Date: 2014 12 19
Docket: S-1-FM-2012-000112

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *Interjurisdictional Support Orders Act*, SNWT 2002, c. 19

BETWEEN:

ROBIN LYDIA MARIE GAUTHIER

Applicant

-and-

GARY DEAN LOBB

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application for ongoing and retroactive child support and a declaration of parentage under the *Interjurisdictional Support Orders Act*, SNWT 2002, c. 19. The Applicant resides in Saskatchewan and the Respondent lives in Hay River, Northwest Territories. They are the parents of a son, E., who was born in 2003.

[2] Applications for support under the *Interjurisdictional Support Orders Act* take longer than those made under other types of legislation. This is because an applicant must first complete forms in his or her own province or territory. Those forms are then provided to a Designated Authority in the applicant's jurisdiction. That authority sends them to a Designated Authority in this jurisdiction which, in

turn, files the application with the courts in this jurisdiction and attends to service. If there are anomalies or other irregularities, there may be further delays.

[3] In this case, the Applicant first signed off on her supporting documentation on August 3, 2011. For reasons that are unclear, this was not received by the Designated Authority for the Northwest Territories until sometime in March of 2012. The solicitors for the Designated Authority attempted to file the application with the Court, but the document was rejected by the Registry because of an irregularity in the *jurat.* Thus, the documents were returned to the Designated Authority in Saskatchewan.

[4] The Applicant prepared and swore a new document which was again transmitted to the Designated Authority for the Northwest Territories and received at the end of October of 2012. It was filed with this Court on November 5, 2012, a year and three months after the Applicant initially swore the supporting document.

[5] Once filed, there were difficulties in finding and serving the Respondent. The bailiff attended at the Respondent's address on a number of occasions between November 2012 and March 2013, but was unable to effect service.

[6] The Designated Authority obtained an order for substituted service on March 21, 2013. The order directed service on the Respondent by leaving the documents with his mother and at his place of employment.

[7] Pursuant to the order for substituted services, the bailiff served the Respondent's mother with notice of the proceedings on April 17, 2013. When the matter came before the Court on April 25, 2013 the Respondent was paged but did not respond. The Designated Authority asked for and was granted an adjournment to June 27.

[8] On June 27, 2013 Charbonneau, J., issued an order for ongoing support in the amount of $373.00 per month, based on an imputed income. She adjourned the matter of retroactive support to August 8, 2013 and directed that the Respondent be served with a copy of that order as well as a copy of an affidavit containing evidence from the Applicant respecting historical communications between herself and Respondent about the child as well as her requests to him for financial assistance.

[9] The bailiff served the Respondent personally on August 5, 2013 with notice of the August 8 hearing. The Respondent was also served with copies of the originating documents.

[10] The Respondent appeared in Chambers in person on August 8, 2013 accompanied by his mother. At that time he claimed that he had not seen any of the documents until he was served on August 5, 2013. Charbonneau, J., suspended the operation of the support order granted June 27, 2013 and invited the Respondent to provide more evidence respecting service of the documents.

[11] The matter was next in Court on August 29, 2013 at which time Charbonneau, J. granted an order for paternity testing on consent. It was subsequently adjourned a number of times and was not before the Court again until it came before me on October 16, 2014. For reasons that are unexplained, paternity testing, the results of which were that the Respondent is the child's father, was not completed until July of 2014.

[12] Through his counsel the Respondent acknowledged that he is required to pay child support and that there should be some retroactive support. His position differs from that of the Applicant on the amount of support and the extent of retroactivity.

[13] The Respondent provided copies of his Notices of Assessment for the years 2011, 2012 and 2013. Income for these years was $32,396.00, $77,419.00 and $32,010.00 respectively. Counsel for the Designated Authority suggested that it is open to the Court to base the Respondent's child support obligation on an average of these three years' incomes, given the fluctuation. The Respondent's position is that it should be based on the income reported on his 2013 Notice of Assessment only.

[14] Section 16 of the *Child Support Guidelines,* R-138-98, provides that a parent's annual income is determined using what is set out as "Total Income" in the T1 General form issued by the Canada Revenue Agency. This is, of course, subject to exception where using the "Total Income" for one year would not provide a fair picture of what the income actually is. In such cases the Court may have regard to the last three years' incomes to determine what is fair and reasonable: *Child Support Guidelines,* s. 17(1).

[15] It is true that the Respondent's income for 2012 was substantially higher than for either of the years 2011 or 2013. There is no explanation for this from the Respondent, but I do note that the Applicant herself indicates that she believed the Respondent's income to be approximately $42,000.00 and that he worked as a truck driver. All of the evidence suggests on a balance of probabilities that the higher income in 2012 was an anomaly and in my view, it would be unfair to use an average of the three years' income. Accordingly, the Respondent's income for child support purposes is $32,010.00 and he will pay ongoing support in the *Guideline* amount for that income.

[16] With respect to retroactivity, the Respondent's position is that support should be retroactive to the date he was served personally with notice of this application, being August 5, 2013. The Applicant's position is that it should go back to September of 2011, which was what she requested in her application.

[17] The Respondent's counsel suggested that a retroactive order going back more than this would cause hardship for the Respondent. There is, however, no evidence from the Respondent of what the nature of the hardship would be, other than the creation of a greater debt than would be created by a shorter period of retroactivity.

[18] The Applicant seeks support back to September of 2011. As noted, she provided evidence respecting her communications with the Respondent about the child. The Applicant says they spoke of their son yearly and that in each of their communications she asked for support. Her evidence does not indicate when these conversations took place; however, she recounted one specific conversation at the end of 2012 during which the Respondent told her he thought the Sheriff's bailiff was looking for him and he asked her if she needed money. She told the Respondent it would be helpful to have some money for Christmas, but she did not receive any money from him. The timing of this aligns closely with the time that application was filed and attempts to serve the Respondent were first made.

[19] Once it is established that retroactive support should be awarded (and the Respondent concedes that is so in this case) the Court has a number of choices as to the date to which retroactivity extends: the date of the application; the date when the respondent was formally served; the date of effective notice, ie. when the topic is broached by the parent seeking payment; and, in the case of a retroactive variation, the date the amount should have increased. The general rule, however, is that it should run from the date the topic is broached. Finally, retroactive awards

should not reach back more than three years: *DBS v SRG,* [2006] 2 SCR 231; 2006 SCC 37.

[20] The Applicant's evidence on her earlier requests for child support from the Respondent is not contradicted and leads to the logical conclusion that the Respondent knew he had a child. As noted however, it is not entirely clear when, before the end of 2012, the Applicant first broached the subject of child support with the Respondent. What is certain is that this Application was filed on November 5, 2012 and shortly following that, the Applicant asked the Respondent for money, which the Respondent said he would provide. He knew, or ought to have known, by then that the Applicant was seeking child support. This is the date to which the order will be retroactive.

[21] There remains the question of how much the Respondent should pay in retroactive support. As noted, his income for 2012 was significantly higher than it was for 2011 and 2013, but I have determined his higher income that year was exceptional. Requiring him to pay arrears based on an income closed to double of what his actual income is would be unfair. Accordingly, retroactive support payments will also be based on yearly income of $32,010.00.

[22] Accordingly, I make the following order:

a. The Respondent is declared to be the father of the child, E.

b. Commencing November 1, 2012, the Respondent shall pay the Applicant child support in the *Guideline* amount of $286.00 per month on the first day of each and every month for so long as the child remains a child within the meaning of the *Children's Law Act* or further court order.

K. Shaner
J.S.C.

Dated at Yellowknife, NT, this
19th day of December, 2014

Counsel for the Designated Authority:	Trisha Paradis
Counsel for Gary Dean Lobb:	Hayley Smith

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