Date: 1998 03 17
Docket: CV 07392

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DOROTHY LAVIOLETTE

Applicant

- and -

FRED KOE

Respondent

Application for support of a child born out of wedlock.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z.VERTES

Heard at Yellowknife, Northwest Territories on Friday, March 13, 1998

Reasons filed: March 17, 1998

Counsel for the Applicant: Angela Davies

Counsel for the Respondent: Adrian C. Wright

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REASONS FOR JUDGMENT

[1] The issue on this application is the determination of an appropriate support order for a child born out of wedlock.

[2] The applicant is the mother of a girl, Regina, born on October 12, 1996. The respondent does not dispute that he is the father. Paternity tests have confirmed that fact. The applicant and respondent never lived together. The child was born as a result of a brief encounter between the parties. The child is being raised by the applicant.

[3] Both parties are employed. The applicant earns approximately $42,000 per year. In addition to Regina she is responsible for the care of another daughter, now 14 years old, from a previous relationship. She estimates her monthly expenses for the care of Regina at $1,172. This amount includes approximately $500 per month in day care expenses. She pays $25 per day for a woman to care for Regina during workdays. There was no evidence as to whether this is a standard or reasonable rate (but the respondent did not question it).

[4] The respondent is a senior government official. His annual gross income is slightly more than $125,000. He is married and has three adult children. He has provided a breakdown of his monthly expenses, both living and debt maintenance, showing that he

barely covers these expenses from his net pay. He says that he supports his two twenty-year-old children who are living at home since they are saving for their college education. There is some indication that his wife works, but there is no evidence as to her contribution to the household income and whether the expenses claimed by the respondent are offset by any contributions from his wife or his children.

[5] The first question that arises is the method to be applied for the calculation of support. The applicant's counsel submitted that, even though this is not a marriage situation, child support should be calculated on the basis of the Federal Child Support Guidelines enacted pursuant to the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c.3 (as amended). The application of the Guidelines would result in a basic monthly support payment of $1,031, based on the respondent's gross annual income. The applicant also seeks, in addition to the basic amount, the proportionate share of the monthly day care cost which would result in an additional payment of $375. This additional amount is treated as a "special expense" pursuant to s.7 of the Guidelines. The total amount of support would therefore be $1,406 per month.

[6] The respondent's counsel argued that it would be inappropriate to apply the Guidelines in the circumstances of this case. He pointed out that to do so would result in the respondent making a support payment which exceeds the total monthly expenses for the child. This would amount, in his submission, to an indirect support payment for the mother. He also argued that in a situation of a "single encounter", as here, the rationale of the Guidelines does not apply because there is no benchmark of a previous standard of living for the family unit. Therefore, in counsel's submission, the appropriate measure would be the respondent's proportionate share of the actual child care costs, a formula expounded in the pre-Guidelines case of *Levesque v. Levesque*, [1994] 8 W.W.R. 589 (Alta.C.A.). This would result in a monthly support payment of $879.53. Indeed counsel argued that this amount should be even less once one factors in the tax-deductibility of the day care expense.

[7] As a general proposition, I see no reason why the approach of the federal Guidelines should not be applied as well to non-marital situations to be determined under territorial legislation (barring any conflict with territorial legislation). There is no good reason to have different principles with respect to child support (or custody for that matter) just because a child is born of unmarried parents. Numerous recent judgments of this court have said so. This approach has been followed in other jurisdictions as well. Madam Justice Kenny of the Alberta Court of Queen's Bench stated the rationale as follows in *Channer v. Hoffman-Turner*, [1997] A.J. No.1002 (at para.12):

> I am of the view that it is appropriate to apply those guidelines in situations of both married and unmarried persons in order that children may be treated fairly. The objectives of the child support guidelines include the need to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation and to ensure consistent treatment of spouses and children who are in similar circumstances. In my view, in similar financial circumstances, we would be treating children of parents who were unmarried differently than children of parents who were married by using different parameters to deal with the issue of child support. I do not believe that that is appropriate nor does it ensure that children in similar circumstances are treated consistently.

[8] There is nothing in the current territorial legislation that would contradict the applicability of the Guidelines. The operative statute (at least for now) is the *Domestic Relations Act*, R.S.N.W.T. 1988, c.D-8. That statute provides, in s.28(4), that the court may make an order for the maintenance of a child in such amount that the court "considers reasonable, having regard to the pecuniary circumstances of the father or the mother." The Guidelines determine the basic support amount from the income of the non-custodial parent, in this case the father. But, as noted in s.26.1(2) of the *Divorce Act*, the Guidelines are "based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation." So, one can assume that in setting the Guidelines amounts, the legislators took into account the reasonable amount necessary for the maintenance of a child. Given that the custodial parent is already supporting the child, the only other relevant pecuniary circumstance is the ability of the non-custodial parent to also support the child.

[9] I note as well that the territorial legislature has given a clear indication that the Guidelines should apply. In October 1997, the legislature passed Bill 4 entitled *Children's Law Act*. It has not yet been proclaimed in force but, when it is, it will replace the *Domestic Relations Act*. The new statute provides that child support will be ordered in accordance with guidelines to be enacted by regulation: s.59(4). In the absence of those guidelines the federal Guidelines will apply: as per the definition of "applicable guidelines" in s.1. The new statute also anticipates that any territorial guidelines will follow the approach of the federal Guidelines. This is evidenced by the similarity of sections 59.1(1) to (4) of the new act, dealing with deviations from the guidelines amount, to sections 15.1(5) to (8) of the *Divorce Act*. They are almost word for word. These provisions, even though contained in an as yet unproclaimed statute, are nevertheless to be taken as an expression of the will and intention of the legislature: see Côté, P.-A., *The Interpretation of Legislation in Canada* (1984), page 69.

[10] Therefore, I have concluded that the Guidelines should be used as the applicable standard. This then leads to the next two considerations: Does it matter that this child was born as a result of a single encounter? Does it matter that the amount of support could exceed the actual monthly expenditures on behalf of the child? In my opinion, neither of these situations should result in a deviation from the Guidelines.

[11] The respondent's counsel submitted that the Guidelines are not applicable because they are, to a great extent, premised on the notion of a pre-existing standard of living for the child as part of a family unit. Hence if there is no pre-existing benchmark then there can be no standard of expectations. Implicit in this argument is the thought that since the mother is solely responsible for the child, the only objective benchmark to use is the actual cost of caring for the child and not, as with the Guidelines, the income of the father. Is it just a fortuitous circumstance that the father in this case, the one involved in this single encounter, happens to have a high salary?

[12] The applicant's counsel submitted that it would be offensive to social policy to have distinctions, for support purposes, between children of a "one-night encounter", or a common-law relationship, or a legal marriage. I agree. Such distinctions would lead to unequal treatment of children for a reason completely beyond a child's control. It would also defeat two of the purposes of a Guidelines regime, those being predictability of outcome and consistency of treatment.

[13] The argument that it would be unfair to order support payments that exceed the monthly expenses incurred on behalf of the child assumes that the expenses itemized by the custodial parent are either the norm or that they are the most that reasonably would be spent. By enacting the Guidelines regime, the legislators assumed that the child's standard of living would always be identified first and foremost with the standard of living of the custodial parent but, also, that the standard of living could be improved for the child by making the non-custodial parent's income as the guide for that parent's support obligation. If that income goes up, so do the support payments. The Guidelines are based on "average" costs necessary to maintain children. They are neither a bare minimum nor the optimal maximum but they can be assumed to be "reasonable". The fact that the custodial parent may estimate the expense at a different level is really not relevant. If there is more money available, presumably there would be more expenditures for the child. I think that there is an assumption that any excess amount, due to support payments, would go to the benefit of the child by increasing the pool of available funds for expenditures on behalf of the child.

[14] It seems to me that one of the drawbacks to the *Levesque* approach was that it was premised on the necessity to calculate the "reasonable" cost for the upbringing of the particular child in each case. That cost, once calculated, would be apportioned between the parents based on each parent's proportion of their combined income. While maintaining the same standard of living for the child was the aim, the *Levesque* case recognized that the calculation of expenses was a very haphazard exercise, one that more often than not led to an underestimation of the true costs.

[15] In a "single encounter" situation, where there is no prior standard of living to maintain, the use of the mother's expenses for child care as the benchmark ignores the entitlement of the child to benefit from the father's income level. In my opinion, it should make a difference to the child if the father is a high income earner. It should result in a higher standard of living for the child. This is part of the personal responsibility that the father must shoulder (even if that responsibility arises only from one encounter).

[16] In this particular case, the applicant's counsel also pointed out the irony in applying the *Levesque* formula as suggested by the respondent. The court in *Levesque* put forward what it termed as a "litmus test" for the reasonableness of a child support order. I will not go into the calculation suggested by the court there. I also note that the court there recognized that this was a "rough" test that would possibly be inappropriate for low income earners or higher incomes. But, if one were to apply that "litmus test" to this case, then the respondent's support obligation, as calculated by applicant's counsel, would be over $2,000 per month. That, I think, would be unrealistic.

[17] For these reasons, I think there is merit in using the basic Guidelines amount of $1,031 as the base for the respondent's support obligation in this case. The particular point that has given me difficulty is the "special expense" claim for day care expenses.

[18] As I noted previously, the applicant says that she pays $25 a day to a woman to babysit the child while she works. She estimates the monthly expense as $500. Applicant's counsel informed me that the babysitter does not give out receipts so the applicant does not claim this amount as a tax deductible expense.

[19] With respect to this type of "special expense", the Guidelines, in s.7(1), state that the court "may" provide for an amount to cover child care expenses, or any portion of those expenses, "taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the

separation." In this case, I can assume that the day care expense is a "necessity" in that the applicant is a single, working mother. It goes without saying that it is in the child's "best interests" to have someone caring for her, if her mother cannot, instead of being left alone. But there is no family "spending pattern" to consider. In addition, as I noted above, there was no evidence as to the "reasonableness" of that expense in the sense of the level of the cost.

[20] The Guidelines also provide, however, in s.7(3), that in determining the amount of the expense the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense and "any eligibility to claim" such benefits. Therefore, it is irrelevant if the applicant does not claim the day care expense as a deduction because of the lack of receipts. The availability of such a deduction must be taken into account. If the respondent is responsible for any portion of this expense, then it must be based on the after-tax cost to the applicant. I was not provided with calculations as to the after-tax cost of the day care expense so any award on my part would be a highly arbitrary one.

[21] With respect to the respondent's ability to pay child support, as I previously noted, he provided a financial statement which on its face shows that he is just able to cover his expenses from his net income. But, I am not convinced that this is a wholly accurate picture due to a lack of information as to how these expenses may be covered off to some extent by contributions from other family members. Furthermore, as has been observed in many cases, child support obligations take precedence over debt payments and non-necessities. Non-custodial parents with support obligations simply have to devise a money management scheme that will ensure that the support obligations are met. Nevertheless, I recognize that the respondent has significant family obligations.

[22] In all the circumstances of this case, I direct that the respondent pay child support in the sum of $1,131 per month. This is made up of the base amount of $1,031 plus a "special expense" allocation of $100 for day care expenses. I break the award into these two components since it is important to differentiate between the base amount calculated simply on income and the "special expense" add-on item which is discretionary and, in this case, a somewhat arbitrary figure for the reasons noted above. I note, as well, that s.13(e) of the federal Guidelines requires that a support order provide particulars of any such award. I assume there will be a similar requirement once the new territorial regime comes into play. The payments will be due on the first day of each month. I make this order retroactive to January 1st, 1998 (the results of the paternity testing being available that month, that is when the respondent should have started making payments).

[23] In addition, by consent, there will be an order granting sole custody of Regina to the applicant. The respondent may have access upon such terms and conditions as the parties may agree upon from time to time.

[24] The applicant sought costs in her originating motion. Respondent's counsel asked that costs be reserved to be spoken to. My inclination would be to award costs to the applicant on the usual basis. I will, however, hear submissions on this point if counsel cannot agree.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, Northwest Territories
this 17th day of March 1998.

Counsel for the Applicant: Angela Davies
Counsel for the Respondent: Adrian C. Wright

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