

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**BRENDA MICHEL**

Applicant

- and -

**ROY DESJARLAIS**

Respondent

**MEMORANDUM OF JUDGMENT**

[1] When the Respondent Mr. Desjarlais' application came before me in Chambers on January 29, 1999, no one appeared on behalf of the Applicant, Brenda Michel, although she was served with notice.

[2] I ordered that Mr. Desjarlais have interim custody of the child Keith Michel (then in the interim custody and care of Brenda Michel) but that the order would not become effective until two weeks after service on Ms. Michel. I ordered further that Ms. Michel has two weeks from the date of service within which to apply to set aside that order.

[3] Mr. Desjarlais also applied for a variation of child support pursuant to the *Children's Law Act*, S.N.W.T. 1997, c. C-14 and rescission of arrears of child support. I reserved on those issues. I have decided that there should be some reduction in the amount of the arrears and that the question of continuing child support should be adjourned pending further information about the situation of the child Keith. My reasons for that decision follow.

[4] This action was originally commenced by Ms. Michel in 1996. On June 17 of that year, an order issued giving Ms. Michel interim custody of the three children and

requiring Mr. Desjarlais to pay interim interim child support in the amount of \$500.00 for each of the three children. The order was made without prejudice to the right of Mr. Desjarlais to contest paternity.

[5] The interim interim support order was subsequently suspended. On August 16, 1996, I ordered a trial of the issue of *loco parentis* with respect to one of the children and the issue of custody with respect to the child Keith. Mr. Desjarlais was ordered to pay Ms. Michel interim child support in the amount of \$500.00 per month for each of Keith and the child Kineta. The earlier suspension of child support was set aside with respect to those two children.

[6] My reasons for making the August 16, 1996 order were set out in a Memorandum of Judgment filed August 19, 1996. A perusal of that Memorandum indicates that I determined that Mr. Desjarlais was capable of earning approximately \$22,000.00 per year based on the information then provided. The evidence before me at that time was that Mr. Desjarlais' income was from employment and unemployment insurance benefits.

[7] Despite the order for trial of the issues referred to above, it appears that no steps were taken by either party (both of whom were represented at the time) to pursue this matter to trial. In December of 1998, Mr. Desjarlais brought the application which is now before me.

[8] Counsel for Mr. Desjarlais put forth a number of grounds for rescission of arrears of child support: that he did not, in fact, make \$22,000.00 in 1996; that his work is erratic and unpredictable; that he should not have to pay more than he would under the *Child Support Guidelines*; that he should not have to pay child support to Ms. Michel for months when he was incarcerated or the child Keith was staying with him.

[9] There is no evidence that Mr. Desjarlais has ever made any of the child support payments voluntarily. Attached to his affidavit is a Debtor Financial Report from the Maintenance Enforcement Program for the period September 1, 1997 to August 25, 1998. It shows a total during that time of \$12,274.33 paid by way of enforcement proceedings. As at August 24, 1998, it shows a balance owing of \$11,725.67.

[10] I agree that the *Child Support Guidelines* should govern from May 1, 1997, the date when the federal *Guidelines* came into effect. I will deal with that further on.

[11] In my view, for the period of time prior to May 1, 1997, the applicable test is the one set out in *Haisman v. Haisman* (1994), 7 R.F.L. (4th) 1 (Alta. C.A.), followed in

this Court in *Whalen v. Boivin*, [1996] N.W.T.R. 111 and *Lafferty v. Football*, S.C.N.W.T. No. CV 03052, May 20, 1997 (unreported). That test may be summarized as follows:

In short, in the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay, the arrears.

[12] Mr. Desjarlais says in his affidavit that he made only \$17,208.00 during 1996, all of it prior to the date of the August order, and that after the order until February of 1997, he was unemployed and received no unemployment insurance benefits. In the rest of 1997, Mr. Desjarlais earned \$34,272.42. His counsel submitted that he earned a total of \$18,325.00 in 1998, however a pay stub for the period ending October 2, 1998 indicates his year to date earnings as \$22,258.78 and in his affidavit he says that subsequent to that employment he made approximately \$1400.00. I find therefore that his annual income for 1998 was a total of \$23,658.78. Since late 1998, it appears that he has been unemployed.

[13] I see no basis upon which to rescind child support arrears which accumulated prior to May 1, 1997. Mr. Desjarlais' child support obligation was calculated on the basis of annual income of \$22,000.00 for purposes of the August 16, 1996 order. Although he did make less than that in 1996, he made substantially more in 1997 and slightly more in 1998. Although he may have been unable to make the payments from August of 1996 to February of 1997 (a total of seven months) as they fell due, I am not satisfied that he was unable to make them once he became employed or that he will not in the future be able to make them. When one considers the last three years, one sees that Mr. Desjarlais is capable of earning employment income despite the intervals of unemployment.

[14] This is not a case where the child support order was made in the absence of information from the payor spouse. The Court had information from Mr. Desjarlais and concluded that he was capable of earning a certain level of income and should therefore pay a certain amount of child support. He did in fact earn that level of income when one considers his average income over three years. He did not appeal the earlier order.

[15] On behalf of Mr. Desjarlais, it was also argued that he supports his common-law wife and their child. It is not clear how long he has been in that relationship. It appears as well from the information provided that his wife works or has worked and contributes to the household income. I am not persuaded that Mr. Desjarlais' obligations to his

second family mean that he is unable to contribute to the support of his first family as was ordered by this Court.

[16] As to the period of time after May 1, 1997, when the *Child Support Guidelines* under the federal *Divorce Act* came into effect, this Court has regularly applied those *Guidelines* in non-divorce situations like this one. And since November 1, 1998, when the territorial *Children's Law Act* came into effect, the amounts payable under those *Guidelines* are statutorily prescribed in cases where the parties are not married.

[17] The *Guidelines* amount should therefore be applied in this case. Instead of \$1000.00 per month as required by the August 16, 1996 order, the monthly amount payable by Mr. Desjarlais for the period May to December of 1997 is \$511.00 (based on annual income of \$34,272.42). The monthly amount for the year 1998 is \$367.00 (based on annual income of \$23,658.78).

[18] Counsel for Mr. Desjarlais argued that for any period of time where he was incarcerated, child support payments which would otherwise be payable should be forgiven. With respect, I think this argument arises from a misinterpretation of the *Child Support Guidelines*. The *Guidelines* base the calculation of child support on the annual income of the payor and the number of children for whom it is to be paid. It does not matter whether the total amount of the employment income in the year is generated over a period of twelve months or some lesser amount of time. Mr. Desjarlais' monthly obligation is calculated on the basis of his total income; the fact that he was incarcerated or unemployed in certain months is irrelevant.

[19] It was also argued that Mr. Desjarlais' child support obligation should be adjusted for periods of time when Keith was staying with him. It appears from the affidavit evidence that the time involved amounts to approximately five months since August of 1996, but it is not clear exactly when save for a period specified from March to June of 1998.

[20] The *Child Support Guidelines* do not provide for adjustment of child support payments based on time that the child spends with the payor parent except in situations of shared custody (s. 9, federal *Guidelines* and s. 11, territorial *Guidelines*). Shared custody is where the payor parent exercises a right of access to, or has physical custody of, a child for not less than forty percent of the time over the course of a year.

[21] At most, Keith may have spent a full four months with Mr. Desjarlais from March to June of 1998. That does not amount to forty percent of the time over the course of the year.

[22] Accordingly, I find no basis upon which to adjust for incarceration or the time Keith has spent with Mr. Desjarlais.

[23] I would also add that the fact that a parent's work may be erratic and unpredictable does not relieve that parent from the obligation to support his or her children.

[24] In the absence of a more complete and up-to-date Debtor Financial Report, I will summarize my findings as to the arrears and leave the actual calculations to the Maintenance Enforcement Program:

1. There will be no reduction of the arrears which accumulated prior to May 1, 1997;
2. Mr. Desjarlais' obligation for child support for the period May 1 to December 31, 1997 is reduced from a total of \$1000.00 per month to a total of \$511.00 per month;
3. Mr. Desjarlais' obligation for child support for the period January 1 to December 31, 1998 is reduced from a total of \$1000.00 per month to a total of \$367.00 per month;
4. For the month of January, 1999, Mr. Desjarlais will pay child support to Ms. Michel in the amount of \$367.00, based on imputed income in the amount he earned in 1998.

[25] The arrears are accordingly reduced to the extent set out above. Should any problems arise with respect to the calculations once they have been done by Maintenance Enforcement and any further order be required, counsel may arrange to bring the matter back on before me in Chambers.

[26] In light of the above, the August 16, 1996 order is varied as to the child support obligations in the amounts set out above. The issue of continuing child support for the period after January 31, 1999 is adjourned to March 12, 1999, at 10:00 a.m. at which

time Mr. Desjarlais is to provide to the Court affidavit material disclosing whether Keith is living with him pursuant to the interim custody order I have made. I direct counsel for Mr. Desjarlais to serve Ms. Michel with notice that the matter will be heard at that time.

[27] I emphasize that this matter is still at an interim stage. I urge counsel to set the matter for trial, as was directed in 1996, so that it may be finalized.

[28] Dated at Yellowknife, Northwest Territories, this 9th day of February 1999.

V.A. Schuler,  
J.S.C.

Counsel for the Respondent: Glennis M. Munro Brydon  
No appearing for the Applicant, Brenda Michel

CV 06343

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