

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**MICHELLE O'BRIEN**

**Applicant**

**-and-**

**KEVIN O'BRIEN**

**Respondent**

**MEMORANDUM OF JUDGMENT**

[1] These are my reasons for confirming with variation, pursuant to s.19(7)(b) of the *Divorce Act*, the provisional order issued by the Court of Queen's Bench of Saskatchewan in this matter.

[2] On June 7, 1996, an order was issued by this court requiring the respondent to pay \$750.00 per month as child support. That amount was taxable in the hands of the applicant. She applied to the Saskatchewan courts for variation. On October 16, 1998, MacLeod J. issued an order (a) varying the monthly support payments to \$754.19 (non-taxable to the applicant of course); (b) requiring the respondent to pay one-half of all extracurricular expenses; and, (c) requiring the respondent to pay one-half of the uninsured expense for the child's orthodontist costs. On April 23, 1999, this matter came on in chambers for confirmation. At that time I received affidavit and documentary evidence on behalf of the respondent as well as submissions from his counsel.

**Guidelines Income:**

[3] MacLeod J. calculated the respondent's total income at \$89,154.23. This was based on \$63,500.70 as the respondent's employment income as a member of the Legislative Assembly of the Northwest Territories, \$22,716.00 as "that portion of his living allowance deemed to be income", and \$2,937.69 as rental income.

[4] The respondent's employment income for 1998, as shown on his tax return, was \$63,469.20. In 1997 he also had rental income of \$2,937.69 but not in 1998. As of

April 1, 1999, the respondent is an elected member of the new Legislative Assembly of Nunavut. According to information supplied by the Clerk of that Assembly the respondent will be earning the following indemnities in 1999 as a member:

Basic indemnity	-\$36,748
Constituency indemnity	- 18,665
Chair of caucus	- 1,860
Chair of Standing Committee	- 2,790
Northern allowance	- <u>8,340</u>
Total	- <u>\$68,403</u>

[5] In my opinion, the figure of \$68,403.00 is the appropriate income for guidelines purposes. Any other allowances received by the respondent are merely reimbursement for actual expenses incurred in his constituency work.

[6] With respect, I do not think it is appropriate to include a living allowance in the calculation of income. I think MacLeod J. proceeded on an incomplete premise put before him at the hearing. The living allowance paid to the respondent is reimbursement for expenses incurred by the respondent when he is attending sessions of the legislature (since he does not live where the legislature sits). How many days the legislature would be in session varies from year to year. It is therefore speculative. The allowance is non-accountable but it is essentially reimbursement for expenses incurred to earn an income. The members' allowances and expenses are set forth in s.29 of the *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5.

[7] In any event, circumstances have changed. The respondent's income, now that he is a member of the Nunavut legislature, should be set at \$68,403.00. This results in a guideline child support payment of \$594.00 per month (non-taxable). The provisional order is varied accordingly.

#### Extracurricular Expenses:

[8] MacLeod J. ordered the respondent to pay one-half of all extracurricular expenses. He did not specify the amount of the expense so it seems to me that this order could be

tantamount to a “blank cheque” for the applicant. It leaves the applicant with complete discretion with respect to those expenses. I am sure this is not what MacLeod J. intended since the applicant’s affidavit provides a list of extracurricular activities (jazz, ballet, curling, gymnastics, piano and golf) with expenses totalling \$1,686.00. If these expenses qualify as “extraordinary expenses” under s.7(1)(f) of the Federal Child Support Guidelines then it seems to me the amount should have been specified and then divided in proportion to the parties’ respective incomes (as per s. 7(2) of the Guidelines).

[9] The evidence in support of the extracurricular expense claim is simply (as stated in the applicant’s affidavit) the fact that the child’s activities have increased as she is getting older. The child is now 9 years old. The jurisprudence on extracurricular expenses has generally adopted what has been termed the “subjective” approach put forth by Bateman J.A. of the Nova Scotia Court of Appeal in *Raftus v. Raftus* (1998), 159 D.L.R. (4th) 264. This approach has been adopted by the Courts of Appeal of Saskatchewan (*Kofoed v. Fichter* (1998), 168 Sask. R. 149), Alberta (*Sanders v. Sanders*, [1998] A.J. No. 565), and British Columbia (*McLaughlin v. McLaughlin*, [1998] B.C.J. No. 2514). This approach starts from the recognition that the basic guidelines amount includes an assessment for the payor’s reasonable contribution to expenses for extracurricular and educational expenses that are not extraordinary. An “intact” family’s ability to fund extracurricular activities correlates with income. Therefore, in deciding whether an expense is extraordinary, the court should take into consideration the combined income of the parties, the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities.

[10] On this basis, given the fact that the total annual income of the parties is over \$100,000.00, as well as the type of activities this child is involved in, these expenses cannot be categorized as extraordinary expenses under the legislation. I therefore vary the provisional order by deleting the requirement to pay extracurricular expenses.

#### Orthodontist Expenses:

[11] The provisional order requires the respondent to pay one half of all orthodontist’s costs that are not covered by the applicant’s insurance plan. The respondent is concerned that these costs be reasonable and necessary.

[12] This type of expense is provided for in s. 7(1)(c) of the Guidelines. The only stipulation is, as set out in s. 7(2), that the expense be shared by the parties in proportion

to their respective incomes. The proportions are approximately 2/3 to the respondent and 1/3 to the applicant. Therefore, the requirement to pay the uninsured portion of the orthodontist expense is confirmed but varied to provide that the respondent pay 2/3 of those costs.

[13] These are my reasons for confirming the provisional order with variation, as required by s. 19(12)(c) of the *Divorce Act*. I direct that respondent's counsel prepare a formal order incorporating the disposition herein. Once the formal order is filed the Clerk is directed to transmit certified copies of the order and this memorandum to the originating jurisdiction.

Dated this 28th day of April, 1999.

J. Z. Vertes  
J.S.C.

Counsel for the Respondent: Sheldon Toner