

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOHN-MICHAEL PETER PRAETZEL

Applicant

- and -

RAYLENE SUSAN PORTER

Respondent

MEMORANDUM OF JUDGMENT

[1] There is no evidence of when the parties began living together but a child of the relationship, M.P.H.P.P., was born April 12, 2005.

[2] In April, 2007, the parties purchased a home but separated in July of that year. Prior to separation, the parties took out a joint loan with the Royal Bank of Canada in the sum of \$29,800.00. The purpose of the loan was to allow the parties to buy vehicles for themselves and to consolidate credit card indebtedness.

[3] The father says that at the time of separation it was agreed he would assume the mother's portion of the debt in lieu of paying child support. This agreement was not reduced to writing nor entered into with the benefit of legal advice. A review of an excerpt from the cross-examination of the mother leaves it somewhat unclear as to whether she agreed to this arrangement. Her evidence was vague. However, she has not had to bear the cost of her legal responsibility in relation to this indebtedness and has not, until the fall of 2008, made application for child support or otherwise given effective notice to the father which would tend to indicate that she did agree to or accept this arrangement. The payments on the loan are \$675.18 each month. The father has made these payments since March 16, 2007.

[4] The father filed an application for custody or, alternately, joint custody and on October 20, 2008, Charbonneau J. ordered that the parties would have joint and shared custody. Also, the parties were to exchange financial information and the matter of child support was adjourned to November 20, 2008 to be spoken to.

[5] The mother now applies for child support commencing November 1, 2008. The father has not opposed this as an appropriate date if child support is to be ordered.

[6] On this motion, counsel for the mother is not seeking retroactive child support, child care costs or to address the issue of intentional under-employment but asks that any order I give specifically state that it is made without prejudice to the mother's right to have those matters dealt with by further interim application or at trial.

#### *Incomes of the Parties*

[7] The father earned \$48,555.00 in 2006 and \$68,699.00 in 2007. The mother argues that, having reference to ss. 16 and 17 of the *Child Support Guidelines*, the father's income should be that which he earned in 2007 or the average of these two taxation years, namely, \$58,627.00. The father's income for 2008, as calculated from pay stubs, was \$56,100.00 when income for the last 3 weeks of December is added to the total of the pay stub amounts.

[8] The father had been working for Superior Propane in 2008 but left that employment because the smell of propane made him ill and the hours of work in winter were very long, unpredictable and left less time available for him to care for M. Subsequently, the father worked for CN Doors then Weatherby Trucking but was going to be laid off so took part time employment or contract work driving trucks on the ice road, presumably to the diamond mines. No documentation or evidence was tendered to indicate how much the father is being paid for this work. He anticipates there will be work at Weatherby Trucking at the end of the ice road haul this spring. His counsel suggests he will earn less than he did in 2008 but is content that his income be fixed at \$55,000.00 for child support purposes.

[9] In my view, the most logical and fair way to determine income is to do so prospectively where there is reliable evidence before the court to allow it to make a rational calculation.

[10] Section 17(1) of the *Guidelines* provides:

**17. (1)** If the court is of the opinion that the determination of a parent's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[11] The court can have regard to patterns of income but also fluctuations. Absent the issue of under-employment, the court here should strive to determine income based on the most up-to-date and predictable financial information available. Early in 2008, the father worked in a job where it appears he was well paid and earned considerable overtime income. The evidence is that he is now less well paid and his continuing steady employment is somewhat uncertain. There is no evidence of his rate of pay for the temporary ice road trucking.

[12] In all of the circumstances, I am going to order that the father's income for child support purposes be set at \$56,100.00.

[13] The mother's income for tax purposes was \$12,100.00 in 2006 and \$6,178.00 in 2007. She says her income should be calculated by taking the average of these two figures at \$9,139.00.

[14] In August of 2008, the mother was approved for funding from the Aboriginal Human Resources Development Assistance Program through the North Slave Metis Alliance. It was allocated by semesters and was intended to cover all of her basic living expenses including childcare expenses in the sum of \$660.00 per month as well as tuition, books and a laptop. The total paid for the fall semester was \$9,995.00. The mother is to receive \$7,835.00 for the second semester (January to April) and \$4,485.00 for the third semester comprising the months of May and June, 2009. The total for this "school year" is \$22, 315.00. This funding is intended to support the mother while she pursues a Bachelor of Science Degree in Nursing at Aurora College. It will continue so long as the mother meets the required educational standards. So, whether she will qualify for this funding in the fall of 2009 is unknown.

[15] The funding the mother receives is not included in income for tax purposes and she says this money should not be considered as income for calculating child support.

[16] The father says that the full amount of the subsidy should be treated as income and that, together with the sum of \$12,303.00 earned by the mother in the summer of 2008, her income should be set at \$34,618.00 for child support purposes. Again, there is no evidence that the mother will be able to obtain a summer job in 2009 or one which would pay her at the same level of income she earned last year. Further, it is noted that the mother's "summer earnings" in 2008 included the months of May and June. Given that the third semester of the nursing program takes place in May and June, she will not be able to earn the same amount of income in the summer this year that she did last year.

[17] Also, there is no guarantee she will be continuing in the nursing program next fall. If she does not, then she will be free to pursue other gainful employment.

[18] Under section 17(1) of the *Guidelines*, in addition to patterns and fluctuations of income, the court may consider the receipt of a "non-recurring" amount. This term is not defined but would seem to be broad enough to include a non-taxable subsidy. It would make no sense to pretend this funding did not exist for the purpose of calculating child support. Money is money whether taxable or not.

[19] At the close of her argument, counsel for the mother tendered a list of calculations which included a tally of the father's 2008 income and one for the mother which came to a total of \$20,473.20. This was arrived at by taking income earned from summer employment in the amount of \$12,303.20 and adding funds received from the Metis Alliance (\$9,995.00) for the fall semester less the cost of tuition and books which are tax deductible. Counsel says that these would be appropriate figures to use in calculating income if I am to "go with 2008 income". The difficulty I have with this submission is that it fails to account for the months of January to April when the mother would have been either receiving funding or working and therefore the 2008 income figure is not based on a full year. In any event, I can take it from this submission that counsel is conceding that it would be appropriate to consider the Metis Alliance funding as income for calculating child support.

[20] I find the Metis funding of the mother to be a non-recurring amount which can be treated as income under s.17 of the *Guidelines*. In all of the circumstances, I am going to consider the amount of funding for the 3 semesters as prospective income for 2009. I will deduct the cost of tuition and books for the three semesters, being

\$4,095.00, and fix the mother's income at \$18,220.00 plus summer earnings for the months of July and August at \$6,200.00 or \$24,420.00 in total.

*Set Off of Loan Payments Against Child Support*

[21] The father argues that given the agreement between the parties, the court should order that any amount of child support he is to pay ought be set off against the mother's share of the joint indebtedness he is discharging. No authorities were submitted in support of this submission.

[22] The mother strongly opposes this suggestion and asserts that this is a family property issue to be dealt with at another time. She adds that it would be improper to allow set off given the right to support is that of the child and that, in any event, there is no clear evidence that she agreed to this arrangement.

[23] Section 59.1(1) of the *Children's Law Act* provides:

**59.1.** (1) Notwithstanding subsection 59(4), a court may award an amount of support for a child that is different from the amount that would be determined in accordance with the applicable guidelines where the court is satisfied that

- (a) special provisions in an order, a judgment or a written agreement respecting the financial obligations of the parents or, where the parents are spouses, the division or transfer of their property, directly or indirectly benefit the child or that special provisions have otherwise been made for the benefit of the child; and
- (b) the application of the applicable guidelines would result in an amount of support that is inequitable given the special provisions referred to in paragraph (a).

[24] This section allows a court to deviate from the Guidelines in making a child support order in certain narrow circumstances. Here, there is no special provision in a court order or judgment and no written agreement. Neither are the parties dividing or transferring family property. The mother has not transferred her debt to the father but rather he has assumed temporary responsibility for honouring her indebtedness in exchange for the mother foregoing child support. While courts will be inclined to give effect to agreements made between the parties, they will look to ensure that these agreements are fair and do not compromise the rights of children.

[25] The father is not claiming undue hardship.

[26] There being no provision which would allow the court to apply a set off of the mother's debt against child support, the father's application in this regard is denied. No doubt he will pursue this issue in the context of the equalization of family property.

*Child Support On Shared Custody Basis*

[27] The mother argues that the court must undertake a full blown analysis of the means, needs and relative circumstances of the parties if it is to award child support based on the differences in their incomes. Section 11 of the Guidelines provides as follows:

- 11.** Where a parent exercises an entitlement to access to, or has physical custody of, a child for not less than 40% of the time over the course of a year, the amount of support for the child must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the parents who exercises such access or custody;
  - (b) the increased costs of shared custody arrangements; and
  - (c) the condition, means, needs and other circumstances of each parent and of the child for whom support is sought.

[28] I find the mother's argument here to be somewhat disingenuous. She filed her application for child support on February 4, 2009 when the parents had been in a shared custody arrangement for in excess of three months. The mother did not file an affidavit. Her counsel did not argue in the first instance on this motion that using the difference between incomes would be an improper way to calculate child support. Rather, this argument seems to have occurred to her during the submission of the father's counsel. Perhaps she assumed that her client's income would not be relevant since she argued it should be set at a figure at or below the threshold level on the table. Regardless, if that formula is not appropriate then what would be? Surely, it would be inequitable to ignore the shared custody arrangement and order the father to pay child support as if the mother were the sole day-to-day custodian of the child.

[29] In making this argument, I did not hear counsel to say that the issue of child support should be adjourned pending a s. 11(c) inquiry.

[30] In the circumstances, I will award child support in the table amount based on the difference between the respective incomes of the parties. Should the mother deem it necessary or advisable, she may make further application to the court to vary the amount of child support based on evidence relevant to this issue. On any such application, the court should hear oral evidence from the parties on a special chambers date.

### *Conclusion*

[31] I am concerned that the incomes of the parties may change considerably over the course of the year. The mother may not get a summer job or one where she can earn the same level of income as she did in 2008. Further there is no guarantee that she will continue to be funded by the North Slave Metis Alliance in the fall of this year. The father's employment situation may also be precarious in light of the decrease in economic activity resulting from the global financial crisis. In the circumstances, I will order that both parties are to notify the other forthwith of any changes in employment conditions, terms or status or changes in funding arrangements which affect their incomes beneficially or adversely.

[32] It is therefore ordered as follows:

1. The father, John-Michael Peter Praetzel, shall pay child support starting November 1, 2008 and remaining payable on the first day of each month thereafter, for the child, M.P.H.P.P., born April 12, 2005, based on the difference in table amounts between his income of \$56,100.00 and that of the mother, Raylene Susan Porter, in the amount of \$24,420.00. This order is made without prejudice to the mother making further application to adjust the amount of child support based on her obtaining evidence relative to the criteria set out in s. 11(c) of the *Child Support Guidelines*.
2. The father's application to have the amount of child support payable to the mother set off against payments he is making on the joint indebtedness of the parties is denied.
3. The parties shall, upon there being any significant change in their financial status or outlook, forthwith advise the other party and provide

any information or documentation relevant to their change in circumstances.

4. The motion concerning issues related to retroactive child support, child care expenses and intentional under-employment are adjourned without prejudice *sine die*.

5. Given the mixed result, there will be no order as to costs.

[33] Counsel for the Applicant, mother, is asked to prepare the formal Order.

D.M. Cooper  
J.S.C.

Dated this 30<sup>th</sup> day of March, 2009.

Counsel for the Applicant: Katherine Peterson, Q.C.  
Counsel for the Respondent: Karina Winton



S-0001-FM 2008000096

---

IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES

---

BETWEEN:

JOHN-MICHAEL PETER PRAETZEL

Applicant

- and -

RAYLENE SUSAN PORTER

Respondent

---

MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE JUSTICE D.M. COOPER

---