SC CV 93 040

CV 04418

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

MILTON LESLIE TUCKER

Applicant
(Petitioner)

- and -

ALISON GRETA MARGARET ASSUNTA McKAY, formerly OLAND and previously ALISON GRETA MARGARET ASSUNTA CURCIO TUCKER

Respondent
(Respondent)

Application for a provisional order pursuant to s.18 of the **Divorce Act**, varying a child support order, granted.

Heard at Yellowknife on March 14th 1993

Judgment filed: August 9th 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Applicant: Katherine R. Peterson, Q.C.

No one *contra*.

FIAT: Let the style of cause be amended as shown above. Dated this 9th day of August 1993

J.S.C.

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REASONS FOR JUDGMENT

A provisional order shall issue pursuant to s.18(2) of the **Divorce Act**, R.S.C. (2nd Supp.), c.3.

The order shall revoke the support order comprised in paragraph 3 of the decree of divorce granted in this Court (No. 6101-01280) on February 25th 1985. In addition, the order shall expunge all arrears outstanding pursuant to the support order.

The support order has required the applicant to pay $150 a month to the respondent for each of the two children of their marriage, namely Barrett William Tucker and Cortney Rachele (or Courtney) Tucker, born respectively on July 1st 1979 and September 10th 1981.

The respondent and the children reside in Nova Scotia; and the applicant resided at the time of the hearing in the Northwest Territories but was then expecting to

be transferred by his employer to British Columbia.

5 It is the evidence of the applicant that he received a letter in November 1992 from the Maintenance Enforcement Administrator of the Northwest Territories to the effect that he was some $28,500 in arrears in payment of support or maintenance for the two children as provided by the support order.

6 The respondent in her affidavit sworn on March 23rd 1993 estimated that the arrears of child support amounted to $26,400 to that time. No particulars were given as the basis for that estimate. The applicant's testimony is that he had paid $7,200 by way of child support prior to June 1st 1986 but nothing thereafter. This amount would appear to have been in excess of the requirements of the support order. No supporting evidence or particulars have however been provided. In addition, it is the applicant's evidence that a sum in excess of $700 is now held to his credit by the Maintenance Enforcement Administrator pending the further order of this Court in the present proceedings, that amount having been realised in garnishment proceedings through his bank.

7 The applicant bases his non-compliance with the support order on an agreement in writing entered into between the parties and one Thomas Summerskill Oland on June 1st 1986. They thereby agreed that the children would be adopted by the respondent and Mr. Oland with the applicant's consent. The respondent furthermore agreed to consent to an application to be made by the applicant to vary the divorce decree granted in this Court on February 25th 1985 so as to relieve the applicant

completely from any obligation to pay maintenance to the respondent for the children.

However, it is not until now that any application has been made to this Court to vary the divorce decree. And it appears that the respondent subsequently changed her mind about the adoption to which she had agreed on June 1st 1986. The adoption did not take place.

It is apparent that the present application has been prompted by the Maintenance Enforcement Administrator's letter to the applicant in November 1992 and the subsequent garnishment. The affidavit of the applicant's then solicitor shows that owing to an oversight on his part the applicant's instructions to bring the application in 1986 were not given effect. At that time, as the correspondence shows, the respondent's solicitors were instructed to consent to the application.

Be that as it may, it does not follow that the application was bound to succeed; or that, if it did succeed, no further order might be made to require maintenance or support for the children to be paid by either of the parties. The fact is that the application did not proceed; and so the support order has remained in force.

That the respondent repudiated the agreement when she decided not to proceed with the adoption in order to preserve the childrens' right to maintenance support from the applicant, and possibly for other reasons, is immaterial. The agreement of June 1st 1986 does not in any way bind the courts. Obligations of support respecting a child cannot be bargained away. And agreements to ignore a court order are of no validity in law. Nor is the agreement to consent to the adoption binding on the respondent.

12 At the same time, the agreement of June 1st 1986 (entered into, as it was, with the assistance of solicitors on both sides and presumably on the basis of their professional advice) does lend some credence to the applicant's testimony to the effect that he believed in good faith that he was no longer obligated to make the monthly support payments provided for in the divorce decree, after June 1st 1986. Mr. Oland was then believed by the applicant to belong to a wealthy family in the Maritimes with interests in a brewery business of that name. It is the applicant's testimony that Mr. Oland bought an expensive 944 Porsche motor vehicle for the respondent, all of which lent support to the applicant's belief that the respondent was financially secure while with Mr. Oland as then no longer having any need of the applicant's monthly child support payments.

13 No step appears to have been taken by the respondent to enforce the support order since June 1st 1986 until the office of the Maintenance Enforcement Administrator was referred to in 1992. This somewhat reinforces the position adopted by the applicant and lends further credence to his view of the matter as one held in good faith even if it proves now to have been mistaken in law and, so far as Mr. Oland's means are concerned, in fact.

14 Both parties to the present application have remarried since their divorce in 1985. The applicant remarried shortly after the divorce. There are three children of that second marriage, aged 6 years, 5 years and 2 months at the time of the hearing in March this year. The respondent married Mr. Oland on March 26th 1986. That marriage resulted in the birth of one child but ended in divorce in November 1990. The respondent

remarried again in December 1991. She states that she and her present husband, William Murray McKay, support a total of five children. I infer that this includes the two children who are named in the divorce decree of February 25th 1985 as well as the child of the marriage between the respondent and Mr. Oland. The respondent at the time of the hearing was not in receipt of any financial support from Mr. Oland for that child. I also infer that the remaining two children were born after the respondent's latest marriage in 1991, making them under 3 years of age at the present time.

5 The applicant testified at the hearing that he would not make any claim for support against the respondent if the two children named in the divorce decree were to live with him. Under the decree, the respondent has sole custody of those children, subject to access from time to time by the applicant. While the details are not clear, it appears that the children have paid annual visits to the applicant for several years pursuant to the access provisions of the divorce decree.

6 Nevertheless, no application has as yet been made on behalf of the applicant to vary the divorce decree provisions regarding custody and access. On the face of it, one way of resolving the difficult situation facing not only the respondent and her present husband but also the children would perhaps be to have these provisions varied so as to relieve the respondent of the burdens inevitably associated with her custodial responsibilities in respect of the two oldest children, both of whom are either in or on the verge of their early teens. It deserves to be noticed in this connection that provision was made in the agreement of June 1st 1986 for the children to decide whether they would reside with the applicant or the respondent, when they reach age 13. I mention this only

in passing, since that matter is not before the Court on this application.

17 The applicant testified at the hearing in March that his annual salary at that time was $55,000. He has been steadily employed for some 18 years as a member of the Royal Canadian Mounted Police. In addition, he was at that time in receipt of an annual Isolated Post Allowance of $13,000. However, this allowance would cease upon his being transferred to British Columbia. A financial statement filed at the hearing showed the amounts of his then current monthly income and expenditures. This will no doubt require revision if he has been transferred in the meantime to British Columbia.

18 The applicant's estimate of $4,200 as the cost of flying the children from Nova Scotia to British Columbia (no doubt less than if they were to fly to a destination in the Northwest Territories) and return appears to be reasonably accurate. It must be observed, on the other hand, that any such amount cannot be offset against court-ordered maintenance or support requirements. These have priority, so long as the support order subsists.

19 It is abundantly apparent that no order made provisionally, without affording the respondent a fair opportunity to appear and be heard, and without the opportunity to test the evidence of both parties to these proceedings through cross-examination, can hope to do more than set matters in motion so that the Nova Scotia courts may proceed and consider matters more fully pursuant to s.19 of the **Divorce Act**. The provisional order made by this Court under s.18 of the Act is of no legal effect unless and until it is confirmed, with or without any variation, by the Nova Scotia courts. If, instead,

confirmation of the provisional order is simply refused there, the support order will continue in effect and the arrears thereunder will remain payable.

The alternative of a dismissal by this Court of the present application, so that no provisional order is made, would preclude the Nova Scotia courts from exercising their jurisdiction in the matter pursuant to s.19 of the Act. The result, in that situation, would be the same as a refusal by the Nova Scotia courts to confirm the provisional order; but it would also deny those courts an opportunity to vary the support order and, in addition, to deal with the respondent's claim for the arrears.

It is therefore in order to enable the Nova Scotia courts to consider matters afresh, as far as possible, that I have come to the conclusion that the applicant should be granted the provisional order I have mentioned, knowing that its confirmation may be refused or that it may well require to be varied, by the Nova Scotia courts, after they have had an opportunity to consider the merits more completely than has been possible in this Court.

Regrettably, these reasons have been delayed by the late filing of the affidavit of the applicant's former solicitor and the intervention of other matters since then. I therefore direct the applicant's solicitor to expedite the entry of the provisional order so that it may be processed without further delay pursuant to the **Divorce Act**.

As to the appropriate official to whom this matter should be referred as the Attorney General for the Northwest Territories pursuant to s.18 of the **Divorce Act**, I direct the Clerk of the Court to seek the advice of the Deputy Attorney General of the

Northwest Territories, who should be asked to provide the Court with the relevant documentary authority. As yet, the Court does not have a copy of the **Department of Justice Act** of the Northwest Territories, as enacted in 1991, in the form of a bound volume from the Territorial Printer.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
August 9th 1993

Counsel for the Applicant: Katherine R. Peterson, Q.C.

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