IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HAZEL OOTOOWAK

Applicant

- and -

NECO TOWTONGIE

Respondent

REASONS FOR JUDGMENT

of the

HONOURABLE JUDGE B. E. SCHMALTZ

Heard at: Yellowknife, Northwest Territories
August 20, 2012

Reasons: December 3, 2012

No one appearing for the Applicant

Counsel for the Respondent: M. Nightingale

Appearing for the Designated Authority: E. Delaney

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I. INTRODUCTION

[1] On January 11th, 2012, Hazel Ootoowak, the Applicant, filed a *Support Application* for her two children. Neco Towtongie, the Respondent, filed *Respondent's Answer to Application* on February 21st, 2012. The Application was heard on August 20th, 2012, after which I reserved my decision.

[2] The Applicant seeks: a declaration that the Respondent is the father of I.E.K.O. and T.P.J.O., twins born September 17th, 2008 (the Children); an order that the Respondent pay child support in accordance with the *Child Support Guidelines, N.W.T. Reg. 138-98* (the *Guidelines*) and a portion of child care expenses; and, an order that the Respondent obtain and maintain medical and dental insurance coverage for the Children.

[3] The Respondent claims that an order requiring him to pay child support in accordance with the *Guidelines* would result in an undue hardship on him and his

current family, as he has a legal duty to support his two other children, as well as a third child that he and his wife were expecting this past July.

[4] The Respondent accepts that he is the father of the Children, such having been confirmed by DNA testing.

[5] I have reviewed the information provided by both the Applicant and the Respondent, and I have considered the "Chambers Brief of the Respondent" and the calculations contained at Tabs 2 and 3 therein. The Applicant did not appear personally on the Application, but Counsel from the Maintenance Enforcement Program appeared on the Application as a friend of the court.

II. FACTS

[6] The Respondent has been in a common law relationship since 1997, and at the time of the hearing had two children from that relationship aged 10 and 13; the Respondent and his partner were expecting their third child in July of this year. The Respondent and his partner had separated for a few months in 2008; during that separation the Respondent and the Applicant were in a relationship during which the Applicant became pregnant, giving birth to twins on September 17th, 2008. After the Respondent's and the Applicant's relationship ended, the Respondent reunited with his common law partner, and was still in that relationship at the time of this hearing.

[7] The Applicant told the Respondent "a few times" that she was pregnant before the birth of the Children. The Respondent told the Applicant that he did not want to raise a family with her and he could not afford more children.

[8] The Respondent did not have contact with the Applicant between June 2008 and September 2011. The Respondent states in his affidavit that "[s]ince the twins were born, I have heard from other people that Hazel has said I am the twins' father." In October 2011, the Respondent contacted the Applicant and told her he wanted DNA

testing done and that he "would accept" the Children as his if the test was positive. The Respondent says in his Affidavit: "We did not talk about child support."

[9] The Respondent states in his Affidavit that he "learned in about November 2011" that he is the twins' father.

[10] The Respondent acknowledges that he has an obligation to pay child support for the Children. The Applicant states in her Affidavit sworn September 16th, 2011, that the Respondent has never provided support for the Children.

[11] The Respondent's income for 2011was $143,056.00. In his *Answer to Application*, the Respondent states his partner's income is $74,357 per annum, and that his partner pays for about 35% of the household expenses.

[12] The Applicant's annual income for 2010 was $110,457. The Children live with the Applicant in Nunavut. The Applicant pays $1,200 per month for child care for the Children, and $40.03 per month for medical/dental insurance premiums for the Children.

III. RESPONDENT'S CLAIM OF UNDUE HARDSHIP

[13] Pursuant to s. 12 of the *Guidelines*, the Respondent made an undue hardship application, and asks that the amount of child support he is required to pay pursuant to the *Guidelines* be reduced. The hardship factor the Respondent relies upon is his legal obligation to support his current spouse and their two children[1].

[14] The Respondent submits that he has a high level of debt and simply put, he cannot afford to pay the *Guideline* amount of child support for the Children, that being $2,035.00 per month. The Respondent has provided a summary of his monthly expenses indicating that he spends $13,820.65 per month, as well as some supporting

[1] The Respondent's partner was expecting their third child in July 2012.

documentation. The Respondent submits he had this level of debt before the obligation to support the Children arose, and there are no expenses he can cut, there is no extra money to support the Children, and to require him to support the Children in accordance with the *Guidelines* would result in an undue hardship to him and his current family.

[15] I have some difficulty with the some of the monthly expenses the Respondent claims:

a) The Respondent lists his "Rent or mortgage" expense on his primary residence as $3,814 per month; attached to his Affidavit is his mortgage statement for his primary residence indicating total bi-weekly payments of $1,156.93, which would be $2,506.68 per month.

b) The Respondent lists a monthly expense of $400 for his RBC Personal Line of Credit. It is not clear to me how this amount is arrived at, as the supporting documentation relating to this item indicates two interest payments totaling less than $100; I recognize the principle will have to be paid, but it is not clear how or when it will be paid off, and if it is paid, why this would be a monthly expense.

c) The Respondent lists a monthly expense of $737 for his CIBC Personal Line of Credit. Supporting documentation does indicate a minimum payment due of $736.87. The documentation also indicates that the CIBC Personal Line of Credit increased by close to $8,000 in January 2012.

d) The Respondent lists a monthly expense of $1,000 to VISA; the supporting documentation indicates a payment was made of $13,900 during the January [2012] statement period. I am not clear as to why the Respondent indicates that he has a VISA expense of $1,000 per month; the minimum payment due on the January statement is $372. Further, the Visa statement submitted indicates a $13,900 payment in January as well as purchases of $23,115. The Respondent has not explained how he was able to make $13,900 payment, nor has he indicated what was purchased for over $23,000 in January.

[16] The Respondent states in his Affidavit (Paragraph 19):

> Juanita and I own our home together and are jointly responsible for the mortgage. I have always been responsible to pay for the mortgage because I earn much more than she does and I don't believe Juanita has much income left at the end of the day.

If the Respondent's partner paid 35% of the "Rent or mortgage" expense, that would leave the Respondent with a "Rent or mortgage" expense of $1,629.34 per month. I accept that the respondent makes approximately twice as much as his partner, and that his partner pays approximately 35% of the family's household expenses. I do not understand why the Respondent would have to be responsible for 100% of the "Rent or mortgage" expense.

[17] The Respondent owns a rental property in Rankin Inlet, Nunavut, valued at $200,000., with a mortgage of $131,000.

[18] Section 12 of the *Guidelines* states:

> 12(1) A court may, on application, award an amount of support that is different from the amount determined under any of sections 4 to 7, 10 or 11 where the court finds that a parent of the child in respect of whom the application is made, or the child in respect of whom the application is made, would otherwise suffer undue hardship.
>
> (2) Circumstances that may cause a parent or child to suffer undue hardship include the following:
>
> …
>
> (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
>
> …

[19] In order to find that the Respondent would suffer undue hardship if he were ordered to pay support in accordance with the *Guidelines*, the Respondent must prove specific facts to establish the undue hardship. If undue hardship is established, then the Respondent must show that his household would enjoy a lower standard of living than the Applicant's household if the child support were not reduced.

[20] Undue hardship does not mean some hardship or any hardship. As the Alberta Court of Appeal said in *Hanmore* v. *Hanmore*, [2000] A.J. 171 (C.A.):

> The objectives of the Guidelines are set out in s. 1. The primary objectives are "to establish a fair standard of support for children that will ensure that they continue to benefit from the financial means of both spouses after separation",

> and "to ensure consistent treatment of spouses and children who are in similar circumstances". Such objectives will be defeated if the Courts adopt a broad definition of "undue hardship" or if such applications become the norm rather than applying to exceptional circumstances. That has been the consistent message of the Courts since the Guidelines came into force.
> …
> … [T]he burden of establishing a claim of undue hardship is a heavy one… The hardship must be more than awkward or inconvenient. It must be exceptional, excessive, or disproportionate in the circumstances. … [I]t is not sufficient that the payor spouse has obligations to a new family or has a lower household standard of living than the payee spouse. The applicant must *specifically identify the hardship which is said to be undue*. A general claim regarding an inability to pay or a generic reference to the overall expense of a new household will not suffice. (at paras. 10 & 17) [my emphasis]

[21] The Court in *Hanmore* referred to several cases that had considered the issue of undue hardship. In *Sampson* v. *Sampson*, [1998] A.J. No. 1214 (Q.B.), Veit, J. stated:

> The guidelines anticipate that a person who asks to be relieved from paying the table amount must first identify the hardship and the court must accept that, in that case there was an undue hardship. A general claim – of the type "I can't afford to pay this amount" – will not usually qualify as a hardship event because the guidelines set their own standard about when parents must provide financial support for their children; …

In *Newman* v. *Bogan*, [2010] N.W.T.J. No. 63 (S.C.) Vertes, J. stated:

> … [A]n applicant who seeks a reduction on grounds of undue hardship must satisfy a two stage test. The first stage requires the applicant to prove specific facts establishing the undue hardship. Section 12(2) sets out a non-exhaustive list of circumstances that may (and I emphasize <u>may</u>, not must) give rise to such a claim. …
>
> This is a very stringent test. The objectives of the Guidelines, as set out in s. 1, are "to establish a fair standard of support for children that ensures that they benefit from the financial means of each parent" and "to ensure consistent treatment of parents and children who are in similar circumstances". Such objectives would be defeated if the courts apply a broad definition of "undue hardship" or if such applications become the norm rather than applying only to exceptional circumstances. [emphasis in original]

In *Messier* v. *Baines*, [1997] S.J. No. 627 (U.F.C.) Wright, J. stated:

> … Second families, and the associated legal duty to support a child of that family, are not uncommon. The assumption of such new obligations may by necessity create a certain degree of economic hardship. That hardship is not however necessarily "undue". Similarly, the mere fact that an applicant's

> household standard of living is lower than that of the other spouse, due in part to the applicant's legal duty to another child, does not automatically create circumstances of undue hardship.

[22] In *Messier*, Wright, J. refers to the assumption of "new obligations". I realize that in this case, the Respondent has not assumed new obligations, but conversely returned to his earlier situation, however the reasoning is similar. The Respondent's obligation to support the Children will by necessity create a certain degree of economic hardship to his 'current' family, but that does not automatically lead to the conclusion that the hardship is undue.

[23] The threshold for establishing "undue hardship" is a high one. The term means hardship that is *exceptional*, *excessive*, or *disproportionate* in the circumstances. Again, the threshold is not met by the Respondent showing <u>some</u> hardship. The question is whether it is undue. *Campbell* v. *Chappel*, [2002] N.W.T.J. No. 96, para. 8.

[24] From reviewing the information provided by the Respondent in this case, whereas the Respondent may suffer some hardship if he were required to pay child support in accordance with the *Guidelines*, I find that that the Respondent would not suffer undue hardship if he were ordered to pay child support in accordance with the *Guidelines*.

[25] Whereas the Respondent has a legal obligation to support the children of his current family, the Respondent's partner also has a legal obligation to support those children.

[26] The Respondent lists RRSPs valued at $11,893, and a house in Rankin Inlet valued at $200,000 in which he has equity of $69,000 as some of his assets. One of the debts the Respondent lists is $18,000 owing to VISA, of which there appears to be over $23,000 in purchases in January alone of this year – there is no explanation as to what the Respondent spent over $23,000 on this past January.

[27] It may be a hardship for the Respondent to pay child support for the Children. However, I find that some of that hardship is due to the financial choices or decisions that the Respondent has made; these choices or decisions may well be reconsidered by the Respondent's family in order to meet the obligations he also has to his and the Applicant's Children. The Respondent would not suffer *undue* hardship or hardship that could not be overcome if he were ordered to pay child support in accordance with the *Guidelines*.

IV. CHILD SUPPORT AND EXTRAORDINARY EXPENSES

[28] Section 4(1) of the *Guidelines* states:

> 4(1) Unless these guidelines provide otherwise, the amount of support for a child who is a minor or for children who are minors is
>
> (a) the amount set out in the applicable table, according to the number of minor children to whom the order will relate and the income of the parent from whom support is sought; and
>
> (b) the amount, if any, determined under section 9.

[29] Section 9 of the *Guidelines* sets out the circumstances in which the Court may include in a child support order a provision to cover special or extraordinary expenses. Section 9(1)(a) lists child care expenses incurred as a result of employment … of the person who has lawful custody of the child. I accept that the Applicant has childcare expenses of $1,200.00 per month; in accordance with s. 9(2) and 9(3) of the *Guidelines*, the Respondent is responsible for half of this expense being $600.00 per month, as well as half the cost of medical/dental insurance for the Children being $20.00 per month.

[30] The *Federal Child Support Amounts: Simplified Tables Northwest Territories*[2] sets out child support of $2,035.00 per month for two children, based on an annual income of $143,056.00.

[2] The Applicant has attached the Northwest Territories Tables to her Application, and I therefore infer that is the Legal Authority on which her Application is based. If the Nunavut Table was used, the *Guideline* table amount support for two children would be slightly higher.

[31] As I have found that ordering the Respondent to pay child support in accordance with the *Guidelines* would not result in undue hardship to the Respondent, the Respondent is ordered to pay child support to the Applicant in the amount of $2035.00 per month plus $600.00 per month towards the cost of child care, and $20.00 per month towards the cost of medical/dental insurance premiums for the Children, for a total of $2,655.00 per month, commencing December 15th, 2012.

[32] The Respondent shall provide to the Applicant on or before June 30th, 2013, and June 30th of every year thereafter, a copy of his Canada Revenue Agency Notice of Assessment for the preceding tax year.

V. RETROACTIVE SUPPORT

[33] The Applicant has requested child support starting as of September 17th, 2008. Pursuant to s. 13(2) of the *Interjurisdictional Support Orders Act*, the Court can make a retroactive support order.

[34] Every parent has an obligation to support his or her children; the obligation exists independently of any court action. It arises when a child is born. Non-payment of child support equals deprivation to the child, and requires the parent who has not met his or her financial obligation to his or her children to make up amounts not previously paid. This is necessary to compensate the deprived party, the Applicant in this case, who has born the financial responsibility to support the Children to this point.

[35] It is not necessary that the Respondent have notice of an intention to pursue child support. Requiring notice as a prerequisite to ordering a retroactive award does not support, and may indeed undermine several of the objectives of the *Guidelines*, and overlook the nature of the financial obligations imposed under them. To require notice of an intention to pursue child support may also shift responsibility to the custodial parent who has little or no information, and delays fulfillment of a parent's obligation to

the intended beneficiary, the child. The Respondent had, and has, an obligation to support his children – that obligation exists regardless of notice.

[36] It should not be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent, the Respondent, chose to bring that unpredictability upon himself.

[37] I have to also consider the circumstances that surround the Applicant's choice (if it was indeed a voluntary and informed one) not to apply for support earlier, and the reasons, if any, for not seeking child support sooner when determining if a retroactive award is justified. The Respondent says he told the Applicant in the early stages of her pregnancy that he "already had a family [he] was responsible for and [he] could not afford more children."

[38] It is not clear to me why the Applicant did not seek child support at an earlier time; perhaps the comment by the Respondent that he could "not afford more children" influenced her decision, or she may have feared he would react vindictively, or perhaps initially she did not want the Respondent's help, even financially, in raising the Children. It may also be the case that the Applicant lacked the financial or emotional means to bring an application. It is unfortunate that an application for child support was not brought until after the Children were three years old.

[39] In considering the issue of retroactive support I also have to consider the conduct of the Respondent. When the Applicant told the Respondent that she was pregnant he told her he did not want a family with her and that he could not afford more children. He says in his Affidavit "I always thought that when she continued her pregnancy she had decided to raise them on her own and did not want or need any help or support from me." He also concedes that "[s]ince the twins were born, I have heard from other people that Hazel has said I am the twins' father." Before the Children were born, he also heard that from the Applicant. The Respondent may have done nothing active to

avoid his obligation to support the Children, but in choosing to ignore his obligations, he may have still been acting in a blameworthy manner.

[40] As I have said, it is unfortunate that the Applicant did not bring this Application earlier; on the other hand, one might have hoped that the Respondent would have had a more responsible attitude towards his financial obligations to his children; his behaviour and attitude are callous at best. On the other hand, recipient parents must act promptly and responsibly in ensuring that children are supported as they are entitled to be, that is by both parents. Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of both parents to fulfill their obligations to their children.

[41] There is no evidence before me as to any specific hardships the Children may have suffered in the past. I do not mean to imply that retroactive support should be considered on a "needs" basis, but if a child has suffered hardship in the past it may be appropriate to compensate the child for an unfortunate situation as much as can be done, through a retroactive support order.

[42] Hardship must also be considered in determining whether or not retroactive support should be ordered. Though I have found that supporting the Children in line with the *Guidelines* would not cause the Respondent undue hardship, hardship in a broader sense must be considered again in determining whether a retroactive award is justified. The Respondent has a family and obligations to meet with respect to them; a retroactive award may cause hardship to the Respondent's other children.

[43] This is a very difficult issue that may well not be resolved in a manner that seems fair to both sides – it is difficult to order a retroactive award that would cause a prospective hardship to the Respondent's other children. At the same time it may well seem unfair that the Respondent is not ordered to compensate for his complete lack of support of the Children since they were born.

[44] Many factors go into the balance in considering a whether a retroactive award is appropriate, and if one is, I have to attempt to craft the retroactive award in a way that minimizes hardship.

[45] I do find that a retroactive award is appropriate. In a perfect world the Respondent would have supported the Children, at least financially, from the day they were born. He did not. But to order him to pay the full support that he should have paid for the Children by way of retroactive support order would cause a hardship to his other children. The Respondent asks that he be ordered to pay support from November 2011, that is the time that the fact that he was the father of the Children was confirmed by DNA testing. The Applicant filed this Application on January 11th, 2012, and the Respondent was served with it on January 20th, 2012, that being the date of formal notice to the Respondent.

[46] As a general rule, the date of effective notice should be the date that retroactive support is ordered from. As I have found that to require the Respondent to pay retroactive support from the date the Children were born would cause a hardship to his other children, the Respondent will be ordered to pay support for the Children from November 2011, the date when the fact that he was the Children's father was confirmed through DNA testing.

[47] Retroactive support is set at $34,449.00[3] less any payments made pursuant to the interim order I made on August 20th, 2012.

VI. CONCLUSION:

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[48] The Respondent is the father of the Children I.E.K.O. and T.P.J.O., twins born September 17th, 2008. The Respondent is to pay to the Applicant support for the

[3] Monthly payments of $2,622 ($2,002 + $600 + $20) from November 2011 to December 2011, plus monthly payments of $2,655 from January 2012 to November 2012 ([2 x $2,622] + [11 x $2,655] = $34,449.00)

Children in the amount of $2,655.00[4] per month, commencing on or before December 15th, 2012, and on or before the 15th day of each month thereafter; the Respondent is to pay the Applicant at least an additional $600.00 per month towards arrears on or before December 15th, 2012, and on or before the 15th day of each month thereafter for the next 4 years, and 10 months, or until the Respondent has paid all child support arrears as arrived at above.

[49] Further the Respondent is to provide the Applicant with a copy of his Canada Revenue Agency Notice of Assessment in relation to the 2012 taxation year, on or before June 30th, 2013, and similarly on or before June 30th, each year thereafter; and, the Applicant is to provide the Respondent with a copy of receipts in support of costs incurred in 2012 for child care for the Children, on or before January 31st, 2013, and similarly on or before January 31st each year thereafter.

[50] I ask that Counsel for the Designated Authority prepare and submit the formal order.

[51] In all of the circumstances, there will be no order as to costs.

Bernadette Schmaltz
J.T.C.

Dated this 3rd day of December, 2012, at
the City of Yellowknife, Northwest Territories

[4] Child Support per the Guidelines in the amount of $2,035.00 per month, plus $600.00 per month towards the cost of child care for the Children, plus $20.00 per month towards the cost of dental/medical insurance for the Children.

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Date: 2012 12 03
File: T-1-FM-2012000001

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