Terri Lynn Storr v. Warren Steen, 2010 NWTTC 11

Date: 2010 09 24
File: T-03-FM-2009 000012

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the *Children's Law Act,* S.N.W.T. 1997, c. 14, as amended

BETWEEN:

TERRI LYNN STORR

Applicant

- and -

WARREN STEEN

Respondent

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at:	Inuvik, Northwest Territories March 14, 2010
Date of Decision:	September 24, 2010
Counsel for the Applicant:	Candace Seddon
Respondent:	Warren Steen

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A. INTRODUCTION AND BACKGROUND

[1] The applicant mother, Terri Lynn Storr, seeks custody of her seven year old daughter along with prospective and retroactive child support. The respondent, Warren Steen, admits that he is the child's father. He has never lived with the applicant but has developed and maintained a relationship with the child. The mother and daughter live in Inuvik and the father lives in Tuktoyaktuk.

[2] Over the seven years since the child was born, the respondent has contributed to her upbringing on an irregular basis. As of December 4, 2009, the cumulative amount paid by the respondent was $6,500. On December 7, 2009, the applicant filed an Originating Notice seeking sole custody and child support. This was the first court application by the applicant although the applicant has requested money from the respondent for the child's support since shortly after the child was born. On March 5, 2010, this Court awarded interim sole custody to the applicant and monthly child support of $454 per month.

[3] The Court must decide who is to have custody of the child; the quantum of child support, if any, to be paid by the respondent in the future; and whether child support should be paid by the respondent for any period prior to March 5, 2010.

B. CUSTODY

[4] In the Originating Notice of December 9, 2009, the applicant sought "sole custody of the child". The respondent was not represented by legal counsel in

these proceedings either with respect to the filing of pleadings or at the hearing held on March 14, 2010. Based on his stated intention and his conduct, it is clear that the respondent seeks either "joint or sole custody" of his daughter. The applicant, through the written submissions of her legal counsel, accepts that the Court should consider the respondent's position with respect to custody despite the lack of formal notice.

[5] This is a proceeding under the *Children's Law Act*, S.N.W.T. 1997, c.14, as amended (the "*Act*"). Section 18 of the *Act* starts with the premise that the father and the mother of a child are equally entitled to custody. This right of a parent, however, is suspended where the parents of the child live separate and apart and the child lives with the other parent; and the parent has consented, either expressly or by implication, or acquiesced to the other parent having sole custody of the child.

[6] In the circumstances of this case, the applicant and respondent have lived separate and apart since the birth of the child and the child has always lived with her mother, the applicant. I find that the respondent, by implication, has acquiesced to the applicant having sole custody of the child and his right to custody is suspended.

[7] In determining a suitable custodial arrangement for the future, the Court must consider the best interests of the child. Section 17(2) of the *Act* sets out the needs and the circumstances of the child which should be considered:

(a) the love, affection and emotional ties between the child and
  (i) each person entitled to or seeking custody or access,
  (ii) other members of the child's family, and
  (iii) persons involved in the care and upbringing of the child;

(b) the child's view and preferences if they can be reasonably ascertained;

(c) the child's cultural, linguistic and spiritual or religious upbringing and ties;

(d) the ability and willingness of each person seeking custody to, directly or indirectly, provide the child with guidance, education and necessities of life and provide for any special needs of the child;

(e) the ability of each person seeking custody or access to act as a parent;

(f) who, from among those persons entitled to custody or access, has been primarily responsible for the care of the child, including care of the child's daily physical and social needs, arrangements for alternative care for the child where it is required, arrangements for the child's health care and interaction with the child through, among other things, teaching, playing, conversation, reading and discipline;

(g) the effect a change of residence will have on the child;

(h) the permanence and stability of the family unit within which it is proposed that the child live;

(i) any plans proposed for the care and upbringing of the child;

(j) the relationship, by blood or through adoption, between the child and each person seeking custody or access; and

(k) the willingness of each person seeking custody to facilitate access between the child and a parent of the child who is seeking custody or access.

[8] The respondent has asked the Court to consider ordering joint custody. In making this consideration, I accept the direction of the Supreme Court of the Northwest Territories in *O'Brien v. O'Brien* [1994] N.W.T.J. No. 61 at paragraph 9:

> **[9]** The current approach of the courts to joint custody was, in my opinion, well summarized by Bielby J. in *Colwell v. Colwell* (1992), 38 R.F.L.(3d) 345 (Alta. Q.B.), at page 348:
>
> > Once, courts were hesitant to award joint custody except where both parents have agreed to it. That hesitancy, no doubt, arose from a concern that joint custody, meaning joint decision-making, was only effective if both parties were willing to participate in the process.
> >
> > That position has been modified. Courts now are prepared to impose joint custody unilaterally where one parent protests but where the evidence shows the parties have, in the past, been able to put aside their personal differences to make co-operative decisions about their children. Almost every case where joint custody has been ordered arises from a situation where the parties once agreed to joint custody and parented on that basis for some time before one of them applied to set aside or vary this arrangement.

> Therefore, where there is no history of effective joint decision-making, post-separation, the court must examine the evidence to decide if it reveals a couple with the maturity, self-control, ability, will, and communication skills to make proper joint decisions about their children. If it does not, it would not be in the best interests of the children to order joint custody.

[9] There has been no history of "effective joint decision-making" between the applicant and the respondent. The applicant has kept the respondent informed to some degree of the progress and status of their child with respect to education and health. The respondent has periodically protested against the applicant unilaterally making decisions when they were unable to agree. To her credit, the applicant has provided the respondent with information and sought his input. The evidence at trial shows that there is substantial conflict between the applicant and respondent when it comes to attempting to make joint decisions about their daughter. I do not see joint custody as a viable alternative at this stage in the child's life.

[10] Although the Court finds that both the applicant and respondent are capable of providing a loving and warm environment for the child, the fact remains that the applicant mother has raised the child essentially on her own with the assistance of her parents. The child has established roots in Inuvik. Her school and her friends are in Inuvik.

[11] To grant sole custody to the respondent would require a disruption in this *status quo*. To be fair to the respondent, in his testimony at the hearing, he stated that it was not his intention to move the child from her home, school and friends in Inuvik, but that he wanted more control in the decision making regarding his child and that he wanted to be able to pick up his child whenever he wanted to see her, whether the applicant agreed or not.

[12] Given my comments about joint custody and given the parties agreement that it is in the best interests of the child for her to maintain the *status quo* in Inuvik, the only viable custodial arrangement is for the applicant to have sole custody with liberal and generous access to the applicant.

[13] The respondent's desire to spend more time with his daughter and to be more involved in her upbringing is a reasonable request. But giving the applicant day-to-day care and control of the child in Inuvik and also allowing the respondent to exercise access without consideration of the applicant is unworkable and not in the child's best interest. Access to the child by the respondent will have to be with consent of the applicant and if the respondent feels that this consent is being

withheld unreasonably, then explicit terms of access will have to be ordered by the Court

[14] Accordingly, the applicant is granted sole custody of the child. The respondent shall be granted reasonable and generous access to the child at the respondent's expense. If the parties are unable to agree on the terms of this access, then either one may apply to the Court for an Order specifying the terms of access. The applicant shall provide the respondent with information about the child's health and schooling on an ongoing basis and shall consult with the respondent prior to making major decisions about the child in this regard. To be clear, however, the applicant shall have the final decision making ability.

C. CHILD SUPPORT – THE LEGISLATIVE CONTEXT

[15] The applicant is seeking a final order with respect to monthly support payments for the child. An interim order was made by this Court on March 5, 2010, in the amount $454 per month. The applicant wishes to have the amount of $454 per month revised upwards given the evidence with respect to the respondent's income that came out at the hearing. She also wishes child support for a period prior to March 5, 2010.

[16] Before deciding on the issue of the quantum of child support and whether it should be paid retroactively, it is necessary to review the legal requirements for child support in this situation.

[17] It is an established tradition of Canadian law that from the day a child is born, each of the parents of a child are responsible for the support of that child. This support obligation is triggered by the birth of the child and not by some other event such as notice of a court application for child support. The obligation goes beyond having to provide for the "necessaries of life". A history of this obligation is set out by Mr. Justice Bastarache in *D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra,* [2006] 2 S.C.R. 231 [paragraphs 35 to 42].

[18] Mr. Justice Bastarache states the basic principles of the current child support regime as follows:

> [38] The contemporary approach to child support was delineated by Kelly, J.A. in *Paras v. Paras,* [1971] 1 O.R. 130. In that case, the Ontario Court of Appeal established a set of core principles that has been endorsed by this Court in the past and continues to apply to the child support regime today: see *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Willick v. Willick*, [1994] 3 S.C.R. 670. These core principles animate the support

> obligations that parents have towards their children. They include: child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent.

[19] Although these principles are stated in the context of a marriage (subject to federal jurisdiction), the principles are equally applicable to a common-law relationship (subject to Territorial jurisdiction). In a situation where the parents did not live together at all and the child was a result of a brief union, the principles are also applicable except, of course, the principle which states that a child's standard of living should be the same after his/her parents' breakup as before.

[20] As a result of the *Guidelines* being introduced on May 1, 1997, and the *Children's Law Act (*which adopted the *Guidelines*) coming into force on November 1, 1998, the amount of this support obligation is determined by the *Guidelines* and is based not on the needs of the child, but rather, the income of the payor parent.

[21] The inherent obligation of the parent to support his/her child is codified in section 58 of the *Act*:

> 58. A parent has an obligation to provide support for his or her child where the parent is capable of doing so.

[22] Child support, then, is a right of the child and an obligation of each parent. It exists in the common law and under the *Act*. A court order is not required for this obligation to exist. On the other hand, this child support obligation may remain unfulfilled. Where a child support obligation is not being fulfilled, an application must be made to the Court to have this obligation enforced. The power of the Territorial Court to make this order is contained in section 59 of the *Act:*

> 59. (1) A court may, on application, order a parent to provide support for his or her child and determine the amount and duration of such support.

D. PROSPECTIVE CHILD SUPPORT

[23] Given that the obligation to pay child support by the respondent exists, what should the amount of this support be?

[24] The Court was advised that from September 5, 2006, the respondent has been employed as an Apprentice Heavy Equipment Mechanic with the Hamlet of

Tuktoyaktuk. His hourly rate is $25.39 and he receives a bi-weekly Northern Allowance of $615.38. Hence his gross income is $65,510.38 and the guideline amount is $608 / month.

[25] With respect to child support in the future, the respondent is ordered to pay $608 / month beginning on October 5, 2010. As will be noted below, there will be additional payments representing the difference between the $454 per month that was ordered in March and the current monthly amount of $608, a difference of $154 per month.

E. RETROACTIVE CHILD SUPPORT

[26] Should the respondent, Warren Steen, be ordered to pay a sum of money to the applicant because he did not make regular child support payments from the time when the child was born (December 27, 2002) to the time that he was ordered to make his first regular child support payment (March 5, 2010)? If the answer is yes, what should the amount of this support be?

[27] Subsection 60(1)(e) of the *Act* empowers the Court to order payment of an unfulfilled support obligation which arose prior to the application date (i.e., an order for retroactive child support):

> 60. (1) In an application under section 59, the court may, in accordance with any guidelines that may be made under subsection 85(1) or (2), make an order
>
> > (e) requiring that support be paid in respect of any period before the date of the order.

[28] In *D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra,* the Supreme Court of Canada set out the following factors as relevant in deciding whether or not a retroactive child support order should be made:

(a) Reasonable excuse for why support was not sought earlier;
(b) Conduct of the payor parent;
(c) Circumstances of the child;
(d) Hardship occasioned by a retroactive award.

[29] I will review each of these factors in the context of the application before the Court.

[30] With respect to the timing of the application and the "reasonable excuse" factor, it is noteworthy that the applicant waited until the child was almost seven years old before making the application for child support. In her affidavit and at trial, the applicant gave no reason for this delay.

[31] The Court is aware that the applicant has asked the respondent to support the child since she was born and that, to some degree, the applicant has contributed financially to her upbringing. To a large degree, the applicant's parents have been involved in the support of the child. The applicant testified that she does not think that she could have survived the last seven years without the help from her parents.

[32] Based on the testimony of the applicant and the respondent, I am of the impression that the issue of support was always a live issue between the parties. The respondent did not pay more because he felt that he was not being provided sufficient access to the child. The applicant did not push the issue of financial support from the respondent because she was receiving support, both financial and childcare, from her parents. She may have also thought if the respondent was ordered to provide financial support, he may have wanted a larger role in the child's upbringing. This *status quo* existed for seven years.

[33] The Supreme Court in *D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra* stated that:

> "the circumstances that surround a recipient's choice . . . not to apply for support earlier will be crucial in determining whether a retroactive award is justified. . . a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply."

[34] There appears to be no reasonable excuse for the applicant to have delayed for seven years before applying for child support. The respondent had made his position with respect to child support clear and this appears to have been accepted by the applicant. Any deficit resulting from the failure of the respondent to provide financial support for the child appears to have been made up by the applicant's parents. By this, I mean that her parents provided shelter, child care, food and financial assistance.

[35] With respect to the second factor, i.e., the conduct of the respondent, there was no valid justification for his refusal to pay child support. The obligation of a parent to support his child is not tied to how much access he is provided. At trial, the respondent stated that if the applicant wanted to take the sole responsibility for raising the child, then she should have the sole responsibility for financial support.

He also acknowledged, "Deep inside I feel that way, but maybe that would be wrong."

[36] Although I find that the respondent was wrong in his assessment of his support obligation, I do not find that he engaged in "blameworthy conduct" as that term is developed in *D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*. The respondent did not hide his income from the applicant or mislead her. His position was made clear to her right from the birth of the child. Although, the respondent was slow in providing financial information to the Court in the course of the applicant's application for child support, this is not a type of behaviour that is relevant for the purposes of determining whether or not a retroactive award should be made.

[37] The third factor to be assessed when determining whether or not a retroactive award should be made requires an examination of the circumstances of the child. As stated earlier, it appears that the applicant's parents were extraordinary in supporting both their daughter and their granddaughter for the seven years when the respondent was refusing to pay. Although this was a hardship to the applicant's parents, it meant that there was less of a hardship suffered by the child as a result of the respondent's unfulfilled obligation.

[38] The final factor is the degree of hardship, if any, that a retroactive award would impose on the respondent. In this situation, the respondent has very little day to day expenses. He lives with his sister in Tuktoyaktuk and has no specific obligations with respect to rent, utilities, food and housing. There has been no disclosure with respect to his accumulated assets; however, even in the absence of savings which could be used to pay a retroactive award, he has sufficient income and lack of expenses so that a reasonable retroactive award could be paid without undue hardship.

[39] In examining these four factors, there is no factor that trumps the other three. Furthermore, there is no presumption that retroactive child support should or should not be paid. A summary of the interaction of these factors is as follows: If a retroactive child support order is made, the Court is reaching back in time and altering the *status quo* that was present between the parties. There is no reasonable excuse for the applicant's delay in applying to the Court. On the other hand, the respondent's position of refusing to pay because he did not have custody of the custody is unreasonable and he has the current ability to pay retroactive child support. Finally, the applicant's parents seem to have stepped up to plate with respect to the deficiencies in the respondent's child support obligations and therefore mitigated any hardship suffered by the child.

[40] Having balanced these factors, I feel that an order of retroactive child support is warranted. However, an order that extends back to the birth of the child would be unduly harsh to the respondent and is not warranted given the other factors. Given my finding that the respondent did not engage in blameworthy conduct, I adopt the three year limitation suggested in *D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra* and order that retroactive child support be paid from December 7, 2006, being three years prior to the return date on the Originating Notice, to the first interim payment on March 5, 2010.

[41] I recognize that the three year rule is somewhat arbitrary and was not adopted by Madam Justice Abella in her concurring reasons in *D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*. The justification for this time limitation in the majority decision is based on section 25(1)(a) of the *Guidelines* which limits a parent's request for historical income information to three years. This limitation is also in section 21 of the *Child Support Guidelines* made pursuant to the *Children's Law Act*. In my view, the three year limitation in the case at bar represents a reasonable balance between the respondent's failure to contribute to the child's support in an amount appropriate to the *Guidelines* since the child was born and the applicant's decision not to pursue child support until December 7, 2009.

[42] As stated earlier, the respondent is employed as an Apprentice Heavy Equipment Mechanic with the Hamlet of Tuktoyaktuk. From September 5, 2006 to February, 2009, he was paid $19.74 per hour and a Northern Allowance of $323.08 every two weeks. This works out to a gross income of $46,893.08 per year and an amount pursuant to the *Child Support Guidelines* (the "guideline amount") of $429 / month.

[43] From February 2009 to August of 2009, he was paid $25.39 per hour with the same Northern Allowance. His gross income was $57,910.58 per year and the guideline amount was $535 / month

[44] Finally, from August of 2009 to the present, his hourly rate stayed the same but the Northern Allowance increased to $615.38. Hence the gross income was $65,510.38 and the guideline amount was $608 / month.

[45] The total retroactive award, then, is as follows:

December 7, 2006 to February 7, 2009 (26 months x $429 / month)	$11,154.
February 7, 2009 to August 7, 2009 (6 months x $535 / month)	$3,210.
August 7, 2009 to March 5, 2010 (7 months x $608 / month)	$4,256.
Total:	$18,620.

[46] The Court was advised that the respondent started making payments of $500 per month in August of 2009. He missed February 2010, and then started making regular payments of $454 with the interim order of this Court. These payments, prior to March 5, 2010 add up to $3,000 which should be deducted from the total, leaving $15,620. This amount shall be paid out over six years at a rate of $216.95 / month beginning on October 5, 2010. The $6,500 that was paid between the date when the child was born and December 4, 2009 shall not be applied to the retroactive total.

[47] At the time the interim order of this Court was granted on March 5, 2010, the respondent had not provided full disclosure of his income. The Court is aware that the proper guideline amount is $608 / month rather than the $454 / month that was ordered. This is a deficient of $154 / month or $1,078 on the 7 payments between March 5, 2010 and September 5, 2010, inclusive. This amount shall be paid out over 12 months beginning on October 5, 2010.

[48] In summary, with respect to child support, the Court orders as follows:

(a) Beginning on October 5, 2010, and continuing on the 5th day of each and every month thereafter until the child is no longer a "child" pursuant to the *Act*, or until further order of this Court, the respondent shall pay monthly payments of $608, representing child support pursuant to the guidelines;

(b) In addition to the above and for the twelve (12) monthly payments beginning on October 5, 2010, the respondent shall pay an additional monthly payment of $81.84, representing retroactive child support payments since March 5, 2010; and

(c) In addition to the above and for the seventy-two (72) monthly payments beginning on October 5, 2010, the respondent shall pay an additional monthly payment of $216.95, representing retroactive child support payments prior to March 5, 2010.

[49] Each of the parties shall bear his or her own costs of these proceedings.

[50] Counsel for the applicant shall prepare and submit the formal order on this matter. The applicant shall serve the respondent with a copy of the formal order. Service may be by registered mail.

Garth Malakoe
J.T.C.

Dated at Yellowknife, Northwest Territories, this 24th day of September, 2010.

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