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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated February 13, 2014 which found that the appellant's monthly maintenance payments ($600) must be deducted as unearned income from appellant's assistance, pursuant to Section 24 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

PART D – Relevant Legislation

Employment and Assistance for Persons With Disabilities Regulation (EAPWDR), Sections 1, 9, 24 and Schedules A and B

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PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

1) Agreement dated June 22, 2007 between the appellant and her former husband, with paragraphs relating to the payment of child maintenance. The husband agrees to pay to the appellant the sum of $600 per month for the maintenance of their child, commencing on June 1, 2007 and continuing on the first day of each and every month for so long as the child remains eligible for maintenance. The appellant agrees that so long as the husband is paying the amounts set out the husband is entitled to offset the $300 per month from the $600 provided so that the appellant shall receive only the net sum of $300 per month from the husband as a net settlement of child support and expenses. If the appellant determines that the costs are no longer actually being incurred by the husband [for the child's private school and other school-related expenses including an RESP], the appellant has the right to terminate the offset against child support at any time on three month's notice in writing, after which time the full amount of child support shall be payable. A completed Certificate of Independent Legal Advice is attached to the separation agreement in which a lawyer certifies that he provided legal advice solely to the appellant regarding her legal rights and liabilities under the separation agreement and explained fully the nature and effect of the agreement.; and,
2) Request for Reconsideration- Reasons dated January 31, 2014.

In her Request for Reconsideration the appellant wrote that:

- She only gets $300 from her husband and she has never received $600 at any time.
- She was unaware that the wording on their legal document was not correct. She is not trying to be, nor was she every trying to be, deceptive.
- She cannot afford to pay her rent if $600 is taken off her cheque. Her cheque was $640 this month and her rent is $850.

In her Notice of Appeal dated February 18, 2014, the appellant expressed her disagreement with the ministry reconsideration decision and wrote that:

- She does not receive $600 from child support. She has only every gotten $300.
- She is not a lawyer and never would have put herself into a position where she could end up homeless.
- She has no other help and she just had a heart attack in November (2013) resulting in 14 fractures.
- She has not ever claimed taxes for her child's school, which is a total of 8 years, and her husband claims 100% of his school cost.
- She is scared because not receiving the $300 means the difference between her child and her having a home and being homeless. She would not put herself in a position to jeopardize her home, utilities, and food over $300.
- It has not been explained to her how to have her child support reworded correctly by a lawyer or what she is supposed to do. It does not seem fair and she is scared because they almost did not get through February.

Prior to the hearing, the appellant provided an additional document, namely a print out of excerpts of the Federal child Support Guidelines, including Section 1, part of Section 2, Sections 5, 6 and 7.

At the hearing, the appellant stated that:

- Her ex-husband made all the arrangements to get the separation agreement drafted. They

had fought for months before that and she told him she could not afford a lawyer.

- Her ex-husband makes a good income and she does not and he told her to go to Legal Aid. It took 8 months just to have someone from Legal Aid call her to see if she met the criteria.
- Her ex-husband put their child in private school and she had not wanted their child to go to a private school.
- She did not know the law. Her ex-husband wanted things finalized so he finally got a lawyer.
- When she attended at the lawyer's office, the lawyer already had a rough draft of the agreement prepared. Her ex-husband and the lawyer seemed to be friends.
- She just wanted to make sure that she got their child and that is why she signed the agreement.
- She did not read the agreement. She is not a lawyer. Her ex-husband is very smart with money and is always looking for anything he can write off for tax purposes.
- There were things in the agreement that she did not want. The only amendment she made is to remove the part about her ex-husband taking their child out of the country without her permission.
- The lawyer confirmed to her that she would get their child but he never talked to her privately about the agreement.
- At the time that she signed the separation agreement, she was a recipient of disability assistance. She said that, at that time, her ex-husband was making $64,000 a year plus he was buying items, such as boats, in the U.S. and bringing them back to Canada for re-sale at a profit.
- All the appellant ever got was $300 per month and she never claimed a deduction for taxes for her child's school.
- She never heard anything after she did the right thing by taking the agreement to the FMEP [Family Maintenance Enforcement Program] office at the end of 2007. When she went to FMEP a few months ago, she was told that her file had been "open for years" but they put a hold on the cheque because they are waiting for the Tribunal decision.
- She dropped off a copy of the separation agreement to a local office of the ministry in late 2007.
- She will not be able to pay her rent if the full $600 is deducted from her assistance.

At the hearing, the appellant's advocate stated that:

- If the full amount of maintenance as set out in the separation agreement ($600) is deducted from the appellant's disability assistance, she and her child will be at a risk of homelessness and living below the poverty line.
- At the time that the appellant entered into the separation agreement dated June 22, 2007, there was already an assignment agreement in place with the appellant and the ministry and the appellant, therefore, had no right to take any action or seek a variation of the separation agreement on her own behalf. The appellant had no funds to pursue legal action on her own behalf.
- The appellant had insufficient legal representation at the time of entering into the separation agreement.
- While the appellant did not request that the ministry take any action on her behalf, she would only have been able to make a request and not to instruct the ministry in any event.
- The appellant provided a copy of the separation agreement to a local office of the ministry but there has been no involvement by the ministry. If the agreement had been reviewed, the

ministry would have seen that it is grossly unfair to the appellant and that it violates the Federal Child Support Guidelines. There were no steps taken by the ministry to vary the agreement and it appears it was filed in the ministry's records only.

- The ministry had the power and the means to vary the agreement and to change the appellant's situation. The ministry's policy sets out that the program seeks to ensure that family breakdown does not cause poverty. The ministry is supposed to work on the client's behalf to pursue agreements for amounts payable in accordance with the Federal Child Support Guidelines and the failure by the ministry to intervene or to seek to vary the appellant's separation agreement contravenes the ministry's policy guidelines.
- The amount of maintenance in the agreement exceeds the applicable Federal Child Support Guideline amount by $1 and there is no issue taken with that part of the separation agreement. The issue is with the provision for extraordinary expenses for the child's private school.
- The appellant is a single mother on disability assistance and the ex-husband earns in excess of $64,000 per year so having their child attend private school with the costs shared equally between the appellant and her ex-husband is not appropriate. The additional costs for the private school could be "reasonably" covered by the appellant's ex-husband alone, based on his income.
- The ministry policy guidelines indicate that the family maintenance program assists recipients to pursue support that they may be entitled to and seeks to ensure that family breakdown does not cause poverty or place a burden on public funds. It also seeks to ensure that clients achieve enforceable support orders. The client is referred to a family maintenance worker who works on the client's behalf to pursue support orders or agreements for amounts payable in accordance with the Federal Child Support Guidelines.
- In the frequently asked questions section of the ministry's online policy guidelines, the situation is covered where the client already has an agreement. The answer provided is that the family maintenance worker will review the agreement and ensure that the amount is in accordance with Federal Child Support Guidelines.
- Sections 17, 18, 21 and 22 of the EAPWDR are relevant to a consideration of the rights and responsibilities under an assignment of maintenance rights, which the appellant has with the ministry. These provisions require the appellant to disclose and assign her maintenance right to the ministry [Section 17]. The maintenance rights that must be assigned include the right to make an application for variation of a maintenance agreement [Section 18]. The terms of the assignment include an acknowledgement by the assignor that she cannot take any of the actions or enter any agreements related to maintenance unless authorized by the ministry and to do so without authorization will affect the assignor's eligibility for disability assistance [Section 21]. If the assignor fails to comply with the terms of an assignment, the assignor may be declared ineligible for disability assistance, unless the ministry is satisfied that the failure to comply is beyond the assignor's control [Section 22].
- Sections 1, 3 and 7 of the Federal Child Support Guidelines are relevant to a consideration of the appropriateness of the terms of the appellant's separation agreement. These provisions stipulate that the amount of child support for children under the age of majority is the amount set out in the applicable table based on the number of children and the income of the spouse against whom the order is sought [Section 3(1)] plus the amount determined for any special or extraordinary expenses under Section 7. Special or extraordinary expenses may be estimated, 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 spouse and

those of the child and the family's spending pattern prior to the separation and include extraordinary expenses for primary or secondary school education [Section 7(1)(d)]. The definition of "extraordinary expenses" is those expenses that exceed those that the spouse requesting an amount can reasonably cover, taking into account that spouse's income [Section 7(1.1)]. The guiding principle in determining the amount of a special or extraordinary expense is that the expense is shared by the spouses in proportion to their respective incomes [Section 7(2)].

- As a result of the assignment of her maintenance rights, the appellant has been effectively placed in a "Catch-22" situation because she is subject to the ministry's enforcement of the terms of an agreement that are grossly unfair and she cannot take action on her own behalf to vary the terms and must rely on the ministry to do so.
- Since the ministry did not protect the appellant's rights to maintenance, as required under the assignment signed by the appellant, by ensuring the separation agreement provided for amounts payable according to the Federal Chile Support Guidelines or by varying the terms that are grossly unfair to the appellant, the ministry is now legally estopped from applying the legislation to the terms of that agreement.
- Action by the ministry to rely on the existing terms of the separation agreement of June 2007 and to deduct the full amount of the maintenance payment set out in the agreement is creating circumstances of extreme hardship through impoverishment for the appellant and her child and is not reasonable.

The ministry relied on the facts as set out in its reconsideration decision.

- The appellant is a sole recipient of disability assistance with one dependent child.
- As per the separation agreement dated June 22, 2007, there is a provision for payment of $600 child maintenance income to the appellant with $300 of this monthly maintenance being paid to the child's private school.

At the hearing, the ministry stated that:

- The appellant has been a recipient of assistance since March 1992 and she received disability assistance starting in January 1996.
- In December 2002, the appellant met with FMEP and signed a Family Maintenance Rights Agreement and thereby signed over her right to pursue both child and spousal support to the ministry. As part of that assignment agreement, the appellant acknowledged that she cannot take any action regarding the payment of support on her own behalf, unless authorized to do so by the ministry, or her eligibility for assistance will be affected.
- Despite having signed this assignment agreement in 2002, the appellant subsequently entered into the separation agreement with her ex-husband in 2007 without advising the ministry.
- The appellant has been required to report any changes in her circumstances to the ministry and the fact that she had entered into an agreement with her ex-husband for the payment of maintenance was not reported to the ministry.
- The ministry cannot take action if the ministry is not made aware of the situation. The onus remains on the appellant to advise the ministry of any changes.
- The ministry has no record of the separation agreement being filed with the ministry by the appellant or through family maintenance. There is no note in the electronic system from that time (late 2007). The agreement was either misplaced or never submitted by the appellant.
- If the appellant had gone to the ministry when her ex-husband approached her about entering

into the separation agreement, the ministry would have fought for her and her child.
- While the appellant has declared $300 as income to the ministry, she has declared it as earned income and claimed the exemption that applies for earned income. She did not declare the $300 as maintenance until January 2014.

Admissibility of Additional Information

The appellant did not object to the admissibility of the ministry's oral testimony regarding the terms of the Family Maintenance Rights Agreement as the advocate argued that obtaining an assignment of maintenance rights is considered 'standard operating procedure' for all ministry clients, and the advocate also made arguments based on the existence of this assignment agreement. The panel considered the information and records before the ministry at the time of reconsideration and finds that neither the Family Maintenance Rights Agreement nor information or arguments based on an assignment of maintenance rights were before the ministry at the time of reconsideration. Therefore, the panel did not admit the oral testimony regarding an assignment of maintenance rights as this is neither information or records that were before the ministry at the time of reconsideration or oral testimony in support of information and records before the ministry at the time of reconsideration, thereby not meeting the legislative test in Section 22(4) of the *Employment and Assistance Act.* The panel considered the excerpts from the Federal Child Support Guidelines as part of the argument on behalf of the appellant.

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PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision, which found that the appellant's monthly maintenance payments ($600), as set out in the June 2007 separation agreement, must be deducted as unearned income from appellant's assistance, pursuant to Section 24 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the appellant's circumstances.

Section 24 of the EAPWDR provides that:

Amount of disability assistance

24 Disability assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than

(a) the amount determined under Schedule A, minus

(b) the family unit's net income determined under Schedule B.

Schedule A of the EAPWDR sets out the total amount of disability assistance payable as the sum of the monthly support allowance for a family unit matching the family unit of the applicant or recipient plus the applicable shelter allowance. In calculating the net income of a family unit under Schedule B, various exemptions from income are provided but, otherwise, all earned and unearned income *must* be included.

Section 1 of Schedule B of the EAPWDR provides as follows:

When calculating the net income of a family unit for the purposes of section 24 (b) *[amount of disability assistance]* of this regulation,

. . .

(b) any amount garnished, attached, seized, deducted or set off from income is considered to be income, except the deductions permitted under sections 2 and 6,

(c) all earned income must be included, except the deductions permitted under section 2 and any earned income exempted under sections 3, 3.1 and 4, and

(d) all unearned income must be included, except the deductions permitted under section 6 and any income exempted under sections 7, 7.1, 7.2 and 8.

Section 1(1) of the EAPWDR defines "unearned income" to mean:

any income that is not earned income, and includes, without limitation, money or value received from any of the following:

(a) money, annuities, stocks, bonds, shares, and interest bearing accounts or properties;

(b) cooperative associations as defined in the Real Estate Development Marketing Act;

(c) war disability pensions, military pensions and war veterans' allowances;

(d) insurance benefits, except insurance paid as compensation for a destroyed asset;

(e) superannuation benefits;

(f) any type or class of Canada Pension Plan benefits;

(g) employment insurance;

(h) union or lodge benefits;

(i) financial assistance provided under the Employment and Assistance Act or provided by another province or jurisdiction;

. . .

(j) workers' compensation benefits and disability payments or pensions;

(k) surviving spouses' or orphans' allowances;

(l) a trust or inheritance;

(m) rental of tools, vehicles or equipment;

(n) rental of land, self-contained suites or other property except the place of residence of an applicant or recipient;

(o) interest earned on a mortgage or agreement for sale;

(p) maintenance under a court order, a separation agreement or other agreement;

(q) education or training allowances, grants, loans, bursaries or scholarships;

(r) a lottery or a game of chance;

(s) awards of compensation under the Criminal Injury Compensation Act or awards of benefits under the Crime Victim Assistance Act, other than an award paid for repair or replacement of damaged or destroyed property;

(t) any other financial awards or compensation;

(u) Federal Old Age Security and Guaranteed Income Supplement payments;

(v) financial contributions made by a sponsor pursuant to an undertaking given for the purposes of the Immigration and Refugee Protection Act (Canada) or the Immigration Act (Canada);

(w) tax refunds.

Ministry's position

The ministry's position is that the total amount of maintenance payments under the separation agreement, or $600 per month, must be deducted from appellant's assistance, since her net income determined under Schedule B of the EAPWDR must be deducted from the amount of disability assistance determined under Schedule A for a family unit matching her family unit. The ministry argued that in determining net income under Schedule B, all unearned income must be included, which has been defined in Section 1 of the EAPWDR to include, without limitation, money or value received from maintenance under a court order, a separation agreement or other agreement. The ministry argued that the total net amount of the appellant's income calculated under Schedule B includes $600 in child maintenance payments even though half of the amount ($300) is paid to her child's private school. The ministry argued that money received from maintenance is not included as an amount that may be deducted or exempted. The ministry pointed out that the appellant's non-exempt income of $600 must be deducted from the appellant's support and shelter allowance determined under Schedule A and, therefore, the amount of the appellant's disability assistance is reduced by this amount, pursuant to sections 24 of the EAPWDR.

Appellant's position

The appellant acknowledged that the separation agreement dated June 22, 2007 provides for her ex-husband to pay to her the sum of $600 per month for the maintenance of their child; however, she argued that she has only ever received $300 per month from him as $300 is paid by her ex-husband directly to her child's private school. The appellant argued that she was unaware that the wording on their legal document was not correct, and if $600 is taken off her assistance she and her child will be at a risk of homelessness and living below the poverty line. The appellant argued that the separation agreement is grossly unfair to her as a result of the provision that the school-related expenses are shared equally between her and her ex-husband when she is a recipient of disability assistance and her ex-husband makes a yearly income of at least $64,000. The appellant argued that this provision in the 2007 separation agreement violates the Federal Child Support Guidelines, including the guiding

principle in determining the amount of a special or extraordinary expense, that the expense is shared by the spouses in proportion to their respective incomes.

Panel decision

The appellant admits that she is entitled to $600 per month for child maintenance pursuant to a separation agreement that she entered into with her ex-husband on June 22, 2007. Under Section 1 of Schedule B of the EAPWDR, all unearned income "must" be included in the calculation of net income unless it is specifically exempted. According to Section 1 of the EAPWDR, "unearned income" is defined to mean any income that is not earned income and includes, without limitation, money or value received from any of the following: "...maintenance under a court order, a separation agreement or other agreement." Although the appellant argued that she has only ever received $300 per month from her ex-husband because of the provision that her ex-husband is entitled to offset one half of the school-related expenses for their child, the panel finds that the ministry reasonably concluded that maintenance payments under a separation agreement are specifically included within the definition of "unearned income" with no applicable deductions or exemptions in the appellant's circumstances.

The appellant argued that she did not have sufficient legal representation at the time of entering into the separation agreement which is grossly unfair to her and violates the provisions of the Federal Child Support Guidelines; however, the panel notes that this is a matter between the parties to the agreement, the appellant and her ex-husband, as well as the lawyer who provided legal advice to the appellant. According to the Certificate of Independent Legal Advice attached to the separation agreement, the lawyer signed and thereby certified that he provided legal advice solely to the appellant regarding her legal rights and liabilities under the separation agreement and explained fully the nature and effect of the agreement to her.

The panel finds that the ministry reasonably determined that the amount of the appellant's maintenance payments ($600) must be included in the calculation of her income and that, given the directory language used, the ministry does not have the discretion to do otherwise. The panel finds that the ministry reasonably concluded that the net amount of the appellant's income, or $600, under Schedule B must be deducted from the amount of assistance determined under Schedule A for the appellant's family unit and that, therefore, the appellant's disability assistance is reduced by this amount pursuant to Section 24 of the EAPWDR.

Conclusion

The panel finds that the ministry decision was reasonably supported by the evidence and confirms the decision pursuant to Section 24(2)(a) of the *Employment and Assistance Act*.