417.95

[39] Ransom's current income, based on her financial statements, would total $122,674 for 2014 (combining base salary, northern benefits, vacation travel benefit and child tax benefit). This would result in a monthly child support payment of $1,112.00 (based on the current Guidelines support table for one child).

[40] Coulter's income history is as follows:

| | |
|---|---|
| 2010 | $92,676.37 |
| 2011 | $43,643.69 |
| 2012 | $63,203.53 |
| 2013 | $72,748.37 |

[41] His expected income for 2014 is $80,943.60 based on his employment as a Sheriff's Officer with the Department of Justice and occasional shift work as a corrections officer and at a local sporting goods store.

[42] Dowe is employed as a teacher's assistant and his income in 2013 was $63,985.48.

[43] Ransom's counsel argued in his pre-trial brief that, if this case is found to not be a shared custody situation, then alternatively the presumptive amount of support should be reduced based on undue hardship pursuant to s.12 of the Guidelines. One of the circumstances that may cause a parent to suffer undue hardship is that the parent has a legal duty to support other children. Ransom of course is the mother of her three children with Dowe.

[44] Although this point was raised in the written brief it was not addressed during oral submissions nor was it the direct subject of evidence adduced at trial. Section 12(3) of the Guidelines requires that even if undue hardship is found there must be a comparison of the standard of living for each household and, if the parent claiming undue hardship is found to have a higher standard of living than the other parent, then the claim must be denied. And, of course, the undue hardship referred to in the Guidelines is not just some hardship or any hardship. It must be hardship that is exceptional, excessive or disproportionate: *Ootawak* v. *Towtongie*, [2012] N.W.T.J. No. 96 (T.C.).

[45] In this case both Ransom and Coulter have to live on tight budgets. In Ransom's case, the costs of maintaining the condominium and the apartment are borne by Dowe but Ransom covers other living expenses as well as making monthly payments on joint debts accumulated during her marriage. In Coulter's case, he has the cost of maintaining an apartment and other usual expenses. But, on the face of it, the income available to Ransom, not to mention to her and Dowe together, is far more than available to Coulter.

[46] The claim for undue hardship is denied. Child support will be set at $1,112.00 per month.

**Retroactive Support:**

[47] Coulter also claims retroactive support dating back to the separation of he and Ransom in mid-2010.

[48] The principles governing retroactive support were outlined by the Supreme Court of Canada in *D.B.S.* v. *S.R.G. et al*, [2006] 2 S.C.R. 231. In particular, the court said that, in determining the date of retroactivity, the date of effective notice of the claim should be used. There may, however, be circumstances where an earlier date should be used, particularly if there has been some type of blameworthy behavior on the part of the payor parent.

[49] Here, the parties are agreed that formal notice of Coulter's claim for support was not given until sometime in December 2013. Coulter argues, however, that support should be ordered at the earlier date because the matter had been raised in the past and Ransom was aware of the disparity of their incomes.

[50] Coulter stated in his testimony that the issue of child support was raised in 2010 but that he and Ransom agreed to put the issue aside at that time. Part of the reason for that, he claimed, was because he did not have a lawyer at the time. Then the parties entered mediation and the focus was on custody. Child support was not discussed. It was not brought up until December 2013.

[51] Ransom testified that there were no discussions with Coulter about child support in 2010 or while they were going through mediation. The only issue that arose concerning money had to do with the cost of child care.

[52] I have concluded that this is not an appropriate case for ordering retroactive payments beyond the date of effective notice. There was no blameworthy conduct on the part of Ransom. She was always operating under the assumption that there was an equal co-parenting scheme. No formal or even informal demand for support was made earlier. And, in my opinion, a retroactive payment of such magnitude, as claimed by Coulter, would in the circumstances cause a disproportionate hardship to Ransom. As stated by Bastarache J. in the *D.B.S.* case (at para. 95):

> It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing

> obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

[53] I therefore order that the monthly support payments be retroactive to January 1, 2014.

**Claim for Child Care Costs:**

[54] The parties for the past year have shared the costs of Isaac's after-school care programme on a 50/50 basis. They have agreed to continue sharing those costs on an equal basis going forward. Coulter, however, claims reimbursement for Ransom's proportionate share of child-care costs he paid prior to 2013. Those costs, it seems to me, should rightly date from the date of separation in mid-2010.

[55] In 2010, Coulter claimed $7,000.00 in child-care expenses. Half of that is $3,500.00 when accounting for the separation mid-year. In 2011, he claimed $7,000.00 in child care-expenses. In 2012, he claimed $6,755.00 in child-care expenses. These amounts total $17,255.00.

[56] The evidence satisfies me that Ransom offered to share these expenses in the past but the offer was rejected by Coulter. He assumed responsibility for them. The parties have now agreed to share child-care costs on an equal basis. It seems to me that consistency is fairness in these circumstances and therefore Ransom should reimburse Coulter for one-half of the child-care costs he incurred prior to 2013.

[57] The total amount owing by Ransom to Coulter for her share of child-care costs in prior years is therefore $8,627.50. Future costs will be shared, as the parties have agreed, on an equal 50/50 basis.

**Summary:**

[58] An order will issue as follows:

1. Child support of $1,112.00 per month for the child Isaac shall be paid by Ransom to Coulter on the first day of each month.

2. The monthly child support payments shall be deemed to have commenced on January 1, 2014.

3. Ransom shall pay to Coulter the sum of $8,627.50 as reimbursement for her share of child-care expenses in prior years.

4. Future child-care expenses shall be divided equally between Ransom and Coulter.

5. As agreed to by the parties, the child's name shall be formally changed to Isaac Ewan Ransom Coulter. The Registrar of Vital Statistics shall issue a fresh Certificate of Birth reflecting the change of name.

[59] I encourage the parties to work out a reasonable payment schedule for the payment of the retroactive support and child-care amounts. Not to do so will only diminish the resources available for all the children involved with the parties.

[60] Each party shall bear their own costs of these proceedings.

J.Z. Vertes
J.S.C.

Dated this 14th day of August, 2014.

Counsel for the Applicant (Ransom): Sheldon Toner
Counsel for the Respondent (Coulter): Jane Olson
Counsel for the Third Party (Dowe): BettyLou McIlmoyle

S-1-FM-2012 000 084

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MEMORANDUM OF JUDGMENT OF
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