

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:

TRACEY HEWITT

Applicant

-and-

ROBERT YATKOWSKY

Respondent

MEMORANDUM OF JUDGMENT

[1] Ms. Hewitt seeks an order varying child support using the *Interjurisdictional Support Orders Act*, S.N.W.T. 2002, c. 19. Specifically, she asks the Court to make an order varying the amount of support retroactively and for an order directing Mr. Yatkowsky to pay a proportionate share of the child's extraordinary expenses.

[2] By way of procedural history, Ms. Hewitt appears to have filed her application in Ontario in January of 2016. It was then transmitted to this jurisdiction and filed in this Court on October 27, 2016. It did not reach the hearing stage until August 29, 2017. The delay in having it heard is not due to any action or inaction by either party. Rather, it appears to be a function of the processes necessary to bring the application before the Court in accordance with the *Interjurisdictional Support Orders Act*.

[3] Mr. Yatkowsky brings his own motion for an order directing that child support be terminated as at July 1, 2016 as well as an order dismissing Ms. Hewitt's application.

FACTS

[4] The factual findings are based on the affidavits submitted by both parties. For the most part, the facts are not in dispute.

[5] The parties were in a common law relationship and they have one child, L., who is now 19 years old. On December 13, 2005 the parties entered into an agreement respecting, *inter alia*, custody, access and child support. Both received independent legal advice. The relevant provisions of that agreement are as follows:

24. The Father will pay to the Mother child support in accordance with the Child Support Guidelines. The Father's annual income for 2004 is \$35,987.00. The Mother's income for 2004 is \$47,000.00. The child support payable by the Father to the Mother is \$312.00 per month. . .

25. The child support shall continue for so long as the child is an unmarried child who is a minor or is enrolled in a full-time program of education.

[...]

SPECIAL OR EXTRA-ORDINARY EXPENSES

26. The parties acknowledge and agree to discuss any special or extraordinary expenses as defined in s. 7 of the Federal Child Support Guidelines for the children before incurring same, to determine if they are reasonable and necessary. If the expense is reasonable and necessary, the parties will each contribute proportionately . . . toward the cost of special or extraordinary expenses . . .

[...]

ANNUAL REVIEW:

28. For so long as the father is obligated to provide support for the child, the child support and special or extra-ordinary expenses payable pursuant to Paragraphs 24 and 25 will be adjusted annually on July 1st in accordance with the Ontario Child Support Guidelines. Commencing on June 1, 2006 and on June 1st of each subsequent year, each party will deliver to the other a copy of their income tax return and notice of assessment . . .

[6] Neither party has ever complied with the requirement to exchange income tax information, nor does it appear either demanded it from the other.

[7] Mr. Yatkowsky's income has increased in the time since the agreement was signed. The most significant increase came in 2014. That information is set out below:

Year	Income
2005	\$40,471.00
2006	\$41,288.00
2007	\$15,781.00
2008	\$12,144.00
2009	\$50,210.00
2010	\$44,763.00
2011	\$36,439.00
2012	\$45,635.00
2013	\$51,533.00
2014	\$97,655.00
2015	\$92,314.00
2016	\$93,650.00

[8] The income information does not include RRSP income. Mr. Yatkowsky accessed his RRSPs while attending school so he could meet living expenses and other obligations, including child support. RRSP income has not formed a regular part of Mr. Yatkowsky's income over the years and accordingly, it should not be included.

[9] Mr. Yatkowsky adjusted child support twice on his own accord, once in 2006 when he started paying \$349.00 per month and again in January of 2015, when he started paying \$400.00 per month. He paid \$400.00 per month until July of 2016. At that time, he ceased paying support altogether.

[10] The reasons Mr. Yatkowsky stopped paying support in July of 2016 are first, that L. had turned 18 and thus reached the age of majority in Ontario and second, L. had completed high school and was not attending an educational program on a full-time basis. He deposes that L. told him in the fall of 2016 that he was enrolled in two high school courses. Mr. Yatkowsky says that he subsequently received a telephone call from L. in January of 2017 during which L. advised him he had left school entirely.

[11] There is no evidence that Ms. Hewitt sought increased child support from Mr. Yatkowsky at any time prior to bringing this application.

[12] The special expenses for which Ms. Hewitt seeks contribution are hockey fees and associate costs, which she has already incurred, and the anticipated out-of-pocket costs of orthodontic work. According to Ms. Hewitt, the estimated cost of orthodontic work is \$6,000.00 but this is based on an assessment she received when L. was 10 years old. There is no evidence from a dental professional regarding the need for orthodontic treatment, nor the cost. Other than Ms. Hewitt's statement that Mr. Yatkowsky was present when L.'s orthodontic needs were assessed, there is no evidence of the issue having been raised with Mr. Yatkowsky.

[13] Mr. Yatkowsky says L. is a beneficiary on his extended health insurance benefits, which includes necessary orthodontic treatment. L. is able to apply for coverage under the plan until he is 21 years old or 25 years old if enrolled full-time in a post-secondary institution. Mr. Yatkowsky says the maximum amount available to L. for orthodontic treatment under the plan is \$3,000.00 and although he is not willing to pay anything above this coverage for L., he is prepared to assist L. in accessing the coverage that is available for him.

[14] Ms. Hewitt feels L. is a gifted hockey player and indicates he was boarding in other communities for the past few years so he could play at a more competitive level. She provided some information about the costs associated with boarding. The hockey seasons ran from September to June. For the 2014-2015 season the room and board was \$250.00 per month. Ms. Hewitt said she also paid \$250.00 for out of town trips and she provided spending money to L. in an unspecified amount. Accordingly, the boarding costs were approximately \$2,750.00.

[15] The approximate cost for boarding during the 2015-2016 season was \$8342.00. This is made up of room and board was \$400.00 per month, \$100.00 per week for L.'s school lunches, personal care and school supplies, \$250.00 for out of town trips and tournaments and \$92.00 for a bus ticket to bring L. home for holidays.

[16] Finally, Ms. Hewitt has paid the costs of registration and equipment since 2011. The receipts she provided indicate the following amounts were paid:

Year	Amount
2011	\$546.77
2012	\$1923.67

2013	\$826.79
2014	\$2,547.38
2015	\$3,642.94

[17] Mr. Yatkowsky says he was aware L. was playing hockey at a competitive level and that Ms. Hewitt raised the issue with him in 2011. He says Ms. Hewitt did not “fully discuss the cost of this activity” with him, nor did she discuss with him the possibility of L. participating in something less costly.

[18] Attached to Mr. Yatkowsky’s affidavit is an e-mail exchange between him and Ms. Hewitt from April of 2011. In his e-mail to Ms. Hewitt he states:

Tracey, I have been thinking about your request to help fund [L]’s hockey. As you are aware all decisions pertaining to extra curricular activities are to be discussed among both parties prior to the decisions that are to be made.

Typically, I would have no issues helping and I have never denied my son of anything . . . however; as you are aware [L] has chosen to have no further contact with me. Therefore, I no longer feel obliged to help him with anything other than what our agreement has outlined. Should [L] have a change in heart and decide to rekindle his relationship with me then I have no issues rethinking further assistance to his extracurricular activities as long as decisions are made and discussed civilly.

[19] Ms. Hewitt replied, indicating she felt Mr. Yatkowsky remained responsible for contributing to L.’s extracurricular activities, but that she would “manage” and she would seek assistance from her own family. She also said she would no longer have any contact with Mr. Yatkowsky regarding L.’s sports.

[20] Mr. Yatkowsky says that after this exchange he thought the issue of hockey expenses was finished. After April of 2011 there was no discussion between them about hockey expenses “other than the occasional text message or e-mail telling me about a hockey expense after she had incurred it and demanding that I pay for the expense”.

[21] The issue apparently arose again in 2014, however. At that time, Mr. Yatkowsky offered to pay for L.’s expenses for hockey registration in the amount of \$1850.00 and \$650.00 for his uniform. He also proposed that he would cease paying child support to Ms. Hewitt and instead pay the room and board amount to the team and anything left over to L. directly to cover other expenses. He reasoned that L. was then sixteen and had chosen to withdraw from parental control and play

hockey in another community. It was also proposed that this arrangement would end once L. returned to Ms. Hewitt's care on a full-time basis.

[22] Ms. Hewitt disagreed with Mr. Yatkowsky's position that L. was withdrawing from parental control, pointing out that he would be enrolled in school full-time and that she was still responsible for making decisions for him. She indicated that she did not expect Mr. Yatkowsky to pay the full amount of the hockey fees. She requested that he pay support to her directly, as he had been since they separated.

[23] There were no further discussions about hockey fees.

ISSUES

[24] There are three issues. The first is whether Mr. Yatkowsky was required to continue paying support after L. finished high school and attained the age of majority. The second is whether the amount of child support should be adjusted retroactively and if so, to what point in time. The third issue is whether Mr. Yatkowsky is required to contribute to L.'s past hockey costs and to pay for orthodontic treatment.

ANALYSIS

Whether child support obligations terminated when L. turned 18

[25] It is a reality that children are sometimes unable to withdraw from their parents' care and support when they reach adulthood. There can be many reasons for this, including illness, disability or, as contemplated here, continued education.

[26] I find Mr. Yatkowsky's legal obligation to support L. ceased at the end of June 2016. This is based on the parties' agreement which states support obligations cease upon L. reaching the age of majority unless he was enrolled in a full-time educational program. As of June 30, 2016, L. had attained the age of majority in Ontario and he had completed high school. He was not thereafter enrolled in a full-time educational program.

Whether child support should be adjusted retroactively

[27] Section 35(2) of *Interjurisdictional Support Orders Act* provides that the *Children's Law Act*, SNWT 1997 is to be applied where, as here, both parties accept this Court's jurisdiction. Section 61(2) of the *Children's Law Act*, in turn, allows the Court to vary child support, both prospectively and retroactively, where there has been a material change of circumstances, as set out in s. 14 the *Child*

Support Guidelines, R-138-98. A material change in circumstances is “any change in the condition, means, needs or other circumstances of a parent or of any child who is entitled to support” and includes a change to the payer’s income which would result in a different amount being payable.

[28] Clearly, Mr. Yatkowsky’s income has increased over the years in a manner that would result in a different amount of support being payable. Therefore, there has been a material change in circumstances. I am also satisfied that when Ms. Hewitt filed the application in Ontario in January of 2016, L. was a “child” within the meaning assigned to that term under the *Children’s Law Act*, as well as under the parties’ agreement.¹

[29] The principles applicable to a request for retroactive variation were articulated in *DBS v SRG; LJW v TAR; Henry v Henry; Hiemstra v Hiemstra*, [2006] 2 SCR 231, 2006 SCC 37 (“*DBS*”). In considering whether support should be varied retroactively, the Court must consider (1) the reason for the delay in bringing the application; (2) the conduct of the paying parent; (3) the child’s circumstances; and (4) the hardship that may be occasioned by a retroactive award. If it appears retroactive variation is warranted, the Court must then consider how far back the variation should go having regard to when the respondent received effective notice.

The Reason for the Delay

[30] As stated, Ms. Hewitt submitted her application on January of 2016, five months before L. was to turn 18. Her explanation for the delay is that she did not know the extent to which Mr. Yatkowsky’s financial circumstances had changed in the years following the separation because he did not provide financial disclosure to her. In other circumstances this explanation might be compelling. In this case, the reasonableness of the delay is diminished by the fact that it was open to Ms. Hewitt to request that information and/or move forward with the application long before 2016.

Blameworthy Conduct

[31] The effect of Ms. Hewitt’s delay is tempered somewhat by what may be fairly considered blameworthy conduct by Mr. Yatkowsky. Mr. Yatkowsky could have complied easily with the requirement in the agreement that he provide his financial information to Ms. Hewitt. His obligation to provide that information was not dependent on a request being made by her, nor was he relieved of his

¹ As noted earlier, it took several months after that for the application to reach this Court and to be served on Mr. Yatkowsky. That is, however, not something that was within Ms. Hewitt’s control.

obligation by reason of Ms. Hewitt not fulfilling her own obligation to share financial information. He was to share his information so the parties could (1) adjust child support and (2) determine the amount each would pay for extraordinary expenses, if any. Ms. Hewitt was to share her information only for reasons of extraordinary expenses. Had Mr. Yatkowsky complied with his obligation, the amount of child support could have been adjusted at the appropriate time, L. would have had the benefit of support at the level to which he was entitled by law and an application for retroactive variation of support would have been unnecessary.

[32] Mr. Yatkowsky has paid support regularly and that he increased the amount voluntarily at two points in time. That said, the amounts by which he increased the support payments fell short of what he ought to have been paying and that shortfall became more acute when his income underwent a dramatic increase in 2014. That he increased the amount of support he was paying is commendable, but it also indicates that he recognized his obligation to pay support in accordance his income and the corresponding *Guideline* amount. Indeed, that is contemplated in the agreement. In my view, Mr. Yatkowsky knew, or ought to have known, that the amount of support he was paying, particularly after 2013, was significantly less than what the *Guidelines* required.

The Child's Circumstances

[33] Mr. Yatkowsky argued that there is little evidence that the shortfall in child support had an effect on the child.

[34] I agree there is not much evidence about L.'s circumstances, both when the increased amount of support ought to have been paid and now, but there is *some* evidence. In particular, Ms. Hewitt deposes that L. worked on weekends to supplement the cost of his hockey programs. She also states that she worked multiple jobs to support herself and L. and that she became ill and required hospitalization. This, in turn, required her to rely on her family to care for L.

[35] It stands to reason that if a child is not receiving the benefit of the support to which they are entitled by law then, barring some third party's generosity, a windfall or some other fortuitous event, it is the other parent and the child who must bear the burden of the shortfall. The result is that the child is denied the lifestyle they would have if the paying parent had been meeting his or her obligations. That is what happened here.

Hardship Occasioned by a Retroactive Award

[36] A retroactive award will in most cases cause some form of hardship. As noted in *DBS* at para 115, a requirement to pay retroactive support is bound to disrupt a paying parent's financial routine at the very least. Depending on that parent's circumstances, it may have a detrimental effect on another spouse and other children. In short, retroactive awards must be structured in a way that minimizes hardship while recognizing the need for support to be paid and to be paid in a timely manner.

[37] In this case, the hardship is be limited to disrupting Mr. Yatkowsky's financial affairs. There is no evidence that he has other children who may be affected and he is currently working and earning a salary that exceeds \$90,000.00 a year.

[38] Considering the foregoing, I find that it is appropriate to make an order varying child support retroactively. There was a delay on Ms. Hewitt's part in bringing the application forward but at the same time Mr. Yatkowsky had to have known the amount of child support he was paying was deficient, given his increased income.

The point in time to which the support payments should be adjusted

[39] The starting point for this analysis is when Mr. Yatkowsky was effectively notified of Ms. Hewitt's intention to seek an increase in child support.

[40] Mr. Yatkowsky deposes he was first notified of Ms. Hewitt's intention to seek increased support when he was served with the Originating Notice in this application. That occurred on November 18, 2016. This is not contradicted in Ms. Hewitt's materials, although she had raised the issue of hockey expenses at previous times. I accept Mr. Yatkowsky's evidence on this point.

[41] Support awards should not generally be made retroactive to a date more than three years before the respondent receives formal notice, unless he or she has engaged in blameworthy conduct, including failing to disclose an increase in income that amounts to a material change in circumstances. *DBS*, paras 123 and 124.

[42] In this case, Mr. Yatkowsky failed to disclose his income as he was required to do by the agreement and I view this as blameworthy conduct. Nevertheless, it would be inappropriate to go back beyond three years for two reasons.

[43] First, Mr. Yatkowsky's income did not change significantly until 2014 when there was a jump of approximately \$46,000.00. Up to that point, his income had remained relatively steady and it had not changed substantially from what it had

been when the parties separated. In 2012, for example, his income would have attracted a *Guideline* amount of 411.37 per month for an Ontario resident. He was then paying \$349.00, a difference of approximately \$62.00 per month. The difference between what he ought to have been paying in 2013 and what he was actually paying was just over \$100.00. I do not suggest this is insignificant, but it may not have been as readily apparent to Mr. Yatkowsky at that time that the child support he was paying fell short of the *Guideline* amounts as it should have been in 2014, when his income jumped so significantly.

[44] Second, Ms. Hewitt waited a very long time to bring this application and she never requested financial information from Mr. Yatkowsky.

[45] Accordingly, child support will be varied retroactively for the years 2014 and 2015 and for the first six months of 2016, in accordance with Mr. Yatkowsky's income and corresponding *Guideline* amounts:²

Year	Income	Amount Paid	Amount Due per Guidelines	Difference each month	Yearly Amount
2014	\$97,655.00	\$349.00	\$898.76	\$549.76	\$549.76 x 12 mo = \$6,597.12
2015	\$92,314.00	\$400.00	\$852.76	\$452.76	\$452.76 x 12 mo = \$5,433.12
2016	\$93,650.00	\$400.00	\$864.33	\$464.33	\$464.33 x 6 mo = \$2,785.98

[46] This amounts to \$14,816.22.

[47] Having to pay retroactive child support will be disruptive for Mr. Yatkowsky and he will need to adjust his own budget to accommodate this. It would not be realistic to expect immediate payment of the entire sum. It must, however, be paid within a reasonable amount of time and, accordingly, at a reasonable rate, which I set at \$500.00 per month. This will retire the debt in approximately two and half years.

[48] I reach this conclusion based on the evidence Mr. Yatkowsky has provided about his income, expenses and assets. He earns in excess of \$90,000.00 per year. He owns a home, although the equity in it does not appear significant. He also has

² The Northwest Territories *Guideline* amounts are used as this is where Mr. Yatkowsky has been residing in the relevant period.

savings and access to credit. Although I do not suggest they are unreasonable, he has a number of discretionary expenses listed in his materials, including meals out and an expense for a personal learning plan. Finally, it is relevant that he was able to pay \$400.00 per month in support from 2015 until June of 2016 on approximately the same salary.

Payment of Extraordinary Expenses

[49] The parties agreed in writing that they would discuss extraordinary expenses before incurring them to determine if they were reasonable or necessary. It is, of course, implicit in any agreement like this that the parties are expected to act reasonably and have meaningful discussions. That may – and often does – require the parties to discuss the subject more than once and to reflect on each other’s point of view before rejecting it or acting unilaterally, as the case may be. Although not the ideal solution, if one party is acting unreasonably, it is open to the other to bring the matter to a court of competent jurisdiction to decide the matter.

[50] With respect to the cost of hockey for L., the expenses incurred in 2014 and in 2015 were extraordinary in that they exceeded what the cost would have been had L. remained at home with Ms. Hewitt and played in the local league. Total expenses for the 2014-15 season exceeded \$5,000.00 and those for the 2015-16 season were more than \$10,000.00.

[51] I appreciate that enrolling L. in the hockey programs may have had many benefits for him and that Ms. Hewitt had his best interests in her mind when she made the decision to do so. The problem here is that the parties did not engage in a meaningful discussions about necessity and reasonableness before Ms. Hewitt incurred the expenses, as their agreement required them to do. With respect to the 2014 expenses, Mr. Yatkowsky made a proposal to pay the expenses, albeit not a particularly reasonable one. That proposal was rejected by Ms. Hewitt. She then appeared to rescind her request and she incurred the expenses on her own. As to the 2015 expenses, there is no evidence that the matter was ever discussed before the expenses were incurred.

[52] Barring a finding that Mr. Yatkowsky refused to have the discussions or to respond, neither of which is made out on the evidence, he is not required to contribute to these expenses.

[53] With respect to the orthodontic treatment, there is no evidence that the treatment is reasonable or necessary and Ms. Hewitt’s evidence that the cost would

be \$6,000.00 is too dated to be reliable. Further, there is no evidence of any discussions of the matter, other than Ms. Hewitt's evidence that Mr. Yatkowsky was present during the initial assessment when L. was 10 years old.

[54] For the foregoing reasons, I find Mr. Yatkowsky is not legally responsible for payment of any part of the expenses incurred by Ms. Hewitt for L.'s hockey activities, nor the anticipated cost of orthodontic treatment.

CONCLUSION

[55] The application to vary support retroactively is granted in part. Mr. Yatkowsky shall pay Ms. Hewitt child support in the amount of \$14,816.22 in installments of \$500.00 per month. Those payments will commence March 1, 2018 and will continue on the first day of every month thereafter until the amount is paid in full.

[56] It is confirmed that Mr. Yatkowsky's obligation to pay child support for L. ceased on June 30, 2016.

[57] The application for recovery of extraordinary expenses is dismissed.

[58] Neither party prevailed. Accordingly, each shall bear their own costs.

K. Shaner
J.S.C.

Dated at Yellowknife, NT
this 23rd day of January, 2018.

Counsel for the Designated Authority: Jana Shoemaker

Counsel for Mr. Yatkowsky: Paul Parker

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