SC CV 94 019

CV 05061

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the
Child Welfare Act;

AND IN THE MATTER OF the
Domestic Relations Act

BETWEEN:

BOBBI JOANNE PALMER

Applicant

- and -

MARSHALL JOSEPH BANKS

Respondent

Application for monthly child support granted, with an order granting sole custody to the applicant mother and reasonable access to the respondent father. Quantum fixed at $600 a month subject to a reduction to $450 in the event that the monthly amount ceases to be taxable in the hands of the mother.

Heard at Yellowknife on June 17th 1994

Judgment filed: June 20th 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Applicant: Thomas H. Boyd, Esq.

Counsel for the Respondent: Ms. Karan M. Shaner

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REASONS FOR JUDGMENT

1 At issue is the *quantum* of child support or maintenance to be paid monthly by the father of a two-year-old child to the mother.

2 The child has been in the day-to-day care and control of his mother since birth. And whereas there was some dispute earlier as to paternity, there is no longer any issue on that point. The parties agree that the mother should have sole custody and guardianship of the child.

3 Each of the parties has established another spousal relationship, sharing expenses of accommodation with the new spouse. The father now has another child from his new spousal relationship; and he asks the Court to be mindful of his obligations

to support this child when considering the mother's application for an order requiring him to make monthly maintenance payments to her for the child first mentioned.

4 The mother was a recipient of social welfare assistance when she launched the present application. She has since ceased to receive such assistance and has obtained paid employment. The father is a painter by trade and has been steadily employed for some time. Both parties are therefore in receipt of an income from employment.

5 To maintain her employment, the mother is obliged to use a day care facility for the child. The cost of this is between $500 and $550 a month. In addition, there are of course other expenses which she incurs in feeding and providing care for the child.

6 The mother's take home pay is $1450 a month. The father's earnings are stated by him to have averaged $2500 a month in 1993 but to have fallen to $1700 a month in 1994. The latter average can be expected to increase with the construction season reaching its peak.

7 The mother testifies in her affidavit sworn June 15th 1994 that the father has not contributed any financial support for the child for approximately a year and a half. On behalf of the father, it is said that this was due to the father's uncertainty on the issue of his paternity, now resolved by his acceptance of that status.

8 In her affidavit, the mother alleges that the father earns additional cash income not revealed in any accounting system and not included in the father's statement

of his income in his affidavit sworn on June 7th 1994. The mother gives figures for jobs performed by the father between 1990 and 1993 for which he was remunerated in cash. She says that she prepared the father's income tax return in 1992 in which his 1991 income was grossly under-reported. According to her, his actual 1991 income was in the region of some $40,000, of which less than half was reported.

9 These allegations are not denied or questioned. I therefore infer that there is some substance to them.

10 The mother asks for an order requiring the father to pay her $900 a month for the child's maintenance. She calculates this on the basis of the child's needs, as follows:

Day care	$500
Groceries, etc.	150
Rent	200
Television	15
Phone	10
	$875

11 Counsel for the mother relies upon **Eschak v. Biron** [1993] N.W.T.R. 255 (S.C.). A monthly amount of $900 was ordered as maintenance for the two-year-old child in that case. As in this instance, the parents of the child were unmarried and had cohabited as husband and wife for about two years, during which period the child was born. Moreover, the mother in that case had a gross income substantially larger than that of the mother in the present case. And the father in that case earned about the same as

the father in the present case says he earned in 1993. As in this case, there was day care to be paid for (almost $600 a month in that case).

12 Although there are these similarities between the facts in **Eschak v. Biron** and in the present case, there are also certain differences. There is no mention of any new spousal relationships, or of an additional child of the father's new relationship in that case. And there is no earlier child of the mother in this case for whom maintenance is sought, as in that case, on the basis that the father had stood *in loco parentis* to that child.

13 Leaving aside these differences, it bears mention that although the Court in **Eschak v. Biron** cited the decision in **Paras v. Paras** (1970), 2 R.F.L. 328 (Ont. C.A.) for a formula used there to calculate the respective obligations of the parents of a child requiring maintenance; and the Court noted that counsel for the mother in **Eschak v. Biron** relied on that formula; there is nothing in the reasons for judgment delivered in that case to show that the formula is recognized as binding on this Court. Indeed, Vertes J., in that case, noted that counsel acknowledged that the "Paras formula" is liable to distortion where there is a wide disparity of incomes, so that some allowance should be made for this factor if the formula is to be applied.

14 Although decided almost 25 years ago, and cited in at least one unreported judgment of this Court: **Van Camp v. Van Camp**, August 21st 1992 (6101-02149), there is apparently no reported decision of a Northwest Territories court citing **Paras v. Paras**, other than **Eschak v. Biron**. And the **Paras** case is not mentioned in **Matrimonial Property, Quantum and Custody Awards, A Practitioner's Guide to Pre-trial Settlement** (Carswell); although it is cited twice in **Canadian Divorce Law and Practice** (Carswell) at pages 15-84 and 15-99, where the citation is given in full as **Paras v. Paras**, [1971] 1 O.R. 130, 2 R.F.L. 328, 14 D.L.R. (3d) 546 (C.A.).

15 The **Van Camp** case, like the **Paras** case, arose under the **Divorce Act** of its day. The present case, like **Eschak v. Biron**, arose under the **Domestic Relations Act**, R.S.N.W.T. 1988, c. D-8 since the parties were not married. Nevertheless, the same principles apply in determining questions of child support. Child support is a right for the benefit of the child rather than the parents, or either parent. Today the accident of birth, in the sense that the child is unable to choose whether or not its parents are married, is immaterial. This is declared in s.54 of the **Judicature Act**, R.S.N.W.T. 1988, c. J-1, as follows:

> 54. For all purposes, any distinction at common law between the status of a child born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined in accordance with Part IV of the *Child Welfare Act*.

16 The child's right to support from its parents is one which is paramount over other claims on the parents arising from debt, or as a result of their respective lifestyles. The situation here is however complicated by the father having acquired additional responsibilities towards a second child in his new family. This situation did not arise in **Eschak v. Biron**. The rights of children in such matters, as recognized in **Richardson v. Richardson** (1987), 1 S.C.R. 857, 38 D.L.R. (4th) 609, 7 R.F.L. (3d) 304, 17 C.P.C. (2d)

104, 77 N.R. 1, were held in **Murray v. Murray** (1991), 35 R.F.L. (3d) 449, 123 A.R. 68, 82 Alta. L.R. (2d) 260, (1992) 1 W.W.R. 183 (Q.B.) to come before such things as car payments, entertainment, alcohol, tobacco, recreation, vacation savings and debts.

17 The approach taken in the **Paras** case was applied in the **Van Camp** case so as to take into specific account the respective subsistence needs of the parents. A similarly modified approach was also taken in **Laraque v. Allooloo**, [1993] N.W.T.R. 124, 44 R.F.L. (3d) 10 (S.C.), although in that instance a lower figure was used for subsistence having regard to the income levels of the parties and the other circumstances. The need to ensure that the parent paying child support is not deprived of the means and incentive to do so is recognized in those cases as it was in **Murray v. Murray**.

18 In calculating the needs of the child in this case I make no allowance for television or telephone services and I notice that no extra rent is claimed by the mother for the child, above what she would have been obliged to pay as her half share in her new home. Her claim that a share of the rent, television and telephone charges is attributable to this 2½-year-old does not persuade me. However, the remaining expenses for day care and groceries, etc., are clearly additional items she would not have to bear but for the child. Those items total $675 (allowing $525 for day care).

19 With a net monthly income of $1450 after salary deductions, allowing the mother $1000 for subsistence (rent $480, groceries $250, vehicle $100, miscellaneous $170), I assess her available means for support of the child at $450 a month.

20 The father's net monthly income is not as simple to calculate. On the

evidence before the Court, making due allowance for his eventual income tax obligations and his share of expenses in supporting his new family, I fix his subsistence costs at $1500 a month and his net income before deducting those costs as averaging $2500 a month, so as to leave available $1000 a month for the support of the child.

21 The ratio between the respective amounts of the means available to the parties for the support of the child is approximately 2 : 1 (based on $1000 : $450). The mother should therefore be responsible for a third of the child's expenses of $675 a month; and the father should pay her the remaining two-thirds, or $450 a month.

22 No attempt was made to provide the Court with figures based upon the impact of taxation on the parties. And it is notorious that any such impact is at present the subject of litigation before the Supreme Court of Canada. I therefore make the following order:

1. the mother shall have sole custody and guardianship of the child;

2. the father shall have reasonable access to the child, on reasonable notice and as agreed by the mother, not to be unreasonably withheld;

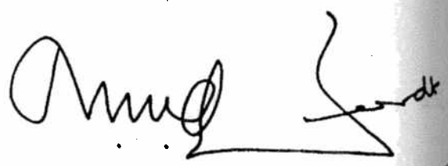
3. the father shall pay the following monthly amount to the mother as child support, until further order:

   (a) $600.00 on the 1st day of each month commencing on July 1st 1994;

   (b) in the event that the monthly child support payments cease to be taxable in the hands of the mother, they shall be reduced to $450 per month without further order;

4. the mother shall have her costs of this application in the amount of $300.

I leave it to counsel for the mother to prepare the formal order with all necessary detail subject to the approval of counsel for the father. Counsel may arrange an appointment to settle the terms of the order before me if that should be necessary.



M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
June 20th 1994

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Counsel for the Respondent: Ms. Karan M. Shaner

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