Date: 2016 06 23
Docket: S-1-FM-2014-000052

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JENNIFER PITT

Applicant

- and -

JOSHUA TEE

Respondent

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] This was an application heard in Special Chambers where the Applicant, Jennifer Pitt, is seeking child support and retroactive child support from the Respondent, Joshua Tee. The Originating Notice also raises the issues of custody and access but the parties were able to resolve those issues without the necessity of a hearing.

BACKGROUND

[2] The parties commenced a relationship in August 2004 when the Applicant was pregnant with D.P. D.P. was born in January 2005 and the parties subsequently had a child, M.P., together in September 2006. The Respondent is the biological father of M.P. and has acted *in loco parentis* to D.P. since she was

born. There is no dispute that he has acted as a father to D.P. and he has continued to do so following the parties' separation.

[3] There is an Order from the Saskatchewan Court of Queen's Bench from June 7, 2007, ordering Clinton Nabe, the biological father of D.P., to pay child support for D.P. in the amount of $359 per month. A Creditor Financial Report from the Maintenance Enforcement Program indicates that Mr. Nabe, as of April 1, 2014, was $16, 946.55 in arrears.

[4] The parties ended their relationship in 2010, although they disagree on the exact date. Following the separation, the children lived with the Applicant and the Respondent exercised access. In May or June 2012, the parties began sharing custody of the children.

[5] There is no child support order in place and since their separation, the Respondent has paid approximately $2400 in child support, although he has not made many payments since 2011. The Applicant is seeking child support retroactive to the date of separation. The Applicant has also enrolled the children in extracurricular activities like dancing, swimming, gymnastics and piano lessons and seeks the Respondent's contribution for his share of the expenses.

[6] The Applicant has enrolled in the nursing program at Aurora College which has meant that her income is less than it previously was when she worked full time as a medical daycare booking clerk at Stanton Regional Hospital.

[7] The Respondent acknowledges that he owes child support and his share of childcare and extracurricular costs. However, he does not agree with the amounts proposed by the Applicant arguing that the issue is complicated by the child support order against Mr. Nabe for D.P., that the Applicant is deliberately underemployed, and her income should reflect her ability to earn income and the education funding she receives to attend school.

ANALYSIS

[8] The law which governs child support is the *Children's Law Act*, S.N.W.T. 1997, c. 14 (the *Act*) and the *Child Support Guidelines*, R-138-98 (the *Guidelines*) which governs the calculation of child support.

[9] The *Act* obligates a parent to provide support for their child. Section 58 states that "a parent has an obligation to provide support for his or her child where the parent is capable of doing so." The definition of parent includes persons who stand in the place of a parent for the child.

[10] In this case, M.P. is the biological child of the Respondent and he has acknowledged that he is in a parental role with respect to D.P. He has continued that role following separation, exercising access to both children and the parties share custody of both children.

[11] The question of what support should be payable by the Respondent for the children is determined under section 7 of the *Guidelines* which states:

> 7. Where a person from whom support is sought stands in place of a parent for a child, the amount of support for a child is, in respect of that parent, such amount as the court considers appropriate, having regard to these guidelines and any other parent's legal duty to support the child.

[12] The Court is required to consider: (1) what amount might be payable pursuant to the guidelines and (2) the duty of another parent to support the child.

[13] The Respondent's income, based upon his income tax returns for the years 2010 to 2014, was as follows:

Year	Total Income
2010	$ 60,493
2011	$ 72,520
2012	$ 74,604
2013	$ 65,509
2014	$ 63,427

[14] The Respondent has argued that tuition, textbooks and union dues should be deducted from the Respondent's income for these years because the Respondent did not have the benefit of this income and could not have used it to support the children. Additionally, the Respondent seeks the deduction of $ 4,900.00 from his income for 2011 as this amount was withdrawn from RRSP's in 2011, arguing that this is a non-recurring amount.

[15] The determination of a parent's income is governed by sections 15 to 20 of the *Guidelines.* A parent's annual income is based upon the Total Income in their

T1 General Form issued by the Canada Revenue Agency and adjusted in accordance with Schedule C: S.16 of the *Guidelines*.

[16] Schedule C allows the deduction of certain employment expenses pursuant to the *Income Tax Act* (Canada), R.S.C., 1985, c. 1 (5th Supp.). Union dues are a permitted adjustment. As such, the union dues that the Respondent paid will be deducted from his annual income.

[17] With respect to adjustments for RRSP withdrawals and expenses for tuition and textbooks, Schedule C does not specifically permit those to be deducted from the calculation of a payor's income.

[18] As stated in *Fraser* v. *Fraser*, 2013 ONCA 715 at para. 103:

> The clear wording of the *Guidelines* includes RRSP withdrawals as income and no special exception for RRSP withdrawals has been provided in Schedule III.

[19] In *Fraser,* the Court held that RRSP income was presumptively part of a payor's income for child support purposes (at para. 97). *Fraser* was a matter arising under the *Divorce Act,* R.S.C. 1985, c. 3 (2nd Supp.). However, the *Guidelines* in the Northwest Territories mirror the *Federal Child Support Guidelines,* SOR/97-175 enacted under the *Divorce Act*.

[20] The Ontario Court of Appeal in *Ludmer* v. *Ludmer,* 2014 ONCA 827, held that inclusion of RRSP withdrawals in the determination of a payor's income was not mandatory and that Court had discretion to exclude it in appropriate circumstances (at para. 23).

[21] In this case, the Respondent withdrew $4,900 in RRSP's in 2011. Adopting the reasoning of the Ontario Court of Appeal in *Fraser* and *Ludmer*¸ RRSP income is presumptively part of the calculation of the payor's income for child support purposes. There is no explanation for the withdrawal and the argument advanced by the Respondent is that it is a non-recurring amount. In my view, it is income as contemplated by the *Guidelines* and there is nothing to suggest that it should not be included as part of the Respondent's income for 2011.

[22] The adjusted income of the Respondent and corresponding child support payable would be as follows:

Year	Total Income	Child Support
2010	$ 60,292	$ 919.32
2011	$ 72,257	$ 1,099.75
2012	$ 74,369	$ 1,131.39
2013	$ 65,295	$ 995.37
2014	$ 63,427	$ 967.49

[23] The parties ended their relationship in 2010, although they do not agree on the exact date. The children lived with the Applicant until May or June 2012, when the parties began sharing custody. During this time, the Respondent paid $2,400.00 in child support.

[24] The Applicant testified that she and the Respondent broke up in July 2010. She testified that after the relationship ended, the Respondent stayed either at his parents' place or her place until he moved out in October 2010.

[25] The Respondent testified that the relationship ended when he moved out in October 2010. He testified that while they were arguing and the relationship was in the process of ending earlier than that, they were still together.

[26] It is not disputed that the relationship was over in October 2010 when the Respondent moved out. The parties agree that the relationship was troubled before that and they were arguing and not getting along. I am not satisfied that it was clearly over prior to October 2010. In the circumstances, October 2010 will be the date when the Respondent was obligated to begin paying child support for the children.

[27] The Applicant testified that they began sharing custody in May 2012. The Respondent testified that they began sharing custody in June 2012. The Respondent's log book shows that he was completing his level III training as part of his apprenticeship as an aircraft maintenance engineer from March 26, 2012 to May 30, 2012. His apprenticeship training required him to attend courses outside of Yellowknife. As such, I find that the parties began sharing custody in June 2012.

[28] With respect to any other parent's support obligation, there is the Order from 2007 ordering Clinton Nabe to pay child support for D.P. in the amount of $359.00 per month. The financial report issued by the Maintenance Enforcement Program indicates that Nabe is in arrears and has not made payments regularly. As of July 10, 2015, he was $ 20,579.13 in arrears.

[29] This Court has considered how to approach the consideration of how much a parent should pay when there is more than one payor. In *Zoe* v. *Kent*, 2007 NWTSC 86, Justice Vertes stated at para. 12:

> In my opinion, the discretionary aspect of section 7 enables a court to consider all of the circumstances in determining what is an appropriate amount of support. The references to the guideline amount and the natural parent's duty to support does not mean that one simply looks at the guideline amount and then subtracts from that amount the obligation of the natural parent (although that is commonly done). One must also consider the condition, means, needs and circumstances of the parent and the children. One may also consider the relationship between the person who stands in the place of a parent and the children, particularly whether it continues or where, as here, the relationship has effectively ceased.

[30] In this case, the Applicant is suggesting that the amount that Clinton Nabe was ordered to pay should be deducted from the amount owing by the Respondent as well as credit for the $ 2,400.00 that the Respondent had previously paid. The Respondent has advocated a similar approach. In the circumstances, I agree that this is an appropriate method to determine the Respondent's child support obligation.

[31] The child support that would be payable by the Respondent according to the *Guidelines* for two children is as follows:

Oct. 2010 – Dec. 2010	$ 919.32	x 3 =	$ 2,757.96
Jan. 2011 – Dec. 2011	$ 1,099.75	x 12 =	$ 13,197.00
Jan. 2012 – May 2012	$ 1,131.39	x 5 =	$ 5,656.95
	Total		**$ 21,611.91**
Less child support paid			- $ 2,400.00
Less C. Nabe child support ($ 359 x 20)			- $ 7,180.00
Total Child Support Owing to May 2012			**$ 12,031.91**

[32] The parties have shared custody since June 2012. The Applicant worked full time as a clerk in the Medical Day Care unit at Stanton Hospital until she began attending Aurora College in the Nursing program in September 2014.

[33] Where the parties share custody, s. 11 of the *Guidelines* is applicable:

> 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 table 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.

[34] The Applicant's income based on her Notices of Assessment from the Canada Revenue Agency for the years 2010 to 2014 was as follows:

Year	Total Income
2010	$ 61,836
2011	$ 65,381
2012	$ 74,544
2013	$ 72,747
2014	$ 53,012

[35] The child support payable by each of the parties from June 2012 to August 2014 according to the *Guidelines* is set out below:

Year	Applicant		Respondent	
	Income	Child Support	Income	Child Support
June – Dec 2012	$ 74,544	$ 1,133.94	$ 74,369	$ 1,131.39
Jan – Dec 2013	$ 72,747	$ 1,106.91	$ 65,295	$ 995.37
Jan – Dec 2014	$ 53,012	$ 809.18	$ 63,427	$ 967.49

[36] During this period, based on this calculation, the Applicant would have owed the Respondent monthly child support of $ 2.55 from June to December 2012 and $ 111.54 in 2013. The Respondent would have owed the Applicant monthly child support of $ 158.31 in 2014. This would have equated to the Applicant owing the Respondent $ 1,356.33 and the Respondent owing the Applicant $ 1,899.72, the difference being $ 543.39 owing to the Applicant.

[37] The Order requiring Clinton Nabe to pay $ 359 per month is a circumstance that needs to be taken into account in the consideration of the parties' obligation to pay child support. During this same period, a number of payments were made by Clinton Nabe but not all payments were made and they had ceased by October 2013 and did not resume for over a year. Based on my calculations, Nabe was obligated to pay $ 11,129 in child support and paid approximately $ 2,073.80 in child support during the period from June 2012 to December 2014.

[38] Therefore, for the period from October 2010 to December 2014, child support was payable as follows:

Child Support Payable by the Respondent Oct. 2010 – May 2012	$ 12,031.91
Child Support Payable by the Respondent June 2012 – August 2014	$ 543.39

[39] In considering the child support payable between June 2012 and August 2014, there should be some consideration of Clinton Nabe's contribution to the Applicant. Taking into account the amount owed by Clinton Nabe during the period from June 2012 to December 2014, the amount actually paid by Nabe, the possibility that Nabe may eventually pay some of the arrears and the other circumstances of the parties, I am satisfied that the retroactive child support owed by the Respondent for the period from October 2010 to December 2014 should be set at $ 10,000.00.

[40] In September 2014, the Applicant began attending school full-time and the Respondent argues that she is intentionally underemployed and that her income should be imputed at the amount she earned in 2013 when she worked full-time and not based upon her current income. The Applicant works part-time and receives funding from the government to attend school but her income is significantly less while she attends school.

[41] The Applicant acknowledges that she is intentionally underemployed but argues that it is based on her reasonable educational needs. The Applicant urges that the Court impute an income that is consistent with minimum wage of $ 25,000 per year arguing that it is similar to what she receives in funding and from working part-time.

[42] Section 19 of the *Guidelines* addressed the intentional under-employment of a parent. Section 19(1)(a) states:

> 19(1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
>
> > (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child for whom the parents are both responsible or any minor child or by the reasonable educational or health needs of the parent.

[43] The Applicant testified that she worked as a clerk in the medical daycare unit at Stanton Hospital making $ 33.00 per hour. She worked 37.5 hours a week and also worked overtime. She decided to pursue her Bachelor of Science in Nursing. She testified that the starting salary is $ 45.00 per hour for a nurse and that there are opportunities to work overtime. She decided to pursue nursing because she was not challenged in her job and that it would provide an increase in her income.

[44] The Applicant has a high school education and was employed fulltime. She was making a wage well above minimum wage. However, by pursuing a nursing degree, she is furthering her education and employment opportunities as well as increasing her earning potential. I am satisfied that the Applicant's intentional under-employment is a result of her reasonable educational needs.

[45] It is difficult to ascertain the Applicant's current income. She testified that she receives funding of $ 1450 per month while she attends school and that she works at Stanton Hospital part-time earning $ 34.23 per hour. Based upon this and what she can reasonably be expected to work during the school year and during the summer months, I am imputing an income to the Applicant of $ 30,000 per year while she attends school to get her nursing degree.

[46] Therefore starting January 2015, the Applicant would owe the Respondent $ 464.00 in child support per month which would be set off against the Respondent's obligation to pay $ 967.49 per month. Clinton Nabe is also required to pay $ 359 per month which will be deducted from the amount owing by the Respondent. Therefore, effective January 1st, 2015, the Respondent is to pay the Applicant $ 145.00 per month in child support until the conclusion of her nursing program.

[47] Since the parties ended their relationship, the Applicant has paid for the children's childcare and extra-curricular activities. The expenses incurred by the Applicant for childcare, camps, dancing, gymnastics, swimming and piano lessons for D.P and M.P. are as follows:

Year	D.P. Childcare/camps	D.P. Sports/Arts Activities	M.P. Childcare/camps	M.P. Sports/Arts Activities
2010	$ 3,200	$ 250.00	$ 8,800	$ 50.00
2011	$ 1,380	$ 500.00	$ 4,980	$ 500.00
2012	$ 2,001	$ 210.45	$ 2,001	$ 767.23
2013	$ 2,280	$ 965.00	$ 2,280	$ 703.00

Total :	$ 8,861	$ 1,925.45	$ 18,061	$ 2,020.23

[48] The Respondent, in his evidence, acknowledged that he owed the Applicant for the expenses that she had incurred. He expressed his frustration that the Applicant did not consult with him regarding the activities the children were enrolled in but simply decided on the activities and expected him to pay afterwards. The Respondent did not contest the appropriateness of any specific expense claimed by the Applicant. Hopefully, as the parties have been able to resolve some issues, they will be able to agree on childcare expenses and extracurricular activities in the future.

[49] At the time of the hearing, there was no Order requiring Clinton Nabe to pay his proportionate share of the childcare expenses or the cost of extracurricular activities. In the circumstances, the Respondent will be required to pay his proportionate share for the childcare expenses and extracurricular activities based upon his income.

Year	Childcare expenses and extracurricular activities	Applicant's Income	Respondent's Income	Respondent's Share
2010	$ 12,300.00	$ 61,836 (51%)	$ 60,292 (49%)	$ 6,027
2011	$ 7,360.00	$ 65,381 (48%)	$ 72,257 (52%)	$ 3,827.20
2012	$ 4,979.68	$ 74,544 (50%)	$ 74,369 (50%)	$ 2,489.34
2013	$ 6,228.00	$ 72,747 (53%)	$ 65,295 (47%)	$ 2927.16
Total :	$30,867.68			$ 15,270.70
2014		$ 53,012 (46%)	$ 63,427 (54%)	
2015+		$ 30,000 (32%)	$ 63,427 (68%)	

[51] Therefore, the Respondent will be required to pay the Applicant $ 15,270.70 for his proportionate share of childcare expenses and the cost of extracurricular activities from 2010 to 2014. For 2014 and 2015, no expenses were submitted but the Respondent will be responsible for 54% of the childcare expenses and the cost of extracurricular activities in 2014 and for 68% of the expenses in 2015 and until the Applicant has completed her nursing program.

[52] If the parties are unable to agree on what expenses should be reimbursed, they can contact the Clerk of the Court to have the matter scheduled for a hearing.

CONCLUSION

[53] For these reasons, there will be an Order as follows:

1. The Respondent is required to pay to the Applicant child support for the period of October 2010 to December 2014 in the amount of $ 10,000.00;

2. As of January 1st, 2015 and on the first day of every month thereafter, the Respondent shall pay to the Applicant the amount of $ 145.00 per month in child support;

3. The income of the Applicant shall be imputed at $ 30,000 for 2015 and while she is attending the Aurora College Bachelor of Science in Nursing Program;

4. The Respondent will pay to the Applicant his proportionate share of child care expenses and the cost of extracurricular activities for the years 2010 to 2013 in the amount of $ 15,270.70;

5. The Respondent will be responsible for 54% of the child care expenses and the cost of extracurricular activities for 2014 and for 68% of the child care expenses and the cost of extracurricular activities for 2015.

[54] There will be no Order as to costs.

S.H. Smallwood
J.S.C.

Dated in Yellowknife, NT, this
23th day of June, 2016

Counsel for the Applicant : Donald P. Large
Counsel for the Respondent : D. Jane Olson

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