Date: 1999 04 16
Docket: CV 04290

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HELENE LARAQUE

Applicant

-and-

TITUS ALLOOLOO

Respondent

REASONS FOR JUDGMENT

[1] This is an application by Mr. Allooloo for variation of the child support payable by him to Ms. Laraque, his former common-law spouse. There is a concurrent application for variation of the child support he pays to Margaret Allooloo on file no. 6101-01475.

[2] Mr. Allooloo and Ms. Laraque have two children, ages 13 and 10, who are in the custody of Ms. Laraque. By an order made in January of 1997, Mr. Allooloo is required to pay to Ms. Laraque $500.00 per month per child. He is also required to pay $500.00 per month to Margaret Allooloo for the support of the teenage child he has with her.

[3] Mr. Allooloo seeks reduction of his child support obligations to bring them in line with the *Child Support Guidelines*. He seeks a further reduction in this case on the basis of undue hardship and an adjustment with respect to the child Siku (his daughter with Ms. Laraque), who has been staying with her maternal grandparents in Colorado since September of 1998.

[4] The order requiring that Mr. Allooloo pay $500.00 per month per child was made prior to the coming into force of (i) the 1997 amendments to the *Divorce Act* which resulted in the federal *Child Support Guidelines* and (ii) the *Children's Law Act*, S.N.W.T. 1997, c. 14, which in effect adopts the federal *Guidelines* for non-*Divorce Act* matters, which apply to this case.

[5] By operation of ss. 61(2) and (3) of the *Children's Law Act* and s. 14(c) of the *Child Support Guidelines* made under that *Act*, the coming into force of the *Act* constitutes a change in circumstances which permits the Court to make a variation order, in which case the order shall be made in accordance with the *Guidelines*.

[6] Although the Court has a discretion whether to vary an order, it seems clear that deeming the coming into force of the *Act* a change in circumstance was meant to ensure that pre-*Act* orders could be brought into line with the *Guidelines* and the objectives set out in section 1 of same. At the same time, there may be cases, perhaps rare, where a court declines to order variation to conform with the *Guidelines* amount, for example, where the parties had earlier agreed on support which is higher than the *Guidelines* amount and there is no real justification for reducing the amount: *Wang v. Wang* (1997), 41 B.C.L.R. (3d) 375 (B.C.S.C.).

[7] Section 4(1)(a) of the *Act* provides that the amount of child support is to be the amount set out in the applicable *Guidelines* table according to the number of children to whom the order will relate and the income of the parent from whom support is sought.

[8] Mr. Allooloo deposed in his affidavit sworn in February, 1999 and filed on this application that his 1997 total income was $41,000.00 and his 1998 total income was anticipated to be between $40,000.00 and $50,000.00. When I heard this matter in Chambers, counsel for Mr. Allooloo filed, with no objection from Ms. Laraque, what appear to be file copies of Mr. Allooloo's income tax returns for the last three years. These show the following taxable income: 1996 - $31,737.00; 1997 - $40,863.00; 1998 - $42,715.00.

[9] Based on Mr. Allooloo's 1998 income, the *Guidelines* amount would be $622.00 total for the two children who live with Ms. Laraque. This amount would not be taxable in the hands of Ms. Laraque.

[10] Ms. Laraque made the argument that reducing the child support payable to the *Guidelines* amount would be wrong because the Court should encourage a payor to do the best he can to support his children, rather than the least he can. While I agree with that concern, I have to consider whether there is any evidence that Mr. Allooloo is doing the least he can.

[11] Mr. Allooloo's income tax return shows that of his gross income of $42,715.00 in 1998, $25,361.43 was from pensions or superannuation, $10,197.44 from employment income and $7156.34 from self-employment business income (specified as

guiding and outfitting on the income tax return). This means that his non-pension income totalled $17,353.78.

[12] Little information was provided by Mr. Allooloo about his employment situation or his business or what, if any, efforts he has made to increase his income. He has a grade 12 education. He has no college diploma or trade. He does have experience in government and politics as a former Mayor of Pond Inlet and a former member of the Legislative Assembly and former Cabinet Minister. He failed in his bid for re-election in October of 1995. He says that he has always provided for his family by hunting and that is what he knows best.

[13] Ms. Laraque argued that Mr. Allooloo can do better. She asked me to impute income to him, to find that he can earn more than he does now, mainly because he earned much more in his previous career. She is really asking that I find that he is intentionally under-employed: s. 19(1)(a) of the *Guidelines.*

[14] It has been held that the indentical s.19(1)(a) found in the federal *Child Support Guidelines* is to be limited to situations where the payor has deliberately embarked on a course of conduct to frustrate or avoid child support obligations: *Williams v. Williams* (1997), 32 R.F.L. (4th) 23, [1997] N.W.T.R. 303 (S.C.); *Yaremchuk v. Yaremchuk* (1998), 38 R.F.L. (4th) 312 (Alta. Q.B.). I see no reason why s. 19(1)(a) of the *Guidelines* under the *Children's Law Act* should not be limited in the same way.

[15] Mr. Allooloo was not cross-examined on his affidavits and neither party asked for a hearing with viva voce evidence. I am left with the information provided by Mr. Allooloo about his income for the last three years. Considering his level of education and the fact that he now lives in Yellowknife, it is possible that his political career was something of a unique opportunity for him, something unlikely to be repeated. There is certainly no evidence upon which I can conclude that he is likely or able to obtain the level of income he had before October of 1995.

[16] Nor is there any firm evidentiary basis I can use to impute any other income to Mr. Allooloo. Any figure I could set would be an arbitrary one. Also, referring again to s.19(1)(a), there is no evidence before me upon which I can safely conclude that Mr. Allooloo is deliberately acting so as to avoid his child support obligations. This is not a situation where the payor parent has specific training which realistically means he could obtain a specific type of employment. In all the circumstances, and considering that $42, 715.00 is not a negligible income (although most of it is not from employment), I am prepared to rely on the income that Mr. Allooloo has been able to attain.

[17] Accordingly, I find Mr. Allooloo's income for *Guideline* purposes to be $42,715.00, which would result in child support being payable in the amount of $622.00 for the two children he has with Ms. Laraque.

[18] I turn now to the hardship application. It is based on s. 12 of the *Guidelines*, which provides that the Court may award an amount of support different from what is set out in the applicable table where the Court finds that a parent would otherwise suffer undue hardship. Mr. Allooloo relies on s. 12(2)(d) based on his obligation to support the child he has with Margaret Allooloo and the child he has with his present wife, Cathy Allooloo. Also residing in the household maintained by Mr. Allooloo and Cathy Allooloo are the latter's two children from another relationship.

[19] Section 12 is discretionary. It involves a two-part test. First, I must be satisfied that Mr. Allooloo, as the party invoking undue hardship, comes within the criteria set out in s. 12(2)(d). I am satisfied that he does - he has the legal duty to support his child by Margaret Allooloo and his child by Cathy Allooloo. However, these circumstances are among those which <u>may</u> cause a parent to suffer undue hardship [s.12(2)(d)]. If the Court finds that the parent <u>would</u> suffer undue hardship, then it <u>may</u> order support in an amount other than that provided for by the *Guidelines* [s.12(1)].

[20] The second step is for the Court to conduct an analysis of the relative standards of living of the households of Mr. Allooloo and Ms. Laraque. The analysis submitted with Ms. Austin's brief indicates that Ms. Laraque's household has the higher standard of living.

[21] This simply means that I am not required to deny Mr. Allooloo's undue hardship application under s. 12(3) as I would if I found that after paying the *Guidelines* amount of support, Mr. Allooloo's household would still have a higher standard of living than the household of Ms. Laraque. The mere fact that Mr. Allooloo's household has the lower standard of living does not mean that he would suffer undue hardship.

[22] The question then is whether Mr. Allooloo has demonstrated that he would suffer undue hardship if required to pay the *Guidelines* amount to Ms. Laraque. That conclusion is not one to be drawn automatically.

[23] The fact that Mr. Allooloo also has to contribute to the support of his child by Margaret Allooloo as well as his child by his present marriage does not necessarily warrant a finding of undue hardship. This has been addressed in other cases, for

example, *Walkeden v. Zemlak* (1997), 33 R.F.L. (4th) 52 (Sask. Q.B.) and the case referred to therein:

> Admittedly the costs of supporting a second family may create a certain degree of financial hardship. However, such a hardship is not necessarily "undue" hardship within the meaning of s.10 of the guidelines. Again I agree with the reasoning of Wright (M.E.) J. In *Messier v. Baines*, wherein she stated at pp.5 and 6:
>
> > These objectives [s.1 of the guidelines] will be defeated if courts too readily deviate from the presumptive rule set out in section 3 of the Guidelines absent compelling reasons for doing so. Second families, and the associated legal duty to support a child of that family, are not uncommon. The assumption of such new obligations may by necessity create a certain degree of economic hardship. That hardship is not however necessarily "undue". Similarly, the mere fact that an applicant's household standard of living is lower than that of the other spouse, due in part to the applicant's legal duty to another child, does not automatically create circumstances of undue hardship.
>
> In this case the respondent has an income of approximately $52,000.00 per year. In his circumstances regular support in accordance with the guidelines, for one child, in my view, does not constitute undue hardship. Hence the amount required to be paid should not be reduced. Given this conclusion, there is no need to do a standard of living comparison.

[24] On behalf of Mr. Allooloo it is pointed out that his current spouse makes little income. Copies of her tax returns were provided (again, they appear to be her file copies) which show her income to range between $9816.00 and $20,889.00 from 1996 to 1998. This income is in part from guiding and outfitting self-employment. There is no information as to what other employment options may be available to Cathy Allooloo.

[25] Mr. Allooloo chose to have a third family. While I am not prepared to find that he is intentionally conducting his affairs so as to avoid his child support obligations, I am concerned that he has provided very little information about his employment income and why he has been unable to earn more than he asserts. In my view, a party claiming undue hardship should provide the fullest information possible. When the claim is based on having other children to support, the party should provide information to show that he has done everything possible to earn sufficient income to provide a reasonable level of support for all his children. Mr. Allooloo has not done that. I am not satisfied that he has established undue hardship.

[26] Mr. Allooloo also submitted that a reduction to the amount of support should be made because Siku, his daughter by Ms. Laraque, has been staying with her grandparents in Colorado since September of 1998. He relies on an agreement executed in March of 1994 in which he and Ms. Laraque agreed that child support would be payable until such time as the child in question is no longer in the full time care of Ms. Laraque.

[27] In her affidavit, Ms. Laraque explains that Siku has been staying with the grandparents since September 21, 1998 at her own request so as to be with her grandmother while she undergoes cancer treatment. She is to return to Yellowknife at the end of the school year. Ms. Laraque deposes that Siku is still in her care and they are in contact by telephone and e-mail two or three times a week. She is contributing to Siku's expenses for clothing, school, sports activities and medical insurance and also paying approximately $200.00 (U.S.) per month to the grandparents for Siku's care. Ms. Laraque also pays for Siku's long distance telephone calls and travel expenses.

[28] Those being the facts before me, I see no basis upon which to find that Siku is no longer in her mother's full-time care. I view the time she is spending with her grandparents as amounting to an extended visit, rather than an assumption by them of her care. I see no difference between Siku staying temporarily with her grandparents in these circumstances and being away at school. It is a temporary situation, during which Ms. Laraque still bears financial responsibility for her daughter as well as providing her with emotional support.

[29] The clause in the agreement says that child support is payable by Mr. Allooloo "until such time as" the child is no longer in Ms. Laraque's care. This suggests to me that the parties contemplated that support would be payable until the child was permanently no longer in Ms. Laraque's care. That is clearly not the case. I do not read the agreement as exempting Mr. Allooloo from the obligation to pay child support whenever the child is not physically resident with Ms. Laraque.

[30] Accordingly, I find there is no reason to reduce the support payable for Siku below the *Guidelines* amount.

[31] In the result, the child support payable by Mr. Allooloo to Ms. Laraque for the children Siku and Pauloosie is varied and will be $622.00 per month. There were no submissions made in chambers about the effective date of the variation. I order that it take effect July 1, 1999.

[32] Ms. Laraque expressed a concern in her submissions that if Mr. Allooloo's pension becomes payable in a lump sum, there may be very little available for his child support payments. As can be seen from the figures set out above, over half his income is represented by his pension. Her concern is a valid one. I therefore order that Mr. Allooloo provide Ms. Laraque with current information, in writing, about the status of his pension, including how it is paid and any notification he receives about any proposed change to how it is paid. This information is to be provided once a year starting from the date these Reasons for Judgment are filed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories

this 4th Day of June, 1999

Counsel for the Respondent: Lucy Austin
Helene Laraque appearing on her own behalf