Date: 2014 04 29
Docket: S-1-CV-2013-000114

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *INTERJURISDICTIONAL SUPPORT ORDERS ACT*, S.N.W.T 2002, c.19

BETWEEN

LORNA APRIL JOY CREWE

Applicant

- and –

SHANNON THOMAS ROBERTS

Respondent

MEMORANDUM OF JUDGMENT

I) INTRODUCTION

[1] This is an Application brought pursuant to the *Interjurisdictional Support Orders Act*, S.N.W.T. 2002, c.19 (the *Act*). The Application is governed by Division 1 of the *Act*: the Applicant lives in Alberta and seeks relief against the Respondent, who lives in the Northwest Territories.

[2] The Applicant seeks a declaration that the Respondent is the father of her child, J., born in December 1998; she seeks an order for child support in accordance with the *Child Support Guidelines*, R-138-98 (the *Guidelines*); and she asks that the order be retroactive to January 1, 2009.

[3] The Respondent lives in Behchoko. He has a spouse and a 5 year old child. He has filed materials in response to the Application, including information about his income for the last several years and a Financial Statement that sets out in some detail the global income and expenses in his household.

[4] The Respondent does not dispute that J. is his son. He agrees that a child support order should be made. He also agrees the order should be retroactive to some degree, but he does not agree that it should go as far back as January 1st, 2009.

[5] Given the positions of the parties, there are two issues to be decided by this Court. The first is the amount of child support that should be ordered. The second is what the date of retroactivity should be.

II) ANALYSIS

1. Amount of child support

[6] Child support is based on the income of the payor parent. The usual method for determining that income is by reference to the figure that corresponds to that parent's "Total Income" in the T1 General form issued by the Canada Revenue Agency. *Guidelines,* section 16.

[7] In November 2013, the Respondent provided the Designated Authority with copies of tax returns indicating that his total income was $56,863.32 in 2012; $38,032.36 in 2011; and $52,659.50 in 2010. In the Financial Statement that he filed in February 2014, he estimated his total income for 2013 to be the same as the previous year.

[8] Usually, the determination of the amount of child support is determined in accordance with tables that specify the amount payable based on the parent's income and the number of children that the support relates to. *Guidelines,* s.4

[9] Section 12 of the *Guidelines* provides that in certain circumstances, the Court may order an amount of child support that is different from the amount specified in the tables. To do so, the Court must be satisfied that ordering support in accordance with the tables would result in hardship for the parent or the child.

[10] Based on the Respondent’s most recent income information (a total income of $56,863.32) the amount of support owed for the support of one child would be $524 per month. He asks that instead, the child support amount be set at $300.00 per month. He argues that he would suffer hardship if he were required to pay the full table amount. He bases this claim on his high level of debts, the high cost of living, and the fact he is supporting another child.

[11] Section 12 of the *Guidelines* sets out the legal framework that governs a hardship claim. Paragraph 12(2) outlines various circumstances that may cause hardship:

> 12(2) Circumstances that may cause a parent or child to suffer undue hardship include the following:
>
> (a) the parent has responsibility for an unusually high level of debts reasonably incurred
>
> (i) to support the parents and their children before the separation, if the parents lived together with the child, or
> (ii) to earn a living;
>
> (b) the parent has unusually high expenses in relation to exercising access to a child for whom the parents are both legally responsible;
> (c) the parent has a legal duty under a judgment, an order or a parental or separation agreement to support any person;
> (d) the parent has a legal duty to support a child, other than a child for whom the parents are both legally responsible, who is
>
> (i) a minor, or
> (ii) the age of majority or over, but who is unable, by reason of illness, disability, pursuit of reasonable education or other cause, to withdraw from a parent's charge;
>
> (e) the parent has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.
>
> *Guidelines*, para. 12(2)

[12] On the evidence before me, many of these considerations do not apply in this case.

[13] While J. lives in Alberta, which could potentially engage significant access costs, there is no evidence that the Respondent has exercised access in the last several years. The parties have different versions as to how this came to be, but this is not an issue that I can resolve on the basis of the limited evidence that was adduced. In any event, for the purposes of this Application, the question is not why access has not taken place, but whether there have been unusually high access costs. Clearly, there have not been. Sub-Paragraph 12(2)(b) is inapplicable here.

[14] Sub-Paragraph 12(2)(c) is also inapplicable. There is no evidence that the Respondent is bound by any judgment or separation agreement to provide support to any person.

[15] There is also no evidence that the Respondent has a legal duty to support any person who is unable to obtain the necessaries of life due to illness or to a disability. Sub-Paragraph 12(2)(e) is not applicable either.

[16] The Respondent and his spouse have a child. He has a legal obligation to support that child, as does his spouse. That is something that can, pursuant to Sub-Paragraph 12(2)(d), be a circumstance giving rise to hardship. But the mere fact that he is supporting one other child does not, on its own, make out his hardship claim, especially considering his level of income and that of his spouse. There is no indication, in the Respondent's Financial Statement, that there are particularly high or unusual expenses in relation to that child.

[17] The Respondent also relies on his high level of debt. Sub-Paragraph 12(2)(a) states that an unusually high level of debt is a circumstance that can result in hardship. However, that provision does not encompass all debts. On the contrary, it specifies that the debts must have been reasonably incurred either to earn a living, or to support the parents and their children before separation.

[18] There is no evidence suggesting that any of the debts listed in the Respondent's Financial Statement were incurred before separation. There is also no indication that they were incurred for him to earn a living.

[19] Arguably, given the wording of section 12 (the uses of the word "includes" in the English version and of the word "notamment" in the French version), the list of circumstances that can result in hardship that are identified in the provision is not exhaustive. But certain themes emerge from the circumstances that are listed: most of them relate to a legal duty to support a person, usually a child, or service debts that were incurred for the support of a child. They are fairly restrictive. This is consistent with the well established principle that child support must be treated as a priority by the payor parent.

[20] The Respondent's Financial Statement makes reference to several debts and monthly payments associated with them. Under the heading "debt", the following are listed:

- Visa (spouse)	$100.00
- Visa	$254.00
- loan 1	$333.78
- loan 2	$253.00

[21] Under the heading "Other", the following additional debts are listed:

- spouse's truck	$904.00
- spouse loan	$867.00
- spouse plc	$253.00 (I take it that "plc" refers to a personal line of credit)
- spouse loan	$143.00

[22] I accept that the Respondent and his spouse carry a number of debts and that a significant amount of money is used, each month, to service those debts. But that does not mean that those debts can be taken into account in a hardship claim. It is difficult to see, for example, how monthly payments of $900.00 for a vehicle could in any way serve as a justification for the Respondent's child support obligations being reduced. That amount alone represents almost twice the table amount of child support applicable to his income level.

[23] Similarly, in my view, expenses related to the repayment of a spouse's loan or personal line of credit fall outside the scope of Sub-Paragraph 12(2)(a) of the *Guidelines*. There is no suggestion here that the Respondent's spouse is dependent on him financially. On the contrary, she makes a very good wage.

[24] I am therefore not satisfied that there is a sufficient basis to make a finding of hardship.

[25] It is also helpful, in considering these types of claims, to compare the standards of living in the respective households of the payor parent and of the recipient parent. In fact, this type of analysis is mandatory when the Court is inclined to allow a hardship claim, because the Court's discretion in this regard is limited by Paragraph 12(3) of the *Guidelines*:

> 12(3) Notwithstanding a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent or child in respect of whom undue hardship is claimed would, after determining the amount of support under any of section s.4 to 7, 10 or 11, have a higher standard of living than the household of the other person with whom the standard of living is compared.

Guidelines, para. 12(3)

[26] The comparison as to the standards of living in the parties' respective households is done on the basis of calculations following the formula set out in Schedule B of the *Guidelines*. *Guidelines*, s. 12(4).

[27] Counsel for the Designated Authority has very helpfully provided Schedule B calculations for the Applicant's and the Respondent's households. Based on those calculations, the standard of living ratio for the Applicant's household (7.51) is slightly higher than it is for the Respondent's household (6.95).

[28] I note that in doing those calculations for the Respondent's household, counsel has taken into consideration a total of $3,016.78 in "high level of debt". This amount includes the debts referred to at Paragraph 21 as well as the two loans and one of the Visa debts referred to at Paragraph 20. In doing the calculations for the Applicant's household, counsel has also included the debts listed in her Financial Statement.

[29] For reasons already stated, I do not think that the debts referred to at Paragraphs 20 should be included in the calculations, as they are not the types of debts contemplated by Sub-Paragraph 12(2)(a).

[30] As for the other three debts, there is no evidence as to what they were incurred for. The party who makes a hardship claim has the onus of establishing the foundation for that claim. There is no evidence before the Court that establishes that the two loans and the Visa debt referred to in the Respondent's Financial Statement relate to any of the circumstances set out at Sub-Paragraph 12(2), or to anything analogous that could properly be taken into account in a hardship claim. For those reasons, in my view, the Schedule B calculations should not include those amounts either.

[31] If the Schedule B calculations are made without taking into consideration the amount of $3,016.78 that corresponds to the expenses associated with the service of those debts, the Respondent's household income ratio is 7.1. That is slightly lower than the Applicant's household income ratio, but not by much.

[32] Paragraph 16(3) compels the Court to dismiss a hardship claim if the parent who makes that claim has a higher household income ratio than the recipient parent. But the reverse is not true: even if the parent who makes the hardship claim has a lower household income ratio than the other parent, it does not mean that the hardship claim must succeed.

[33] Here, the two household income ratios are quite similar. The Respondent's is slightly lower, which means the Court retains its discretion to grant his hardship

claim. However, having carefully reviewed the financial information provided, and in particular considering some of the expenses listed, I am not satisfied that this is a case where the amount of child support should be reduced by reason of hardship.

[34] There is little doubt that having to make child support payments in the amount set out in the *Guidelines* will require the Respondent to make adjustments to his budget. This will, for a time, impact on the availability of funds to pay down the household's debts, put money aside for savings, or make RRSP contributions. But the law is clear: child support must be treated as a priority.

[35] For these reasons, I am not satisfied that the Respondent's hardship claim is made out in this case. I conclude that the child support order should be set in accordance with the tables.

2. Retroactivity

a) General principles

[36] The Respondent concedes that the order should be retroactive to an extent. He only takes issue with the retroactivity date requested by the Applicant. Even so, before I address specifically the issue of the retroactivity date, I want to refer to the general principles that govern a claim for retroactive child support. Those principles, set out 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 (*D.B.S.*), were recently summarized by this Court:

> In *DBS*, the Court said that while it will not always be appropriate for a retroactive award of child support to be ordered, such awards are not to be regarded as exceptional. Although one of the factors that may cause hardship to a payor parent as a result of a retroactive award is unpredictability, the Court pointed out that unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself by not taking appropriate action at the time. The payor parent knows how much income he/she makes and therefore will be aware of how much should be paid under the *Child Support Guidelines*, which mandate a simple calculation based on annual income and number of children. A retroactive award merely enforces an obligation that the parent always had.
>
> *DBS* sets out a number of factors that a court should consider in deciding whether to award retroactive child support, none of which is decisive. Those factors are as follows:
>
> (1) whether there is a reasonable excuse for the recipient parent not making an earlier application for support
> (2) the conduct of the payor parent;

(3) the circumstances of the children;
(4) any hardship that will result from a retroactive award.

Sanderson v. *Pennycook*, 2013 NWTSC 48, paras 17-18.

[37] The present proceedings were initiated by the Applicant in June 2013. She seeks support retroactive to January 2009 which, she says, is when J. returned to live with her, after having lived for a year with his paternal grandparents. The Respondent's position is that the child remained with his paternal grandparents for a period of time after January 2009. There is no conclusive evidence either way on this point.

[38] The Applicant has not provided an explanation for the delay, between 2009 and 2013, in bringing this support application. Even bearing in mind that she had initiated other proceedings previously, there is no indication of why she did not pursue this again after J. returned to live with her. In her letter dated June 6, 2013, submitted with her Application, she appears to acknowledge that she did not pursue this matter as diligently as she should have. I do not find that the delay in bringing this Application has been adequately explained.

[39] There is no evidence that the Respondent engaged in reprehensible behaviour or intimidation tactics to discourage the Applicant from taking steps to seek child support, nor that he misled her into believing that he would provide support and in fact did not. He claims that for a time, he did provide money to the Applicant. This is contrary to her assertion, which is that he never did. Again, it is not possible to resolve this contradiction on the materials before me.

[40] But the Respondent did acknowledge in his submissions at the hearing that he stopped providing money to the Applicant as a result of what he perceived to be a lack of cooperation on her part when he tried to communicate with J. Even if that was the case, (I make no finding about that as there is insufficient evidence for me to do so), a parent cannot decide to withhold child support because he or she is dissatisfied with the other parent's way of dealing with access. Child support is the right of the child, not of the parent. If there are issues with access, those must be addressed through the proper channels. Refusing to pay child support is not one of them.

[41] There is no evidence before me as to J.'s circumstances, from a financial point of view, when his parents were together. There are some indications in the materials that, largely because the Applicant's spouse has a good income, J.'s needs

have been met over the past few years, despite the Respondent's failure to contribute to his support as he should have. The materials also show that J. was in the care of his maternal grandparents for a year, from August 2012 to August 2013. There is no suggestion his needs were not met during that time.

[42] Be that as it may, J., given his age, can still benefit from an award of retroactive support. The fact that J.'s needs were met in the past in the absence of support does not erase the obligations that the Respondent always had to support him. *Sanderson* v. *Pennycook*, *supra*, at Paragraph 48.

[43] Finally, the potential hardship that a retroactive award may cause is a factor that must be considered in considering a request for such an award. The analysis of hardship in this context is very different than what it is in the context of determining the amount of support:

> There are various reasons why retroactive awards could lead to hardship in circumstances where a prospective award would not. For instance, the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can currently afford. As well, payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor parent; it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.
>
> I agree with Paperny J.A., who stated in *D.B.S.* that courts should attempt to craft the retroactive award in a way that minimizes hardship (paras. 104 and 106). Statutory regimes may provide judges with the option of ordering the retroactive award as a lump sum, a series of periodic payments, or a combination of the two; see, e.g., s. 11 of the *Guidelines*. But I also recognize that it will not always be possible to avoid hardship. While hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong one where this is not the case.

D.B.S., *supra*, paras 115-116

[44] Based on the information provided by the Respondent, I accept that there is potential for hardship to him if an award for retroactive support is made. He does have obligations to his current family, and for the most part, the expenses listed in the Financial Statement that he has filed appear reasonable. And I accept that the cost of living in Behchoko is quite high. The potential hardship should be

minimized to the extent possible, but the fact that J. was, all along, entitled to support from his father also has to be recognized.

[45] Taking into consideration all the factors, I agree that a retroactive order to be made. The question is how far back that order should go.

b) Date of retroactivity

[46] The principles relating to this issue were also referred to in *Sanderson* v. *Pennycook*:

> In *DBS,* at paragraph 118, the Supreme Court of Canada said that there are four choices for the date to which an award of child support 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. *DBS* adopts as a general rule the date of effective notice.
>
> The date of effective notice is defined as the date of any indication by the recipient parent that child support should be paid, or if it is being paid, that the current amount of support needs to be re-negotiated.

Sanderson v. *Pennycook*, *supra,* paras 62-63

[47] The relief that the Applicant seeks would have the retroactivity date be the date where she says J. returned to live with her. This would mean the order would reach back 4 years from the date she made the Application.

[48] It is difficult to establish the date of effective notice with any precision in this case. The Applicant's materials make reference to the Respondent never having provided support despite being asked, but do not provide particulars as to timing. The Respondent's position is that he did send her money for a period of time after J. returned to live with the Applicant. Neither party has presented evidence about the timing and nature of whatever discussions took place on this issue.

[49] In addition, while the Court has discretion in deciding on the date of retroactivity, it is usually inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent. *D.B.S.*, *supra*, at para.123.

[50] In this case, the Applicant filed her Application with the authorities in Alberta in June 2013. The materials were filed in this Court on September 16,

2013. The Respondent received notice of the proceedings shortly thereafter, and provided his income information on November 22, 2013. Using the guideline set out in *D.B.S.*, this means the retroactivity date should not go further back than the Fall of 2010. I see no reason here to depart from this general guideline. For that reason, I do not think the date of retroactivity should go as far back as January 2009.

[51] In addition, I have given consideration to the question of the effect that the retroactive award will have on the Respondent, considering his current obligations. I have also taken into account the Applicant's delay in taking steps to take action to enforce J.'s rights. At the same time, the Respondent had an obligation to support his child and no valid reason for not having done so.

[52] Balancing all these factors, I conclude that the date of retroactivity should be January 1, 2011. I also conclude that there should be no retroactive support ordered for the period between August 2012 and August 2013, when J. lived with his grandparents.

[53] In *D.B.S.*, the Supreme Court of Canada noted that in setting the amount of retroactive support, there should not be blind adherence to the table amounts. *D.B.S.*, *supra*, at para. 128. However, I do consider that they constitute a useful and objective starting point in establishing the amount of retroactive support owed, particularly since this is not a situation where the Respondent's income has decreased markedly over the last few years. On the contrary, it has increased since 2011 and has been stable since.

[54] Using the table amounts and the Respondent's income over the relevant time frame, the amount owed for the various years would be as follows:

- for 2011: 12 months @ $345 per month = $4,140.00
- for 2012: 7 months @ $524 per month = $3,668.00
- for 2013: 5 months @ $524 per month = $2,620.00
- for 2014: 5 months @ $524 per month = $2,620.00

TOTAL: $13,048.00

[55] I recognize this is a significant amount of money, and the impact of such an award on the Respondent, and his other child, must be considered. At the same time, retroactive child support orders do not create a right today that did not exist previously: it merely enforces an obligation that the parent always had. *Sanderson* v. *Pennycook*, *supra*, at para. 17.

[56] Taking all of this into account, I have concluded that the amount of retroactive support should be set at $11,000.00.

III) CONCLUSION

[57] For the above reasons, I make an Order as follows:

1. The Respondent is declared to be J.s father;

2. The Respondent shall pay $524 in child support, payable on the 1st day of each month, commencing on June 1, 2014.

3. The child support will be payable until and including December 1, 2016.

4. The Respondent shall pay retroactive support in the amount of $11,000.00.

5. The Respondent shall provide the Applicant with a copy of his income tax return and any notice of assessment by July 1st 2014 for the year 2013; by July 1st 2015 for the year 2014; by July 1st 2016 for the year 2015; and by July 1st 2017 for the year 2016.

[58] I direct counsel for the Designated Authority to prepare a Formal Order to this effect. The preamble of that Order should reflect that the child support order is based on the Respondent being found to have an annual income of $56,863.32. I also direct counsel to ensure that the provisions of the *Act* are complied with as far as transmission of materials to Alberta.

L.A. Charbonneau
J.S.C.

Dated this 29th day of April 2014

Counsel for the Designated Authority: C. Buchanan
Respondent: Shannon Thomas Roberts, self-represented

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