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6101-01680

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MYLES GARFIELD SARTOR

Petitioner
(Respondent by Counter-Petition)

- and -

DANA MARIE SARTOR

Respondent
(Petitioner by Counter-Petition)

Trial of corollary relief claims advanced by Counter-Petition.

Heard at Yellowknife on February 16 & 17, 1993

Judgment filed: March 2, 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE JOHN Z. VERTES

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(Respondent by Counter-Petition): J.D. Brydon

Counsel for the Respondent
(Petitioner by Counter-Petition): T.H. Boyd

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REASONS FOR JUDGMENT

INTRODUCTION

These proceedings were commenced by Mr. Sartor filing a Petition for Divorce on February 15, 1988. In that he sought simply a divorce judgment. On June 1, 1989, Mrs. Sartor filed an Answer and Counter-Petition whereby she sought a divorce judgment and corollary relief consisting of claims for child support and compensation for certain financial obligations purportedly assumed by her.

On December 10, 1992, I issued a divorce judgment. At that time I also gave directions for the trial of the corollary relief claims. I directed that Mrs. Sartor was to have carriage of the proceedings. These are my reasons for judgment on the corollary relief claims.

BACKGROUND INFORMATION

3 The parties were married at Victoria, British Columbia, on October 5, 1984. At the time Mr. Sartor was serving a prison sentence. In August of 1985 he was transferred to a half-way house and then in October, 1985, he was able to reside full-time with Mrs. Sartor and her two children. These were children from Mrs. Sartor's previous marriage. The younger one was a boy named Shane whose date of birth is January 24, 1972. He is the subject of the support claim.

4 While living in Victoria, the parties and the two children lived as a family. The children took Sartor as their surname. Mrs. Sartor worked continuously; Mr. Sartor worked sporadically. All earnings by both of them were put into one bank account maintained by Mrs. Sartor. From that account she paid all family expenses.

5 In August, 1986, the parties decided to make a fresh start and decided to moved to Yellowknife. Mr. Sartor's parents resided in Yellowknife. They sold most of their belongings, except for a car, a motorcycle, and personal belongings. Since they lived in rental premises, there was no real estate.

6 With the money raised from the sale, and cash on hand, the family travelled first to Ontario where they visited Mrs. Sartor's family, then drove back to Yellowknife, arriving in late August, 1986. In Yellowknife they lived with Mr. Sartor's family. The cross-country trip depleted their finances.

On October 12, 1986, the parties separated. Mrs. Sartor says that the separation was a sudden, unexpected move on Mr. Sartor's part. She says that without warning he just kicked her and the children out of his parents' house. Mr. Sartor says that they had discussed separation previously and it was a mutual decision. This is only one of the many issues of fact which are disputed by the parties.

On October 16, 1986, the parties signed a separation agreement. The circumstances surrounding this agreement and its validity are issues which I will discuss later in these reasons. After signing the agreement, Mrs. Sartor and the children travelled to Ontario.

CLAIMS ADVANCED

The relief sought by Mrs. Sartor can be divided into three categories:

1. A claim for child support respecting Shane. This in turn can be divided into (a) a claim for compensation for past support; and (b) a claim for compensation for current support.
2. A claim for $4,717.72 representing payments made by Mrs. Sartor for a motorcycle kept by Mr. Sartor after the separation.
3. A claim for $9,000.00 which represents alleged debts incurred by Mr. Sartor and paid off by Mrs. Sartor.

To place these claims into context, however, I will first review the circumstances of the separation agreement signed by the parties. Mrs. Sartor claims that

this agreement is invalid because it was signed by her under duress and without the benefit of independent legal advice. Mr. Sartor denies duress and claims that Mrs. Sartor had an opportunity to obtain legal advice but consciously chose not to do so.

11 If I find that the separation agreement is invalid, then I can go on to consider Mrs. Sartor's financial claims. If, however, I find that the agreement is valid, it seems to me that any financial claims are subsumed within its terms and then my only concern is whether the terms have been fulfilled.

SEPARATION AGREEMENT

12 The separation agreement is dated October 16, 1986. It was signed by both parties. It contains the usual "boiler-plate" clauses as well as clauses specific to the parties' situation. The pertinent provisions are:

1. Mrs. Sartor was to have sole custody of Shane (who was then 14 years old). The agreement referred to Shane as "Shane Sartor", a "child of the marriage". It further provided that Mr. Sartor "does not desire nor shall he be entitled to any access to the child".

2. Mr. Sartor was to pay no maintenance on behalf of Mrs. Sartor or Shane.

3. Mr. Sartor was to pay to Mrs. Sartor a cash payment of $4800.00 by way of an initial lump sum payment of $2400.00 and then eight monthly instalments of $300.00 each.

4. Mrs. Sartor was to receive all funds on deposit in a joint bank account maintained by the parties in Yellowknife. She was also to assume all debts owing by her as of the date of the agreement.

5. Mr. Sartor released his interest in the automobile and the motorcycle to Mrs. Sartor. With respect to the motorcycle, however, Mr. Sartor was to retain possession of it and refinance it. On doing so he was to take title to the motorcycle.

The agreement was prepared by Mr. Earl Johnson, an experienced Yellowknife solicitor, who was retained for that purpose by Mr. Sartor. Attached to the agreement is the following "Certificate":

CERTIFICATE OF INDEPENDENT ADVICE

I, EARL D. JOHNSON, of the City of Yellowknife in the Northwest Territories, Barrister and Solicitor, do hereby certify:

That I was this day consulted in my professional capacity by MILES GARFIELD SARTOR, named in the within instrument, being a Separation

Agreement and executed by him on the ( ) day of ( ), A.D. 1986, and represented him in this matter. I advised Dana Marie Sartor to obtain independent legal advice with respect to the preparation of the agreement by myself but she declined to obtain said independent legal advice.

DATED at the City of Yellowknife, in the Northwest Territories, this "16" day of "October", A.D. 1986.

(Signed) "Earl D. Johnson"

14 Mrs. Sartor testified that, after leaving the Sartors' house in Yellowknife on October 12, 1986, she received a call from her husband a few days later asking her to meet him. The next day her husband picked her up and took her to Mr. Johnson's office. She said she had no idea what this meeting was about or that her husband was having an agreement drawn up.

15 Mrs. Sartor testified that when she was at Mr. Johnson's office she did not know what was going on. She says she was never told she could have independent legal advice. She says that she was upset and crying. She also says that at one point Mr. Johnson left she and Mr. Sartor alone at which point he threatened her saying something to the effect of "you know what I'm capable of so sign it".

16 Mrs. Sartor further testified that at one point Mr. Johnson asked her if she was content with the agreement and she replied that "she had no choice". She said that she did not read the agreement before signing it.

17 Mr. Sartor testified that he did not threaten Mrs. Sartor and that in fact they

had discussed the terms of the agreement ahead of time. He acknowledged that the agreement was done in a hurry but he said that was because he had just obtained a job out of town and had to leave in a few days. Mr. Sartor further testified that they both read the agreement over before signing it and that, while Mrs. Sartor was upset, she was not crying. He said she did not want a lawyer because she did not want to pay for one.

I also had the benefit of testimony from Mr. Johnson. He acknowledged that he was acting solely on Mr. Sartor's behalf. He said that he drafted the agreement on the basis of instructions received over the telephone from Mr. Sartor who advised him that this was a rush job because his wife was leaving town. Both parties were in his office and he never left them alone.

Mr. Johnson recalls that both Mr. and Mrs. Sartor read over the agreement and signed it. He said that they both appeared normal, although tense and unhappy as would be expected in such a situation. He does not recall Mrs. Sartor crying or exhibiting any overt emotionalism. He does not recall anything that would lead him to suspect that there were threats or coercion. His impression was that they both wanted to have the matter over and done with quickly. He does recall having an exchange with Mrs. Sartor which gave him the impression that she was not happy with the situation but just wanted to get it over.

Mr. Johnson stated that he advised Mrs. Sartor of her right to independent legal advice, but she explicitly did not want to obtain any. He acknowledged that to some

extent he was relying on a "presumption of regularity", that is that he must have advised her of this right because that is his practice. Mr. Johnson, however, testified that he has a specific recollection of doing so because he also recalls making a reference to it in the certificate attached to the agreement.

21 Throughout the trial there were, as I noted previously, many facts on which the parties disagreed. On many issues the lack of supporting evidence leaves me to decide solely on the basis of my assessment of the parties' credibility. On this issue, however, I prefer Mr. Sartor's evidence because it is supported in substance by Mr. Johnson's evidence. I am satisfied that I can rely on that evidence.

22 Generally speaking, courts will defer to the wishes of the parties as reflected in a separation agreement. This is subject of course to a power to override the terms of any agreement respecting child custody and support if those terms are not in the best interests of the child. But the general policy was set out by Wilson J. in **Pelech v. Pelech** (1987), 7 R.F.L. (3d) 225 (S.C.C.) at page 269:

> It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.

23 In this case Mrs. Sartor's counsel argues that the separation agreement is not valid because she signed it under duress and without the benefit of independent legal

advice.

Some jurisdictions have legislation that enables a court to set aside a domestic contract, such as this separation agreement, based on specific criteria. The Northwest Territories has no such legislation. So, in the absence of legislation, the courts must apply the principles of the law of contract. One of the basic principles is unconscionability. The courts will intervene in "the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them": **Miller v. Lavoie** (1966), 63 W.W.R. 359 (B.C.S.C.) at page 365.

The absence of independent legal advice does not necessarily impugn the validity of an agreement any more than the existence of legal advice makes it automatically enforceable. The absence of independent legal advice is not a vitiating factor at common law. The question is whether the agreement is unequal or improvident. If the terms of the agreement are fair, then the fact that the parties were not equally armed in the negotiating process, or were not equally vigilant of their interests, is immaterial: **Mushrow v. Mushrow** (1986), 4 R.F.L. (3d) 82 (Nfld. C.A.); **Obermeyer v. Obermeyer** (1984), 40 R.F.L. (2d) 195 (Ont. Co. Ct.); J.G. McLeod, "Case Comment on **Grant-Hose v. Grant-Hose**" (1991), 32 R.F.L. (3d) 58.

Is the agreement fair? And when I say this I mean is it fair in a strictly financial sense on an objective basis.

27 The parties admittedly had very few assets. Outside of their personal belongings, the only assets of note were the automobile and the motorcycle. The automobile had negligible value, but it was kept by Mrs. Sartor and she drove it to Ontario.

28 The motorcycle, on the other hand, had some value. It was purchased for $14,118.65 in February, 1986. The purchase price came from a loan of $17,268.42 taken out jointly by Mrs. Sartor and Mr. Sartor's mother. I find, based on the evidence, that Mrs. Sartor made 9 monthly payments of $413.08 each on this loan. All those payments, however, came from the family bank account. Mrs. Sartor also made a $1,000.00 lump sum payment on the loan in April or May of 1986.

29 After the separation, the financing on the motorcycle was taken over by a loan of $18,573.00 by Mr. Sartor and his mother. Of that loan, the sum of $14,059.69 was paid in December, 1986, to retire the earlier financing on the motorcycle.

30 The motorcycle was a family asset. Up until separation it was used primarily by Mr. Sartor, but it was enjoyed by the whole family. It was purchased, in Mrs. Sartor's words, as a "coming out of jail" present for her husband. The payments, up until separation, came from the family bank account to which both spouses contributed their earnings. In my opinion, there is nothing strikingly unfair or improvident about the bargain struck over the motorcycle.

Mrs. Sartor as well was to receive $4,800.00 in cash and the funds on deposit in their bank account (which turned out to be negligible as well). Again, I find nothing unfair about this arrangement considering the financial circumstances of the parties at the time.

Mrs. Sartor was also to assume sole liability for debts in her name. This is another contentious and disputed issue.

Mrs. Sartor says that after she returned to Ontario with her children, she started getting unexpected bills on her credit cards. She says these were bills run up by Mr. Sartor on their cross-country trip and she knew nothing about them. She estimated these bills as totalling $9,000.00, but she had no documentation to support this claim.

It seems to me that if Mr. Sartor ran up bills on Mrs. Sartor's credit cards without her knowledge, and he failed to disclose this in their dealings on the separation agreement, then that may be grounds to vitiate the contract. Domestic contracts are regarded, and rightly so, as contracts of the utmost good faith: **Farquar v. Farquar** (1983), 35 R.F.L. (2d) 287 (Ont. C.A.). A material misrepresentation or non-disclosure would not be regarded as "good faith".

Mrs. Sartor, however, has failed to satisfy me that these bills, if they did come in after the separation, were ones run up by her husband without her knowledge. The credit cards were in her name; she was travelling with her husband when he supposedly

used them, so I find it unreasonable to say she would not have noticed; and, if they were used on the trip for expenses, then she benefitted from that as well. The only credit card in Mr. Sartor's name was a supplementary Mastercard account, and he eventually paid that off. Mrs. Sartor carries the burden of proof. The evidence is deficient on this issue, so I find against her on it.

36 My conclusion is that the financial terms of the agreement are objectively fair and not unconscionable. Does the lack of independent legal advice then affect it?

37 I am satisfied that Mr. Johnson advised Mrs. Sartor of her right to independent advice and she chose not to exercise it. If a spouse consciously makes a decision not to retain counsel, for whatever reason, then they cannot subsequently complain about the lack of equality of bargaining power that may result from the lack of counsel: **Bragg v. Bragg** (1986), 4 R.F.L. (3d) 173 (Nfld. U.F.C.). In any event, I found the agreement to be fair, so the lack of independent advice is inconsequential.

38 I am also not satisfied that there was duress. Mrs. Sartor struck me, from the way she gave her evidence, as a very intelligent and strong-willed individual (and I mean this in a positive sense). I think she knew what she was signing. She was not unfamiliar with separation issues since she had been previously involved in litigation with the father of her children over support payments. I also think that she must have had some input into the terms of the agreement. The provisions for the motorcycle, specifically, contain detailed terms as to insurance on the financing and the continuation of payments in the

event of the wife's death. I find it illogical to think that Mr. Sartor would put such protections for Mrs. Sartor's benefit into the agreement unilaterally if his sole concern was to force her to leave town.

From what I heard and observed during the course of this trial, it is apparent that the parties still harbour a great deal of animosity toward each other. It may very well be that Mrs. Sartor and her children had great expectations for their "new start" as a family in Yellowknife. It may very well be that Mr. Sartor acted callously and precipitously in forcing the separation. But I cannot penalize a spouse financially simply because they acted in a mean-spirited manner.

The conduct of the parties, the moral blameworthiness or culpability of either spouse, is not a factor in deciding what economic consequences flow from marriage breakdown. Neither spouse is to be penalized for alleged misbehaviour. The court can only focus on the financial relationship and interdependence of the parties to determine what is fair and reasonable: see **Pelech** at pages 252-255.

I therefore find that the agreement is valid. Any claims for financial compensation, save one that I will now discuss, are subsumed within the terms of the agreement.

COMPLIANCE WITH TERMS

I had earlier indicated that Mrs. Sartor had made 9 monthly payments on the

motorcycle. After reviewing the bank records entered as exhibits, I find that two of those payments were made on October 16 and December 15, 1986. Both of these payments were the responsibility of Mr. Sartor by the terms of the separation agreement.

43 Therefore, I award Mrs. Sartor the sum of $826.16 representing the two payments that should have been paid by Mr. Sartor to her. As this is a liquidated claim, I will allow pre-judgment interest on that amount at a rate of 10% per year from the date of filing of the Counter-Petition.

44 Mrs. Sartor also claimed that Mr. Sartor did not pay her the full amount of $4800.00 due to her under the agreement. Again, I find her evidence deficient on this issue.

45 Mrs. Sartor testified that she received only $1600.00 when she left Yellowknife and then only four of the $300.00 monthly payments. Mr. Sartor claims to have made all payments required by the agreement. He says some were by cheque and some by bank transfer. When cross-examined, Mrs. Sartor says she has no specific recollection of when or how she received the payments she did and indicated that she may have received some payments by bank transfer. She said, however, that the four payments she recalls were by cheque. Again, neither party has documentation on this issue. Having regard to the onus, I find that Mrs. Sartor has failed to establish this claim.

CHILD MAINTENANCE

Mrs. Sartor claims both for past support and for current support on behalf of Shane, who is now 21 years old.

With respect to past support, Mrs. Sartor has produced an estimate of her monthly expenses for her household generally and for Shane specifically when he was living with her in Ontario from October, 1986, to April, 1990. Mr. Sartor's counsel says that there is no jurisdiction to award child support *ex post facto.* I agree.

The issue of past support was definitively addressed in **Rebus v. McLellan** (N.W.T.S.C. No. CV 03919, October 21, 1992). In that case de Weerdt J. made the point that support orders are made for present and future need, not for past obligations for which no claim was ever made. The essential notion of support or maintenance payments is that the payments are for the ongoing needs of the beneficiary. There is nothing in the Divorce Act to suggest otherwise. I therefore deny this claim.

With respect to present support, consideration of this issue starts with s.15(2) of the Divorce Act which states that the court may order a spouse to pay support for any or all "children of the marriage". The term "child of the marriage" is defined in s.2(1) of that Act:

> 2.(1) In this Act,
>
> "child of the marriage" means a child of two spouses or former spouses who, at the material time,

(a) is under the age of sixteen years, or

(b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

50 This definition is further clarified by s.2(2) of the Act:

(2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes

(a) any child for whom they both stand in the place of parents; and

(b) any child of whom one is the parent and for whom the other stands in the place of a parent.

51 For me to make a support order I must be satisfied that Mr. Sartor stands in the place of a parent to Shane and that Shane is still under the "charge" of his mother and is unable to provide for himself. An onus rests on Mrs. Sartor as the person seeking support for her child to establish his inability to provide for himself: **Whitton v. Whitton** (1989), 21 R.F.L. (3d) 261 (Ont. C.A.).

52 Shane is in full-time attendance at a college in North Bay. He has been living in that community, away from his mother, since April, 1990. It was Shane's decision to move there and Mrs. Sartor candidly acknowledged that he has been "more or less" on his own since then. He supports himself through student loans and by working. Last summer he worked to make money for the specific purpose of repaying his student loans. Mrs. Sartor sends him money when she can as presents. She estimated that last year she may have spent $1,000.00 for him. She also provides a home to him during school

breaks. Shane is not physically or mentally handicapped in any way.

I have no doubt that while the parties were living together, they, together with Mrs. Sartor's children, formed a family. Mr. Sartor stood in the position of "father" to Shane. But any such role ceased after the separation. The evidence revealed that the only contact between Mr. Sartor and Shane since the separation in October, 1986, was in the summer of 1989 when Shane came to visit him for five days. There was no evidence of any other communications or contact between them. Unfortunately, I did not hear from Shane himself on this issue.

The status of "parent" in this context, what is known as "*in loco parentis*", is entirely a voluntary one and, at least in the absence of an order, the "parent" may terminate the relationship and, therefore, the obligation to support by simply withdrawing: **Carignan v. Carignan** (1989), 22 R.F.L. (3d) 376 (Man. C.A.). It is the intention of the person standing as "parent" that governs the relationship: **Aksugyuk v. Aksugyuk**, [1975] 3 W.W.R. 91 (N.W.T.S.C.).

In this case Mr. Sartor has not been in the position of "parent" to Shane since the separation. He was not in such position at the time these proceedings were commenced nor at the time of trial.

Furthermore, I am not convinced that Shane is under the charge of his mother. I recognize that the continuation of post-secondary education is often considered to be

cause for ordering support: **Tapson v. Tapson** (1969), 2 R.F.L. 305 (Ont. C.A.). I also recognize that greater latitude is being given to the term "under their charge" so that it is no longer limited to children living at home: **Saunders v. Saunders** (1988), 14 R.F.L. (3d) 225 (Sask. C.A.). But each case must be decided on its own particular facts.

57 In this case I find that Shane is for all intents and purposes an independent and self-supporting individual. I acknowledge the support and comfort given to him by his mother. Shane, however, has not been under her charge since he moved to North Bay in 1990. I therefore hold that he is not a "child of the marriage" and therefore the claim for support is denied.

CONCLUSION

58 I hereby grant judgment in favour of Mrs. Sartor in the sum of $826.16 plus pre-judgment interest on that amount at a rate of 10% per year from the date of filing of the Counter-Petition. All other claims advanced in the Counter-Petition are dismissed.

59 The question of costs has given me some difficulty.

60 This case took an inordinate length of time to come to trial. In all likelihood part of the blame for that can be attributed to both parties. Mrs. Sartor has won a small victory but that is overshadowed by the dismissal of her other claims. There was no trial brief or pre-trial disclosure of documents on her behalf.

In the circumstances, I order that Mr. Sartor recover his costs of this action, those costs to be taxed on the basis of Column 3 of the tariff of costs. The amount awarded to Mrs. Sartor and the costs awarded to Mr. Sartor may be used to offset each other.

John Z. Vertes
J.S.C.

Counsel for the Petitioner
(Respondent by Counter-Petition): J.D. Brydon

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