*Grace Gardiner v. Allan Sibbeston Jr.,* 2015 NWTTC 23

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Date: 2015 12 04

File: T2-ME-1999 000164

## **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:**

## **GRACE GARDINER**

Applicant

**- and -**

**ALLAN SIBBESTON JR.**

Respondent

**REASONS FOR DECISION**

**of the**

**HONOURABLE JUDGE GARTH MALAKOE**

#### Heard at: Yellowknife, Northwest Territories

July 8, 2015

Date of Decision: December 4, 2015

Counsel for the Applicant: Trisha Paradis

Counsel for the Respondent: D. Jane Olson

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1. INTRODUCTION AND BACKGROUND
   1. Issues
      1. The Applicant mother, Grace Gardiner, seeks a variation of the Order of this Court made January 14, 2000 (the “Original Order”). In that Order, the Respondent father, Allan Sibbeston Jr. was ordered to pay child support in the amount of $144.00 per month, commencing on January 1, 2000. The child support is for their son T.G. who was born on December 31, 1997 and who is now 17 years old. The mother and father have lived separate and apart since before the birth of their son. The Applicant has been the child’s sole caregiver since his birth and the Respondent has had a limited presence in the child’s life.
      2. When the Respondent was ordered to pay $144.00 per month as child support, he was making $16,384.80 per year. Since 2000, the Respondent has obtained further training and has been employed in a series of higher paying jobs. His income has increased to the extent that in 2014, his gross employment income was $95,502. Yet, until December 8, 2014, his monthly child support payment remained at $144.00.
      3. Given his increase in income, it is clear that the Respondent should pay more than $144.00 per month in support of his child. The issues that are dealt with in this decision are as follows:
         1. What should the monthly child support payment be?
         2. Should the Respondent pay retroactive child support, and if so, in what amount?
         3. Should the Respondent pay some portion of the orthodontic expenses of his child?
         4. What financial obligation does the Respondent have for his child after the child has graduated from Grade 12?
   2. Background
      1. On November 13, 2014, the Applicant filed a Notice of Motion seeking to:
         1. Vary the amount of child support to be based on an imputed gross annual income to the Respondent of $85,000.00;
         2. Direct the Respondent to pay this increased amount of child support from November 1, 2011;
         3. Direct the Respondent to pay 50% of all non-insured orthodontic/dental expenses that have been incurred for T.G.; and
         4. Direct the Respondent to pay 50% of the post-secondary tuition expenses to be incurred by the child.
      2. On December 8, 2014, this Court made an Interim Order requiring the Respondent to pay child support of $758.00 per month, based on a gross annual income of $81,410 commencing on December 1, 2014 and requiring the Respondent to file financial disclosure.
      3. The Applicant filed affidavit material on November 13, 2014 and April 9, 2015. The Respondent filed an affidavit on April 14, 2015. A hearing was held on July 8, 2015 during which both the Applicant and the Respondent testified.
      4. The Respondent accepts that there should be an increase in the quantum of child support. According to the Respondent, his child support payment should be $734.39 per month based on an average yearly income of $78,709.67 and he should have to pay this amount beginning in September of 2014 which is when the Applicant first approached the Respondent for the increased amount.
      5. With respect to the expenses for orthodontics, the Respondent says that he is unable to afford these expenses now. Further, he asserts that if he had been allowed to be part of the child’s life, he would have ensured that T.G. had a treaty card so that such dental costs would have been covered.
      6. With respect to the expenses for post-secondary tuition, the Respondent asserts that such expenses would be covered under T.G.’s treaty rights or as a lifelong resident of the Northwest Territories through Student Financial Assistance, a program of the Government of the Northwest Territories.
      7. I will deal with these issues in the same order as indicated above. This is a proceeding under the *Children’s Law Act*, S.N.W.T. 1997, c.14, as amended (the “*Act*”). Child support is determined in accordance with the *Child Support Guidelines*, R-138-98 (the “*Guidelines”*) made under the *Act.*
      8. It should be noted that when this action was commenced, the Applicant was referred to as “Grace Graham” in the style of cause. The style of cause was amended to refer to the Applicant as “Grace Gardiner” by the Order of Judge B. E. Schmaltz on April 20, 2015.
2. MONTHLY CHILD SUPPORT
   1. Financial Status of Respondent
      1. At the time of the Original Order, the Respondent was working for the Friendship Centre at a day camp. He was making $16,384.80 a year. The child support payment of $144.00 per month was based on this amount.
      2. In 2000 or 2001, the Respondent completed a driving course; received his Class 1 driver’s licence and started driving trucks and heavy equipment for companies in Hay River. He worked for Rowe’s Construction for 4 ½ years; then Carter Industries and then, Stan Dean and Sons.
      3. On April 22, 2012, he started work for the Government of the Northwest Territories (GNWT) and has worked consistently for the GNWT since then. Currently, he is employed with the Department of Highways as a heavy equipment operator. According to his tax returns, his total income for the years 2011 to 2014 was as follows:

|  |  |
| --- | --- |
| Year | Total Income |
| 2011 | $29,778 |
| 2012 | $62,920 |
| 2013 | $81,405 |
| 2014 | $95,702 |

* + 1. The Respondent states that his base annual salary is $74,099. His earnings in 2014 were higher than normal since he was appointed acting supervisor for six months and had worked many hours of overtime as a result of the forest fire situation. He expects his 2015 income to be consistent with his 2013 income, that is, $81,405.
    2. On balance, it appears that the Respondent’s current total income for the purpose of establishing the child support payments is $81,405. Counsel agree that his union dues of $1,394.00 should be deducted which leaves net earnings of $80,011. On this basis, his child support payment pursuant to the *Guidelines* would be $746.10 per month.
    3. Given the fluctuations in his income with a general increasing trend, I am satisfied that the current payment of $758.00 per month, based on an annual income of $81,410.00 is reasonable and should be maintained.

1. RETROACTIVE CHILD SUPPORT
   1. Background
      1. When the Respondent was ordered to pay $144.00 per month child support on January 14, 2000, the Original Order was based on his then yearly income of $16,384.80. As indicated earlier, the Respondent has been employed in positions since 2000 that have gained him an income in excess of this $16,384.80 amount to the point that his 2014 income was $95,702.00.
      2. The Respondent has clearly paid much less in child support than he would have paid had his yearly child support payments been revised to reflect his increases in salary. For example, during the past five years,
         1. if the child support payments had been based on the previous year’s income (less union dues);
         2. if the income for 2010 is assumed to be the same as the 2011 income; and
         3. if the time period being examined is from January 1, 2011 to December 1, 2015;

then the additional amount that should have been paid is $17,411.20, calculated as follows:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Child Support for Year | Based on Income for Year | Actual amount earned (minus union dues) | Actual Child Support Paid | Revised Child Support Amount | Retroactive Amount Owed |
| 2011 | 2010 | $29,778 | 12 x $144 = $1,728 | 12 x $262.78 = $3,153.36 | $1,425.36 |
| 2012 | 2011 | $29,778 | 12 x $144 = $1,728 | 12 x $262.78 = $3,153.36 | $1,425.36 |
| 2013 | 2012 | $62,920 - $852 = $62,068 | 12 x $144 = $1,728 | 12 x $575.68 = $6,908.16 | $5,180.16 |
| 2014 | 2013 | $81,405 - $1,394 = $80,011 | 11 x $144 = $1,584 plus 1 x $758.00 = $2,342 | 12 x $867.43 = $10,409.16 | $8,067.16 |
| 2015 | 2014 | $95,702 - $1,652 = $94,050 | 12 x $758.00 = $9,096 | 12 x $867.43 = $10,409.16 | $1,313.16 |
|  |  |  |  |  | $17,411.20 |

* + 1. Section 61(2) of the *Children’s Law Act* gives this Court the authority to vary an existing Order with respect to both prospective and retroactive child support:

61. (2) Where the court is satisfied that evidence not available on the previous hearing has become available or that a change in circumstances as provided for in the applicable guidelines has occurred since the making of an order of support or the disposition of another application for variation in respect of the same order, the court may

(a) discharge, vary or suspend a term of the order, prospectively or retroactively;

(b) relieve the respondent from the payment of part of or all the arrears or any interest due on the arrears; and

(c) make any other order under section 60 that the court considers appropriate.

* 1. The Law Regarding Retroactive Child Support
     1. The obligation for a parent to provide adequate financial support for his or her child exists in the absence of any court order. It does not matter that the Respondent was ordered to pay only $144.00 per month. It does not matter that he was not asked by the Applicant to pay more. If his income increased such that he would have been obliged to pay more had it come before the Court, then, on the face of it, that liability for child support based on the higher income exists. The applicability of the *Act* to the situation where the parents did not live together at all and the child was a result of a brief union was discussed by this Court beginning at paragraph 19 in *Storr v. Steen*, 2010 NWTTC 11.
     2. A history of this child support 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]. The connection between the support obligation and income, which applies to the regime in the Northwest Territories, is summarized in paragraph 54 as follows:

54. In summary, then, parents have an obligation to support their children in a way that is commensurate with their income. This parental obligation, like the children’s concomitant right to support, exists independently of any statute or court order. To the extent the federal regime has eschewed a purely need-based analysis, this free-standing obligation has come to imply that the total amount of child support owed will generally fluctuate based on the payor parent’s income. Thus, under the federal scheme, a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children.

* + 1. 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.

* + 1. Before examining these factors in the context of the parties, it is necessary to review the personal circumstances of the Applicant and the Respondent.
  1. Personal Circumstances of the Parties
     1. The Applicant and Respondent began dating in 1996 but were not living together full time when the Applicant became pregnant in 1997. The relationship was terminated prior to the birth of T.G.; however, the Respondent was present for the birth. The Applicant started a relationship with V.G. in 1998 and has been with V.G. since that time except for a short period 14 years ago, when she tried to reconcile with the Respondent. The Applicant married V.G. in August of 2007.
     2. The Applicant also has a daughter, who was born on May 22, 1993. The Applicant receives child support for this daughter who is still living with her.
     3. The Applicant’s husband, V.G., has three children for whom he paid child support of $950 per month until last year. These children did not live with the Applicant and V.G.
     4. When the Applicant obtained the Original Order for child support of $144.00 / month, she was a student at Aurora Community College. She has been working as an early child care educator for the Hay River Reserve for the past 15 years.
     5. The Respondent has two children, a daughter and a son who are older than T.G. and who he has raised. Both lived with the Respondent since they were born. The Respondent and his two children lived with the Respondent’s mother. The Respondent’s mother lives in low income housing and pays rent of $80 / month. The Respondent pays for all utilities, i.e., phone, power, internet, satellite and for food.
     6. The Respondent’s daughter no longer lives with him. His son lives with the Respondent on and off. His son has been incarcerated and has been living with the Respondent since May, 2015.
  2. Requests for Financial Assistance
     1. The Applicant states that she has struggled financially with raising T.G. She has asked for financial assistance from the Respondent as indicated below. Until the summer of 2014, she was not aware that she could return to Court and have her child support payment varied. She thought that once the child support order was made, it could not be changed. Her understanding changed when she spoke to a legal aid lawyer.
     2. The Respondent states that he too, was unaware that the child support order could be varied. He does not agree that the Applicant had asked for financial assistance as she testified. Further, his financial obligations in caring for his mother and his two children did not leave him with anything left over.
     3. The Applicant states that she has asked for financial assistance with respect to specific items for T.G. on a number of occasions. These were set out in her affidavit of April 9, 2015 and she testified about some of them. She stopped asking the Respondent for assistance because she was not getting any help; because she felt she was being ignored and because the Respondent would respond with, “What do you want now woman?” which made the Applicant feel like she was harassing him.
     4. The last time the Applicant asked for help was in 2013 when T.G. required a winter jacket which was well over $300. The Respondent said he would see what he could do and invited her to call back the next day. She called back and left a message on the answering machine. She never received a response and ended up selling a set of lamps on Facebook to cover the cost of the winter jacket.
     5. On one occasion, the Respondent picked up T.G. and went and bought him shoes and brought him home.
     6. The Applicant was able to provide for T.G. by buying used clothes at the thrift shop and at garage sales. Prior to having the orthodontist work done, the Applicant asked the Respondent if he could help contribute. The Respondent did not respond.
     7. The Respondent denies that the Applicant ever asked for money for baby formula, or for a winter jacket or for braces for T.G.’s teeth. He does recall purchasing shoes and being asked to assist with a cell phone.
     8. I accept the Applicant’s testimony that she sought assistance from the Respondent during the times indicated and that she received the responses indicated which discouraged her from contacting the Respondent. I also accept the Respondent’s testimony that up until spring of 2014, the Applicant did not encourage the Respondent to have any role in T.G.’s life but rather discouraged such a role so as to not detract from the father role of her new partner.
  3. The Circumstances Relative to Deciding Retroactive Payments

**(a) Reasonable excuse for why support was not sought earlier**

* + 1. The principle that a parent is financially responsible for his or her child based on his or her income has already been discussed. This obligation exists independent of any Court order. On the other hand, a parent who is making payments pursuant to an existing Court order should have the assurance and certainty that this amount will not be changed retroactively so that he or she owes more.
    2. In this case, both the Applicant and Respondent were aware that the $144.00/month child support payment was determined at a time when the Respondent was making $16,384.80 a year. The Applicant was aware to some extent that the Respondent had improved his employment situation after 2000 and that he was making more money. I accept that the Applicant was unaware that she could apply to have the original child support Order varied until the summer of 2014.
    3. In my view, the Respondent should have been aware that the amount of his child support obligation increased as his annual salary increased. The Applicant did nothing that would lead the Respondent to believe that she did not need further support for their son. To the contrary, there were a number of requests by the Applicant to the Respondent which would have indicated that the Applicant was struggling financially with raising their son.

**(b) Conduct of the payor parent**

* + 1. To his credit, the Respondent has been making regular payments with respect to the Original Order and the Order of December 8, 2014. My impression, based on his testimony, is that the Respondent felt that the Applicant and her husband were raising T.G.; that the Respondent did not feel that he had a connection with T.G.; and that the Respondent felt his only obligation was the payments under the Original Order.
    2. I do not attribute “bad faith” to the Respondent with respect to not paying more than the $144.00 per month. He was simply ignoring the financial requests from the Applicant and not thinking about the possibility that he should be paying more as his salary increased by 500% to 600%. However, his increase in salary constituted a material change in circumstances which justified a change in child support. This was “blameworthy conduct” as the term is described in *D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra.*

**(c) Circumstances of the child**

* + 1. The Applicant did her best to raise T.G. within her financial means. The child and the Applicant suffered as a result of not receiving additional financial support from the Respondent. A retroactive award would have the effect making up for some of that deprivation.

**(d) Hardship occasioned by a retroactive award**

* + 1. The payment of a retroactive award will have a significant effect on the Respondent; however, I do not see it as a hardship. The Respondent is obliged to make utility payments at his mother’s house and feels an obligation for ongoing support of his adult son. Nonetheless, he does not have to pay for sharing accommodations at his mother’s house and his adult daughter is no longer living with him.
  1. Conclusion regarding Retroactive Support
     1. Given these factors, I will order that retroactive child support be paid for the three years prior to the return date of the Notice of Motion filed November 23, 2014. The rationale for this three year limitation is set out at paragraph 40 of *Storr v. Steen,* 2010 NWTTC 11. For ease of calculation, the retroactive child support will equal the difference between what was paid by the Respondent in the years 2012, 2013, 2014 and what should have been paid, based on his income for each of those years. From the table in section C.1 above, this amount is $14,672.68, being the sum of $1,425.36 (2012), $5,180.16 (2013) and $8,067.16 (2014).

1. ORTHODONTIC / DENTAL EXPENSES
   1. Issue
      1. In 2011, T.G. required braces which had a total cost of $7,581.51. The Applicant’s spouse’s insurance paid $3,359.13 of this amount and the Applicant paid the remaining $4,222.38 out of her pocket. She seeks re-imbursement for one-half of this amount, being $2,111.19.
      2. The Guidelines specifically identify orthodontic treatment as an extraordinary expense that the Court may order to be paid in addition to monthly child support:

9. (1) In a child support order the court may, on the application of a parent or another party to the application, provide for an amount to cover all or any portion of the following expenses, taking into account the necessity of the expense in relation to the child’s best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, if the parents lived together with the child, to the family’s spending pattern before the separation:

. . .

(c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

* + 1. The Respondent does not take issue with the need for or the amount of the orthodontic expenses. Instead, he says that T.G. should have had these expenses paid by either the federal government, if he would have obtained his treaty card, or by the insurance company, if the Respondent had put T.G. under his GNWT insurance policy.
    2. Let me first address the issue of treaty status.
  1. Treaty Status of T.G.
     1. The Applicant states that she is a member of the Hay River Dene First Nation. She has treaty status. The Respondent is Metis but does not have treaty status. The child, T.G. is a member of the Hay River Band but the Applicant has not been able to obtain treaty status for T.G. since his biological father (the Respondent) does not have treaty status.
     2. The Respondent states that he is Metis. As a result, his two older children are Metis and have certain benefits. He has not obtained Metis benefits for T.G. because he was never asked and because he thought T.G. had treaty status. The Respondent has been in the process of applying to be a member of the Hay River Dene First Nation for the past couple of years. His reason for doing this was because he was told that he could get a refund of the GST that he paid on his truck. The Respondent testified that his paperwork keeps getting sent back but he has been assured by the Chief that he will eventually receive treaty status. The Respondent is of the view that once he receives treaty status then his son will be entitled to treaty status.
  2. Conclusion Regarding Orthodontic / Dental Expenses
     1. It may very well be that these expenses would have been paid by a third party if T.G. had treaty status or was covered under the Respondent’s employer’s insurance. Now that the Respondent is aware of the issues regarding treaty status and insurance, it is in his best interest that he take the necessary steps to obtain treaty status and insurance coverage for T.G. These actions will assist with respect to future expenses.
     2. With respect to the orthodontic / dental expenses already incurred, the Respondent will pay $2,111.19 to the Applicant.

1. POST-SECONDARY TUITION EXPENSES
   * 1. T.G. is either in the process of completing or has completed grade 12. Currently, he would like to attend aviation school to learn to fly to helicopters. In any case, he will likely enroll in some form of post-secondary education.
     2. The Applicant seeks an Order that will ensure that the Respondent continues to pay child support while T.G. is going to post-secondary school and that the Respondent share any tuition expenses that are not paid by a third party, such as Student Financial Assistance or pursuant to Metis or treaty status benefits.
     3. Section 57 of the *Act* defines “child” as:

“child” means a person who

(a) is a minor and who has not withdrawn from the charge of his or her parents, or

(b) is the age of majority or over, but who is unable, by reason of illness, disability, pursuit of reasonable education or other cause, to withdraw from a parent’s charge.

* + 1. The case law is clear that since attending post-secondary education is generally in the child’s best interest, the Respondent has an obligation to contribute to child support and post-secondary education expenses. In this regard, see *Montalto v. Montalto*, 2011 ABQB 574 at paragraph 25.
    2. Further, section 9(1) of the *Guidelines* recognizes the validity of post-secondary education expenses:

9. (1) In a child support order the court may, on the application of a parent or another party to the application, provide for an amount to cover all or any portion of the following expenses . . .

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child’s particular needs;

(e) expenses for post-secondary education;

* + 1. In the Applicant’s brief, she submits, “The Applicant anticipates that the child will attend a post-secondary program and the expected costs for a post-secondary program are fairly high.” In my view, the application for child support and tuition is premature given the uncertainty of what T.G. is going to do.
    2. The law with respect to how long child support payments must be made is relatively clear. With proper legal advice, the parties should be able to resolve this on their own. Similarly, with respect to extraordinary expenses and tuition for post-secondary education, the extent of this obligation will be determined by the results of the Respondent’s efforts to obtain treaty status for T.G. and T.G.’s eligibility for treaty status or Metis benefits.
    3. If the parties are unable to come to agreement with respect to when child support payments will terminate or if the Respondent is to pay certain post-secondary expenses, one or both parties can apply to this Court.

1. CONCLUSION
   * 1. It is ordered that:
        1. The Respondent continue to pay $758.00 per month on the 1st of every month based on an annual income of $81,410.00 as set out in the Interim Order of December 8, 2014;
        2. The Respondent pay total retroactive child support in the amount of $14,672.68 to be paid by monthly payments of at least $200.00 on the 1st of every month beginning January 1, 2016 until paid off in full; and
        3. The Respondent pay the sum of $2,111.19 representing his portion of orthodontic treatment expenses to be paid by monthly payments of at least $200.00 on the 1st of every month beginning January 1, 2016 until paid off in full.
     2. Each of the parties shall bear his or her own costs of these proceedings.
     3. Counsel for the Applicant shall prepare and submit the formal order on this matter.

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|  | |  | Garth Malakoe  J.T.C. |
| Dated at Yellowknife, Northwest Territories, this 4th day of December, 2015. | |  |  |

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