

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

AIMÉE CLARK

Applicant

- and -

PAUL TAYLOR

Respondent

MEMORANDUM OF JUDGMENT

[1] The parties seek final orders respecting custody and support. They are each self-represented so I will set out my decision in this written form so there is no misunderstanding.

1. Custody:

[2] The parties are the parents of one child born on December 2, 2000. The child has always resided with the applicant. The respondent now wishes to play a greater role in the child's life. Certainly it would be beneficial to the child if the father were to play a larger and more consistent role. There is, however, no evidence that the parties are able to work together at this time in a co-operative fashion. Such co-operation is a pre-requisite to any consideration of a joint custodial arrangement.

[3] The applicant will therefore have sole custody of the child.

2. Access:

[4] All governing principles of child custody and access emphasize the importance, to the child, of maximizing contact with both parents. In the absence of evidence of risk to the child, it is presumed that generous access for the non-custodial parent is in the child's best interests.

[5] In this case there are allegations of bad conduct by both parties toward each other but no evidence of potential harm to the child. To the contrary, the respondent has raised other children and there seems to be no good reason to deny access. Due, however, to the lack of significant contact to date, access should be gradually developed.

[6] I encourage both parties to work with a family counsellor to develop a workable arrangement for access, one that will enable access to increase over time. For the time being, I direct that the respondent is to have access every Sunday from 1 p.m. to 5 p.m. In addition the respondent will have access for a continuous period of 5 days over the Christmas period (including Christmas day) every alternate year starting in 2004 as well as a continuous period of 21 days in July of each year starting in 2005.

[7] This should not in any way prevent the parties from making agreements for additional or alternative access arrangements. My direction represents minimum terms of access in the absence of agreement. I also want to make certain that both parties understand that these terms can be changed by the court upon application by either party if good grounds exist to do so and such grounds are consistent with the child's best interests.

### 3. Support:

[8] The question of child support has to be considered in separate categories: (a) ongoing support; (b) retroactive support; and, (c) special expenses. The parties are not married so support is governed by the *Child Support Guidelines* enacted pursuant to the *Children's Law Act*, S.N.W.T. 1997, c.14. Those guidelines mirror the *Federal Child Support Guidelines*, enacted pursuant to the *Divorce Act (Canada)*, so the same principles apply.

[9] Child support is calculated on the basis of gross annual earnings. The respondent's current income is \$78,323 (based on pay stubs from his employer). The monthly child support payable based on that income is \$670.00 per month. That will be the amount of basic support payable starting on April 1, 2004.

[10] The applicant also claims retroactive support back to the birth of the child.

[11] As a matter of principle, the obligation to pay child support arises as soon as a child is born and continues whether or not an action is brought to enforce it. As a matter of practice, however, child support orders usually take effect on the date they are made or, sometimes, at the date the application is first made by the person seeking support. A court may, nonetheless, make an order retroactive to an earlier date, even predating the commencement of proceedings. Some of the factors to consider are whether there was a

demonstrated “need” on behalf of the child, an ability to pay on the part of the non-custodial parent, and whether the custodial parent has borne a disproportionate share of child-related expenses. There are also two distinct questions: (1) Should retroactive support be ordered? and (2) If so, in what amount?

[12] Generally speaking, a non-custodial parent should pay what he or she should have paid on his or her real income unless it would be a real injustice to do so.

[13] In this case, there is ample evidence of need. Also, I am satisfied of the respondent’s ability to pay, now and in the past. Furthermore, it is clear that the applicant has borne the significant part of child-related expenses. Also significant in this case, in my opinion, is the fact that the applicant put the respondent on notice, when this action was commenced in June of 2001, that she would be claiming support back to the date of birth. For that reason I order that support be made retroactive to January 1, 2001 (the month after the child’s birth). In other words, if the application for support had been brought right after the child’s birth, the first payment date would be January 1, 2001.

[14] To calculate how much should have been paid requires an examination of the respondent’s income. His tax assessment notices show gross income for 2001 of \$73,669 and for 2002 of \$71,190. The respondent acknowledged, however, that built into these figures was a deduction of \$2,500 to \$3,000 for losses relating to a rental property. So, adding \$2,500 back to the gross income figure, plus taking current income to reflect his 2003 income, results in annual incomes and resultant support obligations as follows:

<u>Year</u>	<u>Income</u>	<u>Monthly Support</u>	<u>Annual Support</u>
2001	\$76,169	\$653	\$7,836
2002	\$73,690	\$634	\$7,608
2003	\$78,323	\$670	\$8,040
2004	\$78,323	\$670	<u>\$2,010</u> (Jan/Feb/March)
			\$25,494

[15] Therefore, the total amount of basic support that should have been paid by the respondent from January 1, 2001, up to and including March 1, 2004, is \$25,494. From this amount there must be a deduction for the basic support paid by the respondent over that period. An interim order was issued on September 28, 2001, requiring payments of \$675 per month. From October, 2001, to March, 2004, those payments total \$20,250. Deducting this from the total payable results in a deficiency of \$5,244.

[16] I therefore order a retroactive support payment of \$5,244. This can be paid in lump sums or, at a minimum, it is to be paid off by monthly instalments of \$218.50 per

month, starting on April 1, 2004, for 24 months. This payment is in addition to any basic support or payments for special expenses.

[17] With respect to special expenses, the Guidelines provide an allocation for, among other things, child care expenses incurred as a result of the custodial parent's employment, illness, disability, or education or training for employment. General baby-sitting costs are not included. These expenses must be related to child care expenses incurred because of one of the listed requirements. These expenses are to be shared by the parents in proportion to their respective incomes and any subsidies or benefits receivable by one of the parents must be taken into account.

[18] The guidelines also provide that health-related expenses that exceed insurance reimbursement by at least \$100 annually, such as orthodontic treatment, drugs and eyeglasses, be treated as special expenses and allocated in the same manner.

[19] To date, the parties have used a formula whereby the respondent's actual payment works out to be 57% of the monthly child care cost. This is because the actual cost of \$700 (on average) is reduced by the tax benefit due to the applicant and the balance is divided in a rough proportion of 75% - 25% representing the income proportions. In my opinion this is a reasonable arrangement.

[20] Special expenses are therefore to be divided and paid for by the respondent (at 75%) and by the applicant (at 25%) subject to any deduction for any subsidies or benefits receivable in relation to the expense. If either parent incurs the entire expense, the other parent will reimburse her or him for the appropriate proportion upon presentation of receipts.

#### 4. Miscellaneous:

[21] Based upon the submissions presented to me, I make the following additional directions.

[22] First, the respondent is to provide to the applicant in each year on or before April 1<sup>st</sup>, twelve (12) post-dated cheques for the twelve (12) succeeding months' basic child support payments. This requirement applies now.

[23] Second, on or before June 30<sup>th</sup> in each year, starting in 2005, the parties will exchange copies of income tax returns or notices of assessment for the previous year as well as documentation reflecting current income. The monthly basic child support payment for the next 12 months will then be adjusted in accordance with the current income information.

[24] Finally, there will be no order as to costs. Funds can be better used to meet the financial obligations outlined herein.

[25] Since both parties do not have the services of legal counsel, the Clerk will file a formal Order, approved by me, to reflect the dispositions outlined in this Memorandum of Judgment. A filed copy of the Order will be sent to each party.

J.Z. Vertes  
J.S.C.

Dated this 1st day of March, 2004.

The Applicant represented herself.

The Respondent represented himself.

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