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CV 03052

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**SHIRLEY ANN LAFFERTY**

Applicant

- and -

**DENNIS FOOTBALL**

Respondent

# MEMORANDUM OF JUDGMENT

This is an application to (a) set the quantum of child support payable by the Respondent to the Applicant and (b) for cancellation of arrears accumulated.

**Background**

The parties were teenagers when they had a relationship and a son, Donovan John Lafferty, was born to them. They had lived together during the Applicant's pregnancy but ended their relationship two months after Donovan's birth.

Donovan has lived with the Applicant since then. He is now nine years old. The parties agree that the Applicant will have sole custody of Donovan and the Respondent will have access as agreed upon and I so order.

Although the Applicant has had janitorial and cashier work at times in the past, she is presently unemployed and attending high school in Rae. She works at a video store from time to time but her wages are applied in reduction of an outstanding bill she has at the store.

The Applicant receives social assistance of $600.00 per month and $300.00 per month Child Tax Benefit. She has two other children apart from Donovan. The Respondent is not the father of these two children.

The monthly expenses the Applicant attributes to Donovan's care are very reasonable at approximately $343.00 per month.

After Donovan's birth in 1987, the Respondent had various jobs as a stock boy, fire fighter and labourer. These appear to have been seasonal or short term. He also received unemployment insurance benefits from time to time.

From 1992 until early 1994, the Respondent attended high school and worked during the summer. In January of 1994, he dropped out of school because of depression, turned to alcohol and in the spring, to his credit, attended an alcohol rehabilitation program. He still receives counselling for the alcohol problem.

The Respondent's total income for 1994 from work as a labourer was $13,042.00. In 1995, for similar work, he earned $7,481.00.

From January to June of 1996, the Respondent was in a Northern Skills Development Program for which he received financial assistance of $195.00 per month. He worked on construction for approximately two months in the summer of 1996, earning $8.00 to $10.00 per hour.

Since September 1996, the Respondent has attended the Adult Basic Education Program at Aurora College in Yellowknife. He is presently at a grade 11 equivalent level and receives financial assistance of $1,045.00 per month. He plans to finish grade 12 in this program and hopes to go on to train as an electrician, plumber or mechanic.

The monthly assistance is not paid during July and August. At the time of trial, the Respondent was in the process of looking for a summer job.

The Respondent is in a common-law relationship and has a child. He is the sole support of his family. Their monthly household expenses are $1,072.00. He does not have a vehicle or other assets.

In August of 1991, the Applicant obtained an order that the Respondent pay child support of $500.00 per month. The Respondent was served with notice of the application which led to the order, but did not respond.

The Respondent testified that he did not respond to the application because he thought that Donovan had been, or was to be, adopted. Although the Applicant admitted that there had been discussions between her and her sister about the sister adopting Donovan, she denied that matters had progressed any further, contrary to the Respondent's evidence that adoption papers of some kind were actually signed. This evidence went only to explain why the Respondent did not respond to the 1991 child support application. It is not particularly relevant to the issues before me and in any event, the Respondent must have realized soon after the order was made that he was still responsible to pay child support as Maintenance Enforcement began to collect on garnishees in May of 1992 and continued to do so on a fairly regular basis thereafter.

Arrears in the amount of $8,765.32 were owing as at March of 1997.

In July of 1996, an order was made by Richard J. of this Court that the 1991 order be treated as an interim order.

Quantum of Child Support

Counsel for the Applicant urged me to order child support using the formula set out in *Levesque v Levesque*, [1994] 8 W.W.R. 589 (Alta.C.A.).

Counsel for the Respondent argued that child support should be ordered in accordance with the Federal Child Support Guidelines, which apply to divorce actions. She submitted that this would be appropriate in that territorial legislation is pending which

is expected to include the same Guidelines and will be applicable to unmarried parents.

In my view, it would be inappropriate and unjust to treat unmarried parents and their children differently than married parents and their children. Certainly the Guidelines have been considered in non-divorce cases in this jurisdiction; see, for example, *Delorme v Speirs* (S.C.N.W.T. No. CV 06886; March 17, 1997) and *Trahan v Piercy* (S.C.N.W.T. No. CV 06378; March 25, 1997).

At present, the Respondent's income is $1,045.00 per month and therefore $12,540.00 per year if he earns at least $1,045.00 during each of July and August. Based on his past employment history, he likely to earn between $8.00 and $10.00 per hour from summer employment and so his income is likely to be closer to $13,000.00. The Guideline amount at that income level is $110.00. In my view, that is the appropriate amount to order.

I have considered ordering that the Respondent provide updated income information at a future date, but I think it preferable to leave that to be dealt with in accordance with any legislative amendments which may be made similar to what is now s.25 of the Guidelines.

Arrears of Child Support

The guiding principles in dealing with arrears are set out in *Haisman v Haisman* (1994), 7 R.F.L. (4th) 1 (Alta.C.A.), considered by this Court in *Whalen v Boivin*,

[1996] N.W.T.R. 111 and *Knowles v Knowles* (S.C.N.W.T. No. CV 06922; March 26, 1997).

In *Haisman*, which was an action under the *Divorce Act*, Hetherington J.A. said the following:

> Where a former spouse has not been able, for relatively **short** periods of time in the **past**, to make child support payments **as they came due**, this circumstance does not justify a variation order which has the effect of reducing or eliminating **arrears** of child support.
>
> Where the **past** inability to make child support payments **as they came due** has lasted for a **substantial** period of time, but the former spouse did not apply during that time for a variation order, the situation may be different. On a later application to vary, a judge will have to decide, with the benefit of hindsight, whether it would have been appropriate to suspend enforcement of the support order during the time when the former spouse was unable to pay, or whether at least a temporary reduction in the child support payments would have been in order. A judge should view with considerable scepticism any claim that a reduction in the support payments, temporary or indefinite, would have been proper. However, if he or she decides that it would, the judge may for this reason reduce accordingly the arrears of child support which have built up. In my view, this is a special circumstance.
>
> I wish to emphasize that the mere accumulation of arrears, without evidence of a past inability to pay, is neither a change under s.17(4) of the *Divorce Act* nor a special circumstance.
>
> A **present** inability to pay **arrears** of child support does not by itself justify a variation order. It may justify a suspension of enforcement in relation to the arrears for a limited time, or an order providing for periodic payments on the arrears. However, in the absence of some special circumstance, a variation order should only be considered where the former spouse has established on a balance of probabilities that he or she cannot pay and will not in the future be able to

pay the arrears.

> 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. [emphasis added in original text]

I am satisfied in this case that for a substantial period of time the Respondent has been unable to make the $500.00 monthly child support payments as they came due. This is evident from Exhibit R-3, the Maintenance Enforcement Program Case Financial Report, and the Respondent's evidence about his work and income pattern.

I am further satisfied that had information about the Respondent's financial situation been before the Court in August of 1991, the Respondent would not have been ordered to pay the sum of $500.00 per month. His work at that time was, as I understand the evidence, short term or seasonal and he was still attending school. Had he applied for a variation of the 1991 order, I expect that he would have been successful as the same work pattern has continued.

It is clear that the Respondent does not have a present ability to pay the arrears. Whether he will ever be able to do so is uncertain.

In my view, this case does present something of a special circumstance because, as indicated above, I conclude that the order as granted would not have been made if the Respondent's circumstances had been before the court. It is also different

from *Haisman* in that the order in question is an interim one.

Exhibit R-3 shows that the total amount garnisheed from the Respondent over 68 months was $25,234.68. That works out to $371.00 per month. I have no doubt that in his circumstances as they were during that time period, he would not have been ordered to pay more than that.

Counsel for the Applicant says that Exhibit R-3 reveals that in some years, such as 1992, based on the amounts garnisheed, the Respondent actually paid more than $500.00 per month. The conclusion to be drawn, she submits, is that he had the ability to pay.

While it may be that for certain periods of time the Respondent had the ability to pay, that is only part of the picture because for other, lengthy periods of time he was clearly unable to pay. In fact, a close examination of Exhibit R-3 reveals that the Respondent was in arrears continually for amounts ranging from 12 to 2 payments (of $500.00 each) between August of 1991 and October of 1994. During October of 1994, all the arrears were paid off, leaving a small credit balance. Between then and March of 1997, the arrears steadily accumulated to the $8,765.32 figure with the only significant (and temporary) reductions taking place in May of 1996.

In my view, considering all the circumstances referred to above, it is appropriate to cancel the arrears.

**Summary of Orders**

Accordingly, I order as follows:

1. The Applicant shall have sole custody of Donovan John Lafferty, with reasonable access for the Respondent as the parties may agree upon;

2. Child support shall be payable by the Respondent in the amount of $110.00 per month, commencing May 1, 1997;

3. The arrears of child support under the August 6, 1991 interim order are hereby cancelled.

4. Each party will bear their own costs of this proceeding.

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

Yellowknife, NT
Dated this ~~16th~~ 20th day of May 1997

Counsel for the Applicant: Olivia Rebeiro

Counsel for the Respondent: Sheila MacPherson

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HONOURABLE JUSTICE V.A. SCHULER