SUPREME COURT OF YUKON

Citation: *M.A.B.* v. *H.I.L.*, 2010 YKSC 08

Date: 20100308
S.C. No. 01-B0057
Registry: Whitehorse

Between:

M.A.B.

Plaintiff

And

H.I.L.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Shayne Fairman — Counsel for the Plaintiff
Carrie Burbidge — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiff mother for an order that the defendant father pay interim child support for A.R. ("the child"), who turned nine years old on February 28, 2010. The mother also asks that the interim child support be made retroactive to September 2008, as that was the month in which she says she gave notice to the father of her intention to claim child support.[1]

[1] I acknowledge that the mother's counsel reserved the right to argue at trial that the retroactive award should commence prior to September 2008, when the father's income first significantly increased.

[2] In responding to this application, the father has asked me to impute income to the mother under s. 17(1)(a) of the *Yukon Child Support Guidelines*, Y.O.I.C. 2000/63, on the basis that she has been intentionally underemployed for the past several years. The father further argues that, if I were to impute income to the mother, then my determination of the child support payable in this shared custody situation, taking into account the principles set out in s. 9 of the *Yukon Child Support Guidelines*, will result in no child support payable by either parent. Although the father did not specifically file a cross-application in this regard, the mother's counsel was not opposed to these arguments being raised by way of responsive submissions.

BACKGROUND

[3] The parents were involved in a brief relationship in 2000 which led to the mother becoming pregnant with the child. The child has resided equally with the mother and the father since approximately 2003. On June 6, 2005, the parents entered into a consent order granting them joint custody of the child and shared residency on a week on/week off basis. In that order, the mother's gross annual income for 2003 was specified to be approximately $14,000 and the father's gross annual income for the same year was specified to be approximately $12,000. The order provided that, based on the income of the parties, there would be no child support payable by either, but that there was an obligation to provide income tax information within 30 days of a written request from the other party.

[4] On February 25, 2009, the parties agreed to a consent order recommending an update to the custody and access report filed April 16, 2004. According to the mother's counsel, the father is seeking to have the child reside primarily with him. That submission

was not disputed by the father's counsel. The process and interviews necessary for the update should be commencing this month, therefore, it is probable that there will be a further interim application, or even a trial, in order to resolve the issue of the child's residency.

[5] According to the mother, the 2005 consent order specified that no child support was payable by either of the parties because their respective gross incomes in 2003 were approximately equal. I would also note that they were very modest incomes at that time. This was apparently due to the fact that the father was then studying to become a journeyman electrician and the mother was then enrolled in the Yukon Native Teacher Education Program ("YNTEP") at Yukon College in Whitehorse. According to the father's fourth affidavit, he completed his certification and has been working as a journeyman for "about two years", which would mean since approximately February 2008. However, the father's financial information indicates that his income significantly increased beginning in 2006, when he earned $50,611. According to that information, his income since has been as follows:

2007 - $64,172

2008 - $75,132

2009 - $74,719

This suggests that the father has been working as a journeyman since at least 2006.

[6] The mother has deposed that the YNTEP is ordinarily a four year program, assuming a student is able to take five classes each semester. However, she further deposed that she has been unable to pursue her studies on a full-time basis for a variety

of reasons:

(a) she has been residing primarily on her own since enrolling in 2003, and has had to maintain employment while pursing her studies;

(b) she has the child with her on alternate weeks;

(c) she has attempted a heavier course load at times, but found that it was difficult to maintain a full course load and obtain a good grade point average;

(d) in November 2005, she was sexually assaulted and, on the recommendation of her doctor, she withdrew from her studies for a period of time because she was not able to cope with the aftermath of the assault and maintain her course load; and

(e) in the fall of 2008, she became pregnant with her second child, G.

[7] The mother's evidence is that she has now completed most of the YNTEP program and expects to graduate in June of this year. She deposed that she has maintained a good grade point average and, therefore, expects to find suitable employment in due course, presumably this coming September.

[8] For the same reasons stated above, the mother deposed that she has only been able to find employment in relatively low paying serving jobs at restaurants or bars, and that this has limited her ability to earn a greater amount of income over the last several years. According to her financial information, the mother's income from 2005 to 2008 was

as follows:

2005 - $21,496

2006 - $4,875

2007 - $10,508

2008 - $13,409

The mother provided no specific financial information about her income in 2009, other than to indicate that she has recently been able to find work as a substitute teacher, although she is limited by the fact that she is still breast feeding her second child, who is currently eleven months old.

ISSUES

[9] The global issues are as follows:

(1) Should I impute income to the mother?

(2) (a) Should the father pay child support going forward?

(b) What effect will an analysis under s. 9 of the *Yukon Child Support Guidelines* have upon the payment of child support?

(3) Should the father pay retroactive child support and, if so, when should that commence?

ANALYSIS

[10] This is an interim application. Accordingly, there are some factual disputes in the affidavit material filed by each party which cannot be resolved in the absence of cross-examination or a trial. However, I have made certain inferences on contentious points where I felt it was fair and reasonable to do so.

Imputation of income?

[11] Essentially, the father's argument on imputation is based on the proposition that the mother has made a choice to return to school to pursue her educational upgrading and, as a result, she has suffered a self-induced reduction of income, which is not justifiable in the circumstances. In that sense, the father's counsel submits that she has been intentionally underemployed for the last several years and has not earned what she was capable of earning.

[12] Section 17(1)(a) of the *Yukon Child Support Guidelines* states as follows:

> "17.(1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances. The circumstances to be considered include
>
> (a) the parent is intentionally under-employed or unemployed, other than where the underemployment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent;…" (my emphasis)

[13] In *Waldron* v. *Dumas*, 2004 YKSC 50, at para. 10, I paraphrased the principles to be considered when deciding whether to impute income, as discussed in a number of cases including *Donovan* v. *Donovan*, [2000] M.J. No. 407 (MBCA); *Hanson* v. *Hanson*, [1999] B.C.J. No. 2532 (BCSC); and, *Pagani* v. *Pagani*, 2000 BCSC 75:

> "1. There is a duty to seek employment where a parent is healthy and there is no reason why the parent cannot work.
> 2. The court must consider what is reasonable in the circumstances. The factors to be considered include the availability of work as well as the parent's:
>
> - age
> - education
> - experience
> - skills
> - health

- freedom to locate
- other obligations

3. A parent's limited work experience and job skills do not justify failing to pursue employment which does not require significant skills, or alternatively, employment where the necessary skills can be learned on the job. This may mean that the parent will have to take employment at the lower end of the wage scale or employment which is not in the parent's desired area.
4. A court may impute income to a parent who persists in obtaining employment which produces little or no income [presumably subject to item 3 above].
5. A parent who pursues unrealistic or unproductive career aspirations will not be excused from their child support obligations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income."

[14] In *Drygala* v. *Pauli*, [2002] 61 O.R. (3d) 711, the Ontario Court of Appeal held that there is no need to find a specific intent to evade child support obligations before income can be imputed. Rather, "intention" simply means a voluntary act, in the sense that a parent chooses to earn less than he or she is capable of earning and there is no requirement to show bad faith (paras. 25-29).

[15] The Court of Appeal in *Drygala* also held that the parent pursing the upgrading has the onus of demonstrating that their educational needs are "reasonable". At paras. 40 and 41, the Court of Appeal stated:

> "[40] But, s. 19.(1)(a) [the equivalent of s.17(1)(a) of the *Yukon Guidelines*] speaks not only to the reasonableness of the spouse's educational needs. It also dictates that the trial judge determine what is required by virtue of those educational needs. The spouse has the burden of demonstrating that unemployment or under-employment is required by virtue of his or her reasonable educational needs. How many courses must be taken and when? How much time must be devoted in and out of the classroom to ensure continuation in the program? Are the academic demands such that the spouse is excused from pursuing part-time work?

> Could the program be completed over a longer period with the spouse taking fewer courses so that the spouse could obtain part-time employment? If the rigours of the program preclude part-time employment during the regular academic school year, is summer employment reasonably expected? Can the spouse take co-operative courses as part of the program and earn some income in that way? These are the types of considerations that go into determining what level of under-employment is required by the reasonable educational needs of a spouse.
>
> [41] The burden of proof is upon the spouse pursuing education as he or she is the person with access to the requisite information. The spouse is in the best position to know the particular requirements and demands of his or her educational program. He or she will have information about the hours of study necessary to fulfill such requirements, including the appropriate preparation time. He or she is in the best position to show whether part-time employment can be reasonably obtained in light of these educational requirements." (my emphasis)

[16] Thus, as the father's counsel correctly submitted, the initial onus is upon the parent who claims the other is underemployed to show that the underemployment is voluntary. If so, the onus then shifts to the other parent to show that their underemployment is due to their reasonable educational pursuits. It was not seriously disputed that the mother's choice to pursue her educational upgrading can support an initial finding that she was "intentionally" underemployed within the meaning of s. 19(1)(a) of the *Guidelines*. The real issue is whether her underemployment has been "required by [her] reasonable educational…. needs."

[17] *Drygala*, at para. 39, says that there are two aspects to this stage of the inquiry. First, the court must consider the course of study and determine whether it is a reasonable one for the parent, because one will not be excused from child support obligations by pursing unrealistic or unproductive career aspirations. In the case at bar, I am satisfied that the teacher training program is a reasonable educational goal for the

mother, and one which will very soon provide her with a significant income and other benefits.

[18] Second, the court must determine what is required by virtue of the parent's reasonable educational needs. Here, the student-parent must demonstrate that things such as their course load, homework requirements and availability for part-time work (if any) are all reasonable in the circumstances. In this regard, the father's counsel raised four arguments in support of her proposition that the mother has been less than diligent in pursing her educational upgrading.

[19] In her first argument, the father's counsel points out that the mother cites her child care obligations as a reason why she was unable to pursue a full or greater course load than she actually did. However, the father's counsel points out that before the birth of the mother's second child on March 9, 2009, the mother only had responsibility for the child, A.R., during alternating weeks. Yet, since the birth of her second child, the mother now claims that she has been able to obtain work as a substitute teacher. This, says the father's counsel, begs the question of why the mother was unable to find such work, or its equivalent, in previous years, when she had fewer family responsibilities. I concede that I find this argument to be rather persuasive, as far as it goes.

[20] In her second argument, as I understood it, the father's counsel suggested that the mother could have completed her teacher training in four straight years, if she had made greater use of the financial assistance available to her through her First Nation, the Teslin Tlingit Counsel ("TTC"). Had she done so, the father says she would have graduated in 2007, and he provided evidence that she could have begun earning an annual income of about $57,000 as of September in that year. The father provided evidence that the TTC

could have funded the mother, as a parent with one child, in the amount $1245 per month, providing she took three courses or more in each semester. In addition, the father says that the Yukon Government would have provided a daycare subsidy, with the difference usually being picked up by TTC. The father's counsel also points to the fact that the mother admits to receiving significant financial assistance from her own mother, the maternal grandmother.

[21] However, the mother deposed that she has in fact accessed funding through the TTC in the past, but is not currently enrolled in enough courses to qualify for the assistance. She says that the reason she has not been able to maintain the minimum level of three courses per semester is because she has been caring for her newborn daughter, G., since her birth. That seems a reasonable explanation. Further, the mother indicates that she is presently receiving support through the federal Department of Indian and Northern Affairs ("DIAND"), of approximately $1500 per month. While there is no reference by the mother in her materials to daycare costs, on its face, that would seem to exceed what was available to her through the TTC. Therefore, it does not appear to be unreasonable for the mother to be making use of federal versus First Nation funding. Finally, the fact that the mother is receiving financial assistance from the maternal grandmother for things such as car payments, occasional groceries, some of A.R.'s clothing, and one half of A.R.'s gymnastics expenses, does not immediately lead to the conclusion that the mother could have pursued four consecutive uninterrupted years of full course loads. Even with the help of the maternal grandmother, it appears that the plaintiff mother was still receiving insufficient funds, whether it be from TTC or DIAND, to make ends meet, and that there was consequently a need for her to find part time

employment. In addition, the mother was caring for the child, A.R., every alternate week, which would have further taxed the time available to her to pursue her studies. Taking all of the circumstances into consideration, I remain unpersuaded that it would be reasonable to expect the mother to have completed her teacher training in four straight years.

[22] In her third argument, the father's counsel says that the mother's claim that she was under stress in trying to balance her employment with her studies, particularly after the sexual assault in December 2005, is not a "sufficient" reason for her not to have worked more. Further, the father's counsel says that the mother has produced no objective evidence that the stress that she claimed she was suffering from precluded her from working to a greater extent. In support of this proposition, the father's counsel relied on two cases, *Barker* v. *Barker*, 2005 BCCA 177, and *Bennett* v. *Stoppler*, 2003 ABQB 723, cited by me with approval in *M.P.T.* v. *R.W.T.*, 2008 YKSC 94.

[23] In *Barker*, the British Columbia Court of Appeal was dealing with an appeal by the respondent husband from a decision of the Chambers judge, which included a finding that the husband was underemployed, imputed income to him and varied his child support payments accordingly. The father was a dentist who worked from 8 a.m. to 5:30 p.m. four days per week. The Chambers judge found that the father had the capacity to work one additional day each week and did not accept the father's testimony that he worked as much as required to service the dental practice he had developed and that any further work would be unproductive. The Chambers judge *did* accept that one of the reasons the father did not work full-time was his desire to be available to help his

common-law wife who was suffering from cancer. However, at paras. 20-22, the Court of Appeal stated:

> "…That is an understandable decision, but not one the Guidelines recognize as justifying underemployment for the purposes of determining the amount of child support to be paid. Importantly, Dr. Barker did not argue before the chambers judge that a normal work week for dentists is 38.5 hours. Nor did he lead evidence to that effect.
>
> In my view, the inference of underemployment was open to the chambers judge on the law and the evidence. Once underemployment is established, the chambers judge had the discretion to impute additional income… .
>
> I am not persuaded the order that resulted is unreasonable or unfair and would not interfere with it."

[24] I take it from these statements that, while the Chambers judge may have been sympathetic towards the father for not working full-time because of the cancer of his common-law wife, he or she nevertheless concluded that the father was not working to his full capacity as a dentist and was therefore underemployed. The Court of Appeal exercised deference in its appellate review of that decision, while adding that, in any event, the illness of a spouse is not a reason recognized by the *Guidelines* for underemployment. This latter comment would seem to be *obiter dicta.* In any event, I conclude that *Barker* is a somewhat unusual case and, as it did not deal directly with the need for objective evidence of health conditions, it is not particularly helpful on the point under discussion.

[25] In *Bennett* v. *Stoppler*, the husband applied to the court for an order to sell the matrimonial property on which the wife was residing. Child support was not at issue. The husband there had worked, on average, about 150 working days per year as an oil field

consultant, and approximately three to four months per year on the couple's farming operation. He stated that he had not been employed recently, in part because of situational stress surrounding the disintegration of the relationship. In deciding which of the spouses was entitled to exclusive possession of the matrimonial property on which the wife was residing, the court noted, at paras. 13 and 14:

> "Mr. Stoppler has some health problems that are situational stress related to these proceedings. Nonetheless, he has not produced any evidence suggesting that this stress cannot be sufficiently relieved by medication, counselling or other treatment, to allow him to resume the work pattern which has been established throughout his life.
>
> Ms. Bennett, on the other hand, has substantially fewer opportunities to find employment and accommodation in the Entwhistle area than does her husband. …"

[26] In *M.P.T.*, cited above, I applied *Bennett* v. *Stoppler* to a case involving an issue of child support. However, both *Bennett* and *M.P.T.* were cases where a party was simply claiming that they were working at less than capacity because of the stress of the marital conflict and the associated court proceedings. Because stress is commonly a factor affecting parties in marital conflict, it is reasonable to expect that a party who is so adversely affected that they cannot work to capacity would provide objective medical evidence to support that assertion.

[27] That is not the situation in the case at bar. Here, the mother has claimed to be a victim of a major sexual assault, which she referred to as a "rape". The father did not contradict that claim, other than to characterize the offence as a "date rape", which the mother disputes. She has further deposed that she withdrew from her studies for a period of time on the recommendation of her doctor and that the assault also greatly limited her

ability to focus on work. While a supporting letter from her doctor would have been helpful, on an interim application such as this, her failure to do so does not render her reason for withdrawing from her studies and reducing her employment as *insufficient*. On the contrary, it seems reasonable to infer that such a traumatic event would very likely interfere adversely with a person's ability to focus on study and employment, at least for a limited period of time. Further, given this probable causal connection, the mother's inability or reduced ability to work in such circumstances could not fairly be described as "voluntary" conduct.

[28] I would add here that the case law, including *Drygada* (at para. 38), clearly holds that there is a duty to seek employment where a parent is "healthy", and that the health of a parent is one of the key factors to consider in determining what is reasonable in the circumstances. Indeed, s. 17(1)(a) of the *Guidelines* also speaks of the "reasonable … health needs of the parent." It would seem arguable to me that being the victim of a rape might well have an adverse impact on one's mental, or even physical, health, and would therefore be a reasonable explanation for a period of underemployment.

[29] The fourth argument by the father's counsel is that, even if I accept that it was reasonable for the mother to attend school part time and work part time, there were employment opportunities available to the mother, which she has not pursued, which would have provided her with a greater income over the past several years. Counsel raised a number of points in this regard:

1. The father says that the mother could have found employment as a substitute teacher while pursuing her education. Unfortunately, the evidence here is lacking as to when the mother would have become eligible

for such employment. According to the father's evidence, to be eligible to qualify as a "Category 2 substitute", one must provide proof of a Bachelor's degree. Yet, there is no evidence that the mother has such a degree. Nor is there any evidence as to what is required for a "Category 1 substitute". Given that it is the father who has the initial onus of demonstrating that the mother has been intentionally underemployed, I would have expected him to provide such evidence. In any event, the mother has indicated that she is, in fact, currently pursuing substitute teaching positions.

2. The father points to the mother's certification as a lifeguard and says that part-time lifeguards are employed at the Canada Games Centre in Whitehorse earning about $20 per hour. The mother's response to this is that while she has some certification, she was unable to complete her instructors' course due to a physical disability from a previous car accident in which she injured her hips, pelvis and knee. Further, she says that the Canada Games Centre has a policy that to be hired as a lifeguard, one must also be a qualified instructor. Therefore, she is not eligible to be hired as a lifeguard. That information was essentially unchallenged by the father, and I accept it as a reasonable explanation for why the mother has not pursued that type of employment. Once again, I would also add that the mother's physical limitations could arguably be considered part of her overall "health" status, and therefore a factor in justifying her underemployment.

3. The father says that the mother has proficiency in the French language and that this ability, combined with her Yukon First Nations heritage, would give her “first priority” in obtaining a teaching position in Whitehorse. The mother’s response here is that her proficiency is limited and that she only understands the French language when it is spoken slowly. She says that she has great difficulty reading and comprehending written French and cannot write in French at all. Once again, on an interim application such as this, that unchallenged explanation by the mother seems to be reasonable.
4. The father questions the mother’s evidence about her physical limitations from the car accident. In particular, the mother has stated that she has difficulty sitting or standing for long periods of time and is unable to lift heavy objects. Yet, notwithstanding those limitations, the mother says that she has been able to work in “serving jobs at restaurants or bars”, which presumably involves standing, or at least being on her feet, for extended periods. This leads the father’s counsel to ask why the mother has not given evidence that she has looked for other more lucrative employment, but was unable to obtain it because of her physical limitations. Once again, I find this argument to be persuasive, as far as it goes.
5. Lastly, the father’s counsel questioned why the mother was not able to work more, particularly in the fall of 2008, when she reduced her program down to two courses. The mother’s explanation was that she was having difficulty handling her studies at that time and it was due to her pregnancy that she reduced her course load. Although she did not specifically depose to a

> causal connection between her pregnancy and her difficulty in handling her studies, it is reasonable to infer that one might affect the other. For the same reason, it is also understandable why she would not have pursued more employment at that time.

[30] On the topic of the mother's second child, G., although not argued by the father's counsel, I concede I was concerned about whether her choice to become pregnant, if indeed it was a choice, could be seen as a reasonable justification for her underemployment. While it is arguable that an intentional pregnancy should not be a reasonable excuse for underemployment, there is no clear evidence that the mother's pregnancy with G. *was* intentional. Further, s. 17(1)(a) of the *Guidelines* also speaks of a parent being underemployed "…other than where the underemployment…is required by the needs of any child…" As the mother's counsel argued, "any child" in this case would presumably include G.

[31] There was also admittedly an inconsistency by the mother about the date on which she was sexually assaulted. She initially deposed that this took place just before Christmas 2007 and that, because the assault took place in her home, she made efforts to have the Whitehorse Housing Authority relocate her from that residence, but was not able to find alternate accommodation until October 2008. This left me with the initial impression that she was still suffering from the trauma of the sexual assault well into 2008. However, when challenged by the father on this point, the mother acknowledged that, "on further reflection", the sexual assault occurred in November 2005. She stated that the event is one which she has "tried hard to forget". While that is understandable, the discrepancy of over two years is a significant one and calls into question whether the

mother was still adversely affected by the trauma of the offence in 2008, as she originally implied.

[32] To summarize on the issue of imputation of income, while I acknowledge that the father's counsel has made a few good points, taking all of the circumstances into account, including the sexual assault in November 2005 and the birth of the mother's second child on March 9, 2009, the mother has satisfied me that her underemployment was required by her reasonable educational needs. I acknowledge that, with some greater effort, she could perhaps have completed the program sooner than she has, or alternatively, that she could have earned more than she has over the past few years. However, the standard is reasonableness, not perfection, and I conclude that any lack of diligence in that regard by the mother is insufficient to require that I impute income to her under s.17(1)(a) of the *Yukon Child Support Guidelines*.

Should the father pay child support?

[33] I turn now to the mother's application for an order that the father pay child support going forward. As this is a shared custody situation, in order to make this determination, I am to have regard to s.9 of the *Yukon Child Support Guidelines*, which states as follows:

> "Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of child support for the child must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the parents;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the condition, means, needs, and other circumstances of each parent and of any child for whom child support is sought."

[34] According to the leading case *Contino* v. *Leonelli-Contino*, [2005] 3 S.C.R. 217, s.9 promotes flexibility and fairness by ensuring that the economic realities and the particular circumstances of each family are accounted for. The three factors set-out in s. 9 all guide the exercise of judicial discretion; no single factor prevails. The weight given to each of the three factors will vary according to the particular circumstances of each case.

[35] *Contino* holds that, under s. 9(a), a simple set-off between the table amounts payable by each parent is an appropriate starting point. The set-off in this case has to be done on the basis on the parties' respective incomes in 2008, since I do not have the gross annual income of the mother for 2009. In 2008, the mother earned $13,409 and the father earned $75,132. Therefore, after the set-off, the father would pay child support to the mother in the amount of $634 per month.

[36] However, the set-off determination must be followed by an examination of the continuing ability of the recipient parent to meet the financial needs of the child, especially in light of the fact that many costs are fixed. The court retains the discretion to modify the set-off amount where, considering the financial situation of the parents, it would lead to a significant variation in the standard of living experienced by the child, as they move between the respective households. Adjustments may be made if the set-off would be inappropriate in light of the factors considered under ss. 9(b) and 9(c).

[37] According to *Contino*, s. 9(b) recognizes that the total cost of raising children may be greater in shared custody situations than in sole custody situations. Thus, courts should examine the budgets and actual expenditures in addressing the needs of the child and determine whether shared custody has resulted in increased costs globally. Such

increased costs would normally result from the duplication of expenses arising from the fact that the child effectively lives in two homes.

[38] Unfortunately, the evidence here is somewhat lacking, especially from the mother. The father has produced a budget in which he indicates that he spends about $6300 annually on the child, the particulars of which are as follows:

“After school care/summ[er]	$2250
Gymnastics/suits	1300
Clothes	400
Outer Wear	400
Sports equipment	300
Travel	800
School Fees	75
Birthday Parties	125
Gifts/extras	600
Other sports	45
Total	$6295”

Dividing $6295 by 12 months equals $524.58 per month, which is a significant amount. However, it is likely that there is some duplication on costs paid by the mother for certain of these items, such as after school care, indoor and outdoor clothes, sports equipment, school fees and gifts. I am also troubled by the fact that the mother has provided unchallenged evidence that the maternal grandmother pays for one half of the child’s gymnastics expenses. If that is the case, then there would be a reduction by half of the

amount claimed by the father for that expense, namely $1300 per year. Of course, the alternative would be that the father's half is $1300 per year, making the total gymnastic expenses $2,600 annually. I infer that the former is more likely to be the case, as it would result in a monthly expense of about $108 for this activity, which seems reasonable for an eight or nine year old child. Having made that finding, I am left wondering about the accuracy of the other figures cited in the father's budget. In the result, it is probably reasonable for me to conclude that there are increased costs as a result of the shared custody arrangement, and while I must take that into account, I am unable to conclude much about the extent of such increased costs.

[39] Under s. 9(c) of the *Guidelines*, *Contino* states that the court is vested with a broad discretion to analyze the resources and needs of both parents and the child. I am to keep in mind that one of the objectives of the *Guidelines* is to achieve a fair standard of support for children and fair contributions from both parents. I am to look at the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances. I may also consider the special or extraordinary expenses of the child as part of her "other circumstances".

[40] Ordinarily, a court would expect the parents to lead evidence relating to the analysis under s. 9(c), just as it would for s. 9(b). As it is the father who is applying for a reduction from the set-off amount based on the shared custody arrangement, I have looked primarily to him for the evidence in support of that application. Once again, all that I have from the father in that regard is his information as to the child's annual budget, the accuracy of which is somewhat in question. On its face, the budget suggests the father is

already spending about $525 per month toward the child's care. If I reduce the gymnastics expenses by half, that would reduce the annual total to $5,645, or $470 monthly. Assuming that is a reasonably accurate figure, it would initially appear that requiring the father to pay the set-off amount of $634 per month *in addition*, might be onerous.

[41] Unfortunately, the mother provided scant evidence relating to the child's budget or the mother's standard of living. As I noted above, she deposed that she receives funding from DIAND of approximately $1,500 per month. She also indicated that her monthly expenses include housing ($1,300), food ($400), vehicle payment ($300), and insurance ($75). In addition, the mother has an overdue student loan ($25,000) and Visa bill ($2,500) plus other unspecified outstanding loans. The mother's partner, J.G., who is the father of her second child, G., will soon be moving into her home, and will be contributing an income of about $1,700 per month.

[42] The mother concedes that she does not spend the same amount of money on the child as the father, as her income in 2009 and in previous years has been significantly less than his and because no child support has been paid. Her counsel submits that the evidence suggests a significant difference in the standards of living between the parents' respective households, i.e. that there are "two very different homes" available to the child. The mother's counsel is additionally concerned that this may become a factor in the father's pending application for primary residence. I share this concern and recognize that it is one of the fundamental purposes of the *Child Support Guidelines* to alleviate such discrepancies.

[43] In concluding my analysis under s. 9, I am persuaded that the set-off amount is generally appropriate, but that it should be reduced somewhat to reflect the expenses currently being paid by the father for the child's care. I note here that, the Consent Order of June 6, 2005, already provides that the child's daycare costs will be split equally by the parties and that all other special or extraordinary expenses are to be shared in accordance with the *Child Support Guidelines*. Taking all of the circumstances into account, I find that the father should pay child support in the amount of $500 per month, commencing March 1, 2010, and on the first day of each month thereafter.

[44] I expect that the mother will likely obtain employment as a teacher in September 2010. If so, she will also likely begin earning an income in the $50 to $60,000 range. Therefore, I assume that the parties will readdress the child support payable at that time, and that the father's ongoing child support obligation will probably be reduced.

Should the child support be retroactive?

[45] The final issue is the question of retroactivity. The mother's counsel relies on the leading decision of *D.B.S.* v. *S.R.G.*, 2006 SCC 37. That case instructs me to strive for a holistic view of the circumstances of a particular case in determining whether to make a retroactive award. In doing so, I am to consider the reason for the recipient parent's delay in seeking child support, the conduct of the payor parent, the past and present circumstances of the child, and whether the retroactive award might entail hardship. As a general rule, the award should be retroactive to the date on which the recipient parent gave "effective notice" to the payor parent that child support should be paid. All that is required is that the topic be broached; once that has occurred, the payor parent can no longer assume the *status quo* is fair.

[46] In this case, the mother sent an email to the father on September 7, 2008, which included the following statement:

> "I am also feeling a little bit of financial strain as of late; and am putting in a formal request for all tax information to be handed in to Maintenance Enforcement to determine whether or not child support would be granted."

I am satisfied that this email constitutes "effective notice" to the father that child support should be paid, since the topic was clearly broached.

[47] However, I am to take a holistic view of all of the circumstances in determining whether to make a retroactive award. Those circumstances include the fact that, by the time she graduates, the mother will have taken seven years to complete a four year educational program. I have already expressed above my reservations regarding the extent to which the mother was limited in her employment prospects by her family situation and her physical restrictions. While I did not find those to be sufficient to support an imputation of income, I do take them into account here. I also acknowledge that making a retroactive award of child support against the father would be an economic hardship for him. In exercising my discretion here, I must consider the fairness of such an award, including whether it will create an unreasonable debt obligation for the father. Finally, I note that there has been no particular evidence adduced that the child suffered from a lack of financial support during the time period in question, although I infer that there likely would have been a discrepancy between the standards of living in the two households.

[48] It is significant to me that on February 6, 2009, the mother's counsel wrote to the father's counsel raising the possibility of the father making a proposal with respect to the

payment of child support, given the perceived significant discrepancy between the respective incomes of the parties. No child support has been paid by the father since receiving that letter. Although his response to the current application was to seek an imputation of income against the mother, it does not appear that any prior notice of his intention to do so was given to the mother's counsel prior to the filing of the affidavits he relied upon at this hearing. Further, the father was again urged by the mother's counsel in his letter of April 23, 2009, to consider the voluntary payment of child support. To be fair, the father's then counsel responded with an indication that before the father could submit a proposal regarding child support, he would need the mother's income information for 2008, as well as her year-to-date income for 2009. It appears that information was not provided by the mother's counsel until his letter of October 6, 2009, which included a third request for voluntary child support, on a without prejudice basis. Nevertheless, it should have been obvious to the father in October 2009 there was a significant disparity between his income and that of the mother. In addition, he would have known that that was the case for the years 2005, 2006 and 2007, as he had received the mother's notices of assessment from the Canada Revenue Agency as far back as November 21, 2008.

[49] Taking all of the circumstances into account, I conclude that there was really no excuse for the father not to address the issue of child support in some constructive fashion after the letter from the mother's counsel dated February 6, 2009. If the father believed that the mother should have income imputed to her, with a view to neutralizing any potential obligation that he had to pay child support, then he should have raised that argument at that time. By then, he ought to have known that the mother was serious

about pursuing her claim for child support, notwithstanding the terms of the Consent Order of June 6, 2005.

[50] Therefore, I am satisfied that there should be a retroactive award of child support and that the amount of $500 per month should commence as of March 1, 2009. That will result in arrears totaling $6,000 to the end of February 2010. Those arrears may be paid down at the minimum rate of $100 per month, until further order of this Court, or unless otherwise agreed by the parties in writing.

CONCLUSION

[51] I decline to impute any income to the mother.

[52] The father shall pay child support for the child in the amount of $500 per month, commencing March 1, 2010, and on the 1st day of each month thereafter.

[53] The father shall also pay retroactive child support for the child from March 1, 2009 to February 28, 2010, at the rate of $500 per month, which will immediately put him into arrears totaling $6,000. Those arrears may be repaid at the minimum rate of $100 per month, until further order of this Court, or unless otherwise agreed to in writing by the parties.

POST SCRIPT

[54] There will need to be a consequent amendment to para. 9 of the Consent Order of June 6, 2005. I will leave it to counsel to draft such an order.

[55] The mother’s counsel specifically asked that I reserve my decision on costs until

after issuing these reasons. If the parties are unable to agree on costs, they can bring the matter back before me.

Gower J.