

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

KASEY DAWN FRANK

Applicant

and

MICHAEL GORDON PAUL AUGER

Respondent

**REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE Bernadette Schmaltz**

Heard at:	Yellowknife, Northwest Territories September 11, 2006
Decision:	October 10, 2006
For the Applicant:	No appearance
Maintenance Enforcement Program:	B. Asmundson (Friend of the Court)
For the Respondent:	E. Keenan-Bengts

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I. INTRODUCTION

[1] Kasey Dawn Frank, the Applicant, has brought an Application for child support and a portion of daycare expenses, payable by Michael Gordon Paul Auger, the Respondent, in an amount in accordance with the *Child Support Guidelines, N.W.T. Reg. 138-98* (the *Guidelines*). The Applicant and the Respondent have one child born August 28, 2002; the child lives with the Applicant in Alberta.

[2] On December 8, 2005, the Applicant filed a Support Application in this Court (this Application was filed in the Family Division of the Provincial Court of Alberta on September 13, 2005). The Respondent was served with this Application on December 15, 2005.

[3] The Respondent has filed an "Answer" to the Application, and claims that an order requiring him to pay child support in accordance with the *Guidelines* would result in an undue hardship on him and his current family. The Applicant was asked to provide a financial statement in 'Form K' and information with respect to:

- the day to day care of the child since January 2006,
- any anticipated or contemplated care arrangements for the child in the future,
- the Applicant's current and anticipated household income and the number of persons in her household.

[4] I have reviewed the information provided by both the Applicant and the Respondent; the Respondent also gave *viva voce* evidence on this application; and I have considered the "Summary of Child Support Guideline Calculations" prepared on the Respondent's behalf. The Applicant did not appear personally on the Application, but Counsel from the Maintenance Enforcement Program appeared on the Application as a friend of the court and made submissions.

II. **FACTS**

[5] The Applicant and Respondent were in a common-law relationship from July 2001 until March 2005. The Respondent has paid some child support since March 2005. On the information provided to date, I find that the amount of support paid to the Applicant by the Respondent since March 2005 is \$1,400.00 in accordance with the documentation the Respondent submitted on this Application.

A. **The Applicant's Current Situation**

[6] The Applicant lives with her and the Respondent's 4 year old son. Whereas the child may sometimes visit his paternal grandparents, the Applicant is the primary caregiver of the child, and has the day to day care of the child. The Applicant works as a teachers' assistant in Edmonton, Alberta and estimates her annual income for 2006 to be \$29,250.00. The Applicant pays \$100.00 per month in day care for the child.

[7] The Applicant's estimated annual income for 2005 was \$26,240.00; her income for 2004 was \$8,288.71; for 2002 the Applicant had no income; for 2001 the Applicant's income was \$6,312.82. There is no information in the materials provided indicating the Applicant's income for 2003.

B. The Respondent's Current Situation

[8] The Respondent is now married, and he and his current spouse have the day to day care of 6 children. Five of these children are his spouse's children from prior relationships, ranging in age from 3 to 12, and the Respondent and his spouse also have a child of their own born in June of this year. The Respondent testified that he and his spouse have been together for "over 2 years now". This is somewhat in conflict with the statement in the Applicant's Application and the Respondent's Affidavit wherein both parties state that they were in a common law relationship until March 2005.

[9] The Respondent estimates his annual employment income for this year to be \$59,130.00. The Respondent testified that his spouse has recently returned to work after the birth of their child and earns approximately \$15,600.00 per annum. Before the couple's child was born in June, the Respondent's spouse earned \$38,000.00 per year, and if she had not returned to work, would be entitled to \$20,000.00 per annum in maternity benefits. The Respondent testified that his spouse does not want to return to her former employment as she had "difficulties in the office"; she has chosen to return to work right away in order to "get herself in a position to get a good job".

[10] The Respondent's income for 2005 was at least \$23,974.09. This figure is taken from the Statement of Earnings included in the Respondent's answer to the Application indicating this total gross income 'year to date'. This amount would have been earned between September 27, 2005 (employment start date at I & D

Management) and December 15, 2005. Projecting his earnings to December 31, 2005, based on this amount would indicate a total income from I & D Management of \$28,333.00. I find the Respondent's testimony that his income for 2005 was \$30,000.00 very conservative; it would appear that the Respondent only earned approximately \$1,700.00 for the first 9 months of 2005. There was no evidence before me as to the Respondent being unable to work or earn income from January to September 2005. The Respondent included Notices of Assessment in his materials for the years 2002, 2003, and 2004; his income for 2004 was \$22,695.00, for 2003 it was \$12,849.00, and for 2002 it was \$7,950.00.

[11] The fathers of the Respondent's spouse's children do not pay any child support for their children. The Respondent testified that all of the fathers of his spouse's children are alive, and agreed that there was nothing barring his spouse from pursuing child support from her children's biological fathers. He thought there may be a support order in effect for two of his spouse's children requiring the father of those two children to pay approximately \$400.00 per month child support, but no child support is currently received. The Respondent further testified that none of his spouse's children's fathers have contact with the children and he stated "I don't see why we should pursue" child support from them. He agreed that it was out of choice that child support from the biological fathers of these children was not pursued.

III. RESPONDENT'S CLAIM OF UNDUE HARDSHIP

[12] Pursuant to s. 12 of the *Guidelines*, the Respondent makes an undue hardship application, and asks this Court to reduce the amount of child support he is required to pay pursuant to the *Guidelines*. The hardship factor the Respondent relies upon is his legal obligation to support his current spouse and the six children currently living with them.

[13] Section 12 of the *Guidelines* states:

12(1) A court may, on application, award an amount of support that is different from the amount determined under any of sections 4 to 7, 10 or 11 where the court finds that a parent of the child in respect of whom the application is made, or the child in respect of whom the application is made, would otherwise suffer undue hardship.

(2) Circumstances that may cause a parent or child to suffer undue hardship include the following:

...

(d) the parent has a legal duty to support a child, other than a child for whom the parents are both legally responsible, who is

(i) a minor, or

...

[14] I find the phrase *other than a child for whom the parents are both legally responsible* refers to “the parents” between whom the application is brought, as opposed to “the parents” of the child whom the Respondent has a legal duty to support. Though I find the phrase ambiguous, I find support for my conclusion in that the identical phrase, *for whom the parents are both legally responsible*, is used in s. 10 of the *Guidelines* and in s. 10 it undoubtedly refers to the parents of the child or children on whose behalf an application is brought. I am confident that the legislators using the same phrase two sections later, intended it to have the same meaning. I also find that *legally responsible* refers to the financial obligations a parent has towards his or her child, again relying on the identical term being used in s. 10, and clearly referring to the financial responsibilities a parent has for a child.

[15] That being said the Respondent must establish that he has a legal duty to support a child other than his son for whose benefit this Application is brought, and that such child whom he has a legal duty to support is not a child for whom the Applicant and Respondent are both legally responsible. I accept that is the case here.

[16] In order to find that the Respondent would suffer undue hardship if he were ordered to pay support in accordance with the *Guidelines*, the Respondent must prove specific facts to establish the undue hardship. If undue hardship is established, then the Respondent must show that his household would enjoy a lower standard of living than the Applicant's household if the child support were not reduced.

[17] Undue hardship does not mean some hardship or any hardship. As the Alberta Court of Appeal said in *Hanmore v. Hanmore*, [2000] A.J. 171 (C.A.):

The objectives of the Guidelines are set out in s. 1. The primary objectives are "to establish a fair standard of support for children that will ensure that they continue to benefit from the financial means of both spouses after separation", and "to ensure consistent treatment of spouses and children who are in similar circumstances". Such objectives will be defeated if the Courts adopt a broad definition of "undue hardship" or if such applications become the norm rather than applying to exceptional circumstances. That has been the consistent message of the Courts since the Guidelines came into force.

...

... [T]he burden of establishing a claim of undue hardship is a heavy one... The hardship must be more than awkward or inconvenient. It must be exceptional, excessive, or disproportionate in the circumstances. ... [I]t is not sufficient that the payor spouse has obligations to a new family or has a lower household standard of living than the payee spouse. The applicant must specifically identify the hardship which is said to be undue. A general claim regarding an inability to pay or a generic reference to the overall expense of a new household will not suffice. (at paras. 10 & 17)

The Court in *Hanmore* referred to several cases that had considered the issue of undue hardship. In *Sampson v. Sampson*, [1998] A.J. No. 1214 (Q.B.), Veit, J. stated:

The guidelines anticipate that a person who asks to be relieved from paying the table amount must first identify the hardship and the court must accept that, in that case there was an undue hardship. A general claim – of the type "I can't afford to pay this amount" – will not usually qualify as a hardship event because the guidelines set their own standard about when parents must provide financial support for their children; ...

In *Jackson v. Holloway*, [1997] S.J. No. 691 (Q.B.), McIntyre, J. in referring to a claim of hardship arising from a payor's obligation to a second family, stated:

Insofar as the respondent argues he cannot afford to pay the table amount of support given his new family unit this cannot constitute undue hardship without identifying and establishing a specific basis for a claim of undue hardship. ... A separated spouse with a child support obligation enters into a new family unit knowing he or she has an obligation and is expected to organize his or her affairs with due regard to that obligation. A general or generic reference to the overall expense of a new household will not give rise to a claim of undue hardship. To permit such a claim would in many instances mean that if the claimant could establish a lower standard of living then a claim of undue hardship must succeed. This is not the test.

Similarly in *Messier v. Baines*, [1997] S.J. No. 627 (U.F.C.) Wright, J. stated:

... 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.

[18] The threshold for establishing “undue hardship” is a high one. The term means hardship that is *exceptional, excessive, or disproportionate* in the circumstances. Again, the threshold is not met by the Respondent showing some hardship. The question is whether it is undue. (see: *Campbell v. Chappel*, [2002] N.W.T.J. No. 96, at para. 18)

[19] From reviewing the information provided by the Respondent, and considering his *viva voce* evidence on this case, whereas the Respondent may suffer some hardship if he were required to pay child support in accordance with the guidelines, I find that that the Respondent would not suffer undue hardship if he were ordered to pay child support in accordance with the *Guidelines*.

[20] It is commendable that the Respondent has willingly embraced his obligation to support his current family. However, the fathers of his spouse’s children are all alive, there is nothing the Respondent is aware of to prevent those fathers from supporting their children, and it is out of choice that the

Respondent and his spouse have not pursued child support from the fathers of those children.

[21] Whereas the Respondent has a legal obligation to support the children of his current family, the Respondent's spouse and the children's fathers also have a legal obligation to support those children. The average weekly income in the Northwest Territories for 2005 was \$962.14, or approximately \$50,000.00 annually¹. The child support that should be paid for support of the Respondent's spouse's children, according to the *Guidelines*, based on an annual income of \$50,000.00, would be between \$1,356.00 per month and \$2,295.00 per month². The Respondent and his spouse have chosen not to pursue any child support from the fathers of these children.

[22] No efforts at all have been made to enforce any current order(s), nor have there been any efforts to seek support if no orders are in place. I find it difficult to justify why the Respondent's child should not be entitled to support in line with the *Guidelines* by reason of the Respondent and his spouse making no efforts to recover the support due to her children, nor even, as the Respondent said "seeing why they should". Perhaps for *his son's* sake they should.

[23] The Respondent's spouse has also chosen to return to work at a salary of approximately \$15,600.00; the Respondent's spouse was due approximately \$20,000.00 per annum in maternity benefits, which I can only assume she has chosen to forgo. The Respondent's spouse has chosen to take employment that pays her approximately 22% less than she would be entitled to in maternity benefits, and pays approximately 55% less than the employment she had before

¹ Statistics Canada Website, <http://www40.statcan.ca/101/cst01/labr79.htm>: Earnings, average weekly, by province and territory

² The Guideline amount of child support for 5 children based on an annual salary of \$50,000.00 is \$1,356.00 per month; the Guideline amount of child support payable for 1 child based on an annual salary of \$50,000.00 is \$459.00 per month times 5 is \$2,295.00 per month.

she took maternity leave. Though the Respondent's spouse has chosen to return to work, she has chosen not to return to the job that was paying her \$38,000.00 per annum as she had "difficulties in the office".

[24] The Applicant does not own a vehicle, and claims an expense of \$60.00 per month for transportation; the Respondent and his family have a 2005 Ford Freestar Van valued at \$27,000.00, and pay \$395.00 for insurance, license, gas, and oil, plus a loan payment on the \$21,000.00 owing on the vehicle. I assume this is included in the \$978.00 per month listed as "Debt (other than mortgage)" on the Respondent's statement of Expenses. The Respondent therefore pays well over \$400.00 per month for transportation. It is not clear what the other \$5,200.00 loan listed on the Respondent's financial statement was for, but if this also relates to the vehicle, then the Respondent's transportation costs are over \$1,300.00 per month.

[25] The Respondent lists RRSPs valued at \$1,400.00 as one of his assets.

[26] It may be a hardship for the Respondent to pay child support for his son. However, I find that some of that hardship is due to the financial choices or decisions that the Respondent and his spouse have made; these choices or decisions may well be reconsidered by the Respondent's family in order to meet the obligations he also has to his and the Applicant's son. The Respondent would not suffer *undue* hardship or hardship that could not be overcome if he were ordered to pay child support in accordance with the *Guidelines*.

IV. CHILD SUPPORT AND EXTRAORDINARY EXPENSES

[27] Section 4(1) of the *Guidelines* states:

4(1) Unless these guidelines provide otherwise, the amount of support for a child who is a minor or for children who are minors is

- (a) the amount set out in the applicable table, according to the number of minor children to whom the order will relate and the income of the parent from whom support is sought; and
- (b) the amount, if any, determined under section 9.

[28] Section 9 of the *Guidelines* sets out the circumstances in which the Court may include in a child support order a provision to cover special or extraordinary expenses. Section 9(1)(a) lists child care expenses incurred as a result of employment ... of the person who has lawful custody of the child. I accept that the Applicant has childcare expenses of \$100.00 per month; in accordance with s. 9(2) and 9(3) of the *Guidelines*, the Respondent is responsible for \$59.00 per month³.

[29] The *Federal Child Support Amounts: Simplified Tables Northwest Territories* (the applicable table) sets out child support of \$546.00 per month for one child, based on an annual income of \$59,130.00.

[30] As I have found that ordering the Respondent to pay child support in accordance with the *Guidelines* would not result in undue hardship to the Respondent, the Respondent is ordered to pay child support to the Applicant in the amount of \$546.00 per month plus \$59.00 per month towards the cost of child care, for a total of \$605.00 per month, commencing January 1, 2006.

[31] The Respondent shall provide to the Applicant on or before June 1, 2007, and June 1 of every year thereafter, a copy of his Notice of Assessment from Revenue Canada.

³ Section 9(2) of the *Guidelines* states:

9(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is to be shared by the parents in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

$\$100. \times \$59,130. / (\$59,130. + \$29,250) = \$67.00$; this amount is reduced to \$59.00 upon taking into consideration the tax benefit the Applicant receives.

V. RETROACTIVE SUPPORT

[32] The Applicant, in her Application filed in this court on December 8, 2005, has requested child support starting as of April 1, 2005. Pursuant to s. 13(2) of the *Interjurisdictional Support Orders Act*, the Court can make a retroactive support order.

[33] The Respondent says his income for 2005 was approximately \$30,000.00. As I stated earlier, I find this amount conservative, but it is the only information I have before me, and the Respondent was not cross-examined on this point. In the circumstances, the Respondent should have been paying \$276.00 per month child support from April 1, 2005 to December 31, 2005. As such, the arrears for the period of April 1, 2005 to December 31, 2005 would be \$2,484.00.

[34] The Respondent has submitted receipts in the amount of \$1,400.00 for child support paid to date - \$500.00 paid in 2006, and \$900.00 paid in 2005. This amount is to be deducted from the arrears and the arrears owing would then be reduced to \$7,134.00⁴.

[35] Should the Respondent provide proof that further child support was paid, or the Applicant concede that further support was received between April 1, 2005 and September 30, 2006, such will be deducted from the arrears.

[36] I will allow the Respondent to file further documentation or evidence with respect to child support payments made to the Applicant between April 1, 2005, and September 30, 2006. Such documentation must be filed, and served on the Applicant, before November 10, 2006.

⁴ At today's date, the child support and extraordinary expenses owed by the Respondent to the Applicant is: (9 months [April 2005 to December 2005] x \$276.00) + (10 months [January 2006 to October 2006] x \$605) - \$1,400.00 = \$7,134.00

[37] This matter will be adjourned to November 20, 2006, at 9:30, at which time the amount of arrears owing will be fixed, and if necessary, a payment schedule for the payment of any arrears will be set.

Bernadette Schmaltz
J.T.C.

Dated this 10 day of October, 2006, at
the City of Yellowknife, Northwest Territories

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