SC CIV 95 012

6101-01460

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

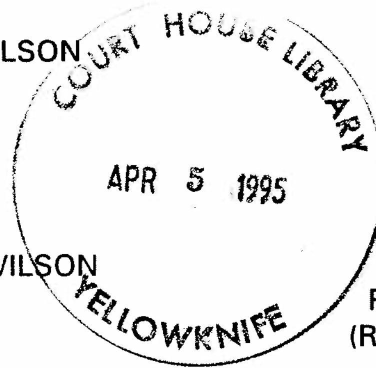
SHAUNA MAY WILSON

Applicant (Petitioner)

- and -

DOUGLAS ALAN WILSON

Respondent (Respondent)



Application for an order varying the quantum of child support granted on terms. Each party to bear his or her own costs in the circumstances.

Heard at Yellowknife on March 7th 1995

Judgment filed: April 3rd 1995

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

Counsel for the Applicant: Ms. Lucy K. Austin

Counsel for the Respondent: Ms. Karen Shaner

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REASONS FOR JUDGMENT

1 An increase in the court-ordered child support for two children, now aged 12 and 10, is sought by their mother (the custodial parent) from the natural father.

2 The parents were divorced in 1986, at which time sole custody of the children was granted to the mother, subject to reasonable access by the father, on terms to be agreed between them. At that time the father was ordered (on consent of both parties) to pay the mother $150 a month for each child by way of maintenance or support. It was expressly provided in the corollary relief provisions of the judgment that the parties might in future apply for a variation in these amounts and, furthermore, that the amounts would be reviewed by the Court when the father had completed his post-secondary education or not later than on January 1st 1988.

3 A further consent order was entered on the record on January 2nd 1990, requiring the father to pay additional amounts of child support, being initially a total of

$450 a month and thereafter $600 a month. Future applications to vary this latter amount were expressly provided for in the event of "a material change in the condition, needs or circumstances of either party or of any child of the marriage".

4 The mother now applies for an increase in the amount to be paid by the father as child support. The amount claimed is not stated in her notice of motion, but it is substantial in any event. The father opposes any increase whatsoever.

5 The governing statutory law is to be found in s.17 of the *Divorce Act*, R.S.C. 1985, c.3 (2nd Suppl.) on which both parties rely. Subsections 17(4) and (8) state:

> 17. (4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order of the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change.
>
> (8) A variation order varying a support order that provides for the support of a child of the marriage should
>
> (a) recognize that the former spouses have a joint financial obligation to maintain the child; and
>
> (b) apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation.

6 As the recited provisions make apparent, it is necessary to examine the pertinent facts. And, in determining what is pertinent, it is of importance to bear in mind the manner in which s.17 of the *Divorce Act* should be applied.

7 In addition to the facts already mentioned, it is to be noticed that the mother and children reside at Yellowknife, whereas the father resides at Victoria, British Columbia. At the time of their divorce, the parties had entered into a separation agreement in writing as to which each had obtained independent legal advice. Article 4 of that agreement states:

> <u>4. MAINTENANCE FOR THE CHILDREN OF THE MARRIAGE</u>
>
> The husband will pay the wife for the maintenance of the infant children of the marriage, the sum of ONE HUNDRED AND FIFTY ($150.00) DOLLARS per month per child. Such payments to commence on the first day of June, 1986. After the husband has completed his course of Bachelor of Education, the maintenance of the children shall be renegotiated, but such renegotiation shall occur prior to January 1st, 1988.
>
> The responsibility for the maintenance of the said children by the husband shall continue for each of the said children until the happening of any one of the following events:
>
> (a) the child attains the age of 19 years and ceases to be in full time attendance at a school, college or university;
>
> (b) the child ceases to be a financial dependant on the wife;
>
> (c) the child reaches of (*sic*) age of 19 years;
>
> (d) the child marries;
>
> (e) the child dies.

8 While the provision made in that agreement for the mother's support is not directly pertinent to the issue requiring resolution on the present application, it is

nevertheless to be noticed that she waived all future claim to such support upon payment to her of $25,000. It is not in dispute that this sum was in fact paid to her at the time by the father. This agreement between the parties goes some way, it seems to me, towards explaining the relatively low level of child support then agreed between them. And the fact that the $25,000 was paid to the mother has caused me to question whether she has in fact made full disclosure of her means and income for the purposes of the present application. I therefore directed her, through her counsel, to file an affidavit disclosing the situation on those points so that I may make a more complete assessment for purposes of s.17(4) and (8) of the *Divorce Act*. She has since filed her affidavit stating that the entire sum of $25,000 has been spent for the support of herself and the children.

9 The mother remarried in 1989. She has become divorced again and is a "single parent" at present. The father has not remarried but is living in a "common law" relationship.

10 Trained and qualified as a Registered Nurse prior to the divorce between the parties (and possibly before their marriage, since this is not made clear), the mother has not continued in nursing since that first divorce due to the long and demanding hours which would have required her to depend fully on a live-in nanny for the children. For reasons not germane here, there apparently were difficulties in retaining the nanny's services in any event. With the children at school during the week and the mother in clerical employment during weekdays, the additional expense of a nanny and of daycare is evidently saved.

11 The primary change in circumstances cited by the mother in her application is her cessation of employment while on two years educational leave attending the Northern Alberta Institute of Technology at or near Edmonton, Alberta, beginning in January this year. She is pursuing courses leading to a diploma in computer systems technology, which will apparently qualify her for a better paid position on her return to work for the Government of the Northwest Territories at Yellowknife. This change was made unilaterally by the mother, the father not having been informed of it until this application was brought.

12 Employed as a school teacher at Victoria since 1989, the father now earns a steady income in a relatively secure position. He has no other children to support besides the two children here in question. He shares accommodation and living expenses with his present spouse, who is employed and receives a net monthly income of $1,250 a month. The father himself earns a gross annual income of $47,664.00. According to his affidavit, his net monthly income (after statutory deductions) is $2,300.

13 Although the mother was earning a monthly income from employment by the Government of the Northwest Territories amounting to $1,984 (net after statutory deductions) in 1989, and a gross annual salary of $48,324 yielding well in excess of that net amount in 1994, no adjustment in the amount of child support was agreed, sought or made in the intervening period. The father fell behind with his support payments in 1994; but these appear now to be up to date.

14 The mother's present annual income from student loans is stated by her to

come to $9,270. She estimates that she will earn, in addition, $5,000 in wages during performance of course-related work experience. On this basis, she calculates that her gross annual income for the next two years will be no more than $14,270, or $1,187 a month.

15 The estimated expenses for the children set out in the mother's affidavit material come to a total of $1,768.00 a month. This sum is not questioned or disputed. It is evidently based upon a life-style which includes afterschool care and summer camp ($1800 a year), computer ($480 a year) and recreation, entertainment and gifts (totalling $1980 a year). It is apparent that the replacement of the mother's previous annual income from employment ($48,324) by her present estimated annual income from loans and expected work ($14,270) results in a reduction in her gross annual income of some $34,054.

16 Both parties make statements in their affidavits about the father's exercise of his rights of access to the children. These statements are to some extent obviously incomplete. It is enough to say that the arrangements for access have not always been mutually satisfactory; the distance separating the father from the children during most of the year, after the mother left British Columbia to return to Yellowknife, has not made matters less troublesome. It is apparent, however, that the father and the children continue to wish to maintain access to one another.

17 The father takes the position that he is unable to afford increased amounts of monthly child support. He has incurred debts, including a still-outstanding student loan

which he is at present retiring on a monthly basis. He and his spouse both operate vehicles in connection with their work, though I find it difficult to see why this is necessary if they are both employed at or near the same school, as appears from the father's affidavit material. The father states that he has invested in a daycare business with six other partners from which he does not expect to derive any income for at least two years. However, he states that he is not currently diverting any of his financial resources to support the business. His financial statement reflects a life-style which includes the acquisition of clothing ($1,536 a year), entertainment and recreation ($960 a year) and gifts ($300 a year).

18 The father strongly objects to his being asked to pay substantially more child support as a result of the mother's unilateral decision to quit her regular job and return to school. He argues, not without some justification in my view, that while the mother's wish to better her lot in the future by doing this will be of potential benefit to the children in the long run, it has clearly and unfairly created an unexpected crisis, in terms of what is now expected of him with regard to the children. The abrupt action taken by the mother is potentially extremely disruptive not only for the children but also, from at least a financial standpoint, for the father.

19 The father and his spouse are, amongst other financial obligations, indebted to a bank under a mortgage on their home. If they are now to restructure their financial affairs to meet the mother's present demand for a substantial increase in child support, a major revision of their current life-style may well prove inevitable; and any such revision may then entail substantial loss to them.

20 Of course, no one suggests explicitly, on either side here, that the children's interests should be subordinated to those of the parents; or that creditors of one kind or another are to take precedence over child support obligations. Yet I cannot escape from the conclusion that the parents here, on both sides, have difficulty accepting their full responsibilities towards the children. Each of the parents has placed other immediate priorities ahead of their respective support obligations. The mother's radical change in her ability to provide the children's accustomed level of support was made also without any sense of responsibility towards the father when she made that change unilaterally and without notice to him. And the father's apparent assumption that he could live beyond his means and still provide child support as the children are reaching their teens, when the separation agreement (and the divorce judgment based on it) clearly provides for increases in such support as the circumstances may require, betrays an equal lack of mature responsibility.

21 It is trite law, for which no precedential authority need be cited, that child support obligations take priority over those owed to creditors generally. The courts are guided, in matters of child support awards, as in custody awards, by what appears to be in the children's best interests. And in post-divorce situations, as here, the court must apply the relevant provisions of the *Divorce Act* as these have been judicially interpreted and applied, especially at the appellate level.

22 Clearly, there has been a significant change in the means of both parents since the last variation of the child support provisions of the corollary relief order of 1986 was made in 1989. As well, there has equally clearly been a significant change in the needs of the children since then. It is only appropriate therefore to make an order further increasing the amount of child support to be paid by the non-custodial parent, here the father.

23 The question then is as to the amount by which the existing level of support ($600 a month in total) should be increased.

24 On behalf of the mother it is submitted that, since she agreed to accept less than a sufficient level of child support while the father was completing his university studies immediately after the divorce, so that she was then bearing more than her fair share of the burden in order to enable him to do that, it is only fair that he should now be obliged to shoulder most of that burden to enable her to complete her course of studies at the Northern Alberta Institute of Technology.

25 The obvious weakness in this submission is that there is no evidence that the father ever agreed to any such mutual arrangement. On the contrary, he appears to have been taken completely by surprise upon learning of the mother's decision to quit her well-paid job to take up a two-year course of studies while subsisting on a very low income. If fairness is to be the criterion, the mother can hardly be said to have acted fairly in forcing the issue, unilaterally and without notice, upon the children and the father. She seems to have acted on the sudden, in the middle of the children's school year at Yellowknife.

26 Leaving the last-mentioned considerations aside, and assuming that the father's monthly contribution of $600 would have to be matched by an equal contribution

by the mother when she was earning a gross income comparable to his, that would yield a total of $1,200 a month to meet the children's requirements whereas according to the mother's estimate (which is not disputed) a figure clóser to $1,800 is required. On that basis she was exceeding her fair share of financial support for the children by a margin of 100% up until she moved to Edmonton in January this year.

27 Simply to correct that imbalance, the father's contribution should be increased to $900 a month. But of course the situation is not nearly so straightforward and simple. The mother is no longer able to contribute a similar amount as her share of the total estimated expenses for the children.

28 I therefore invited counsel for both parties to see me in my chambers, when I posed the question whether the children might not stay with the father at Victoria while the mother is pursuing her course of studies in Edmonton, so as to minimise the cost of housing, always assuming that the father's residence at Victoria is large enough and that his new spouse and the children can get along together. This arrangement would save the mother the cost of accommodating, feeding and clothing the children while pursuing her diploma. It would not ease the father's financial burdens except to keep in his hands the $900 (which he would otherwise be obliged, as a monthly minimum, to pay to the mother as child support), though he would no doubt then be called on to apply that amount in any event to the children's various expenses. The financial saving would lie in using the father's home to relieve the burden of accommodating the children at Edmonton.

29 The alternative approach, on which the present application has been brought, is to leave the children at Edmonton and to then require the father to pay at least $1,200 a month to the mother to make up for the reduced level of her present income. This $1,200 would be double the present child support payment of $600 a month now required of him.

30 None of the figures mentioned above has been adjusted for the impact of income tax on the parties. When revised for that purpose, the father's monthly contribution will be further increased even more. On the other hand, if the children move in with the father at Victoria, that increased contribution will remain in his hands without any tax implications (other than his ability to then claim the children as his dependants for purposes of the usual tax deduction or credit). In that event, the monthly family allowance for the children from the federal government (presently paid to the mother) would presumably be transferred to the father. The mother would probably be unable to contribute otherwise, although in theory her monthly contribution could then be as high as $400.

31 I say "in theory", relying upon the child support calculations agreed by counsel and submitted to me at the hearing. The reference in these to *Levesque* is, of course, to the Alberta Court of Appeal decision in *Levesque v. Levesque* (1994) 4 R.F.L. (4th) 375, [1994] 8 W.W.R. 589, (1994) 20 Alta. L.R. (3d) 429, (1994) 155 A.R. 26, (1994) 73 W.A.C. 26.

32 The calculations are as follows:

Gross income of mother: $14,270.00
Gross income of father: $47,664.00

Combined gross income: $61,934.00

A. *Levesque* estimate for two children is 32% of gross income: $19,818.88 per year or $1,651.57 per month.

B. Mother's estimated monthly expense for the children: $1,768.00.

Respective parental contributions:

A. Based on *Levesque* estimate ($1,651.57):

Mother's contribution: $\frac{14,270}{61,934}$ x $1,651.50 = $ 379.85

Father's contribution: $\frac{47,664}{61,934}$ x $1,651.50 = $1,271.66

B. Based on the mother's estimate ($1,768.00):

Mother's contribution: $\frac{14,270}{61,934}$ x $1,768.00 = $ 406.64

Father's contribution: $\frac{47,664}{61,934}$ x $1,768.00 = $1,361.76

33 It will be noticed from these figures that the $1,200 amount for the father, which was mentioned earlier, is somewhat on the low side whereas the $400 amount for the mother is close to the amounts shown in the calculations. Neither figure takes account, however, of the amounts of family allowance presently sent to her for the children. No mention of those amounts is made with reference to the mother's calculation of her expenses in relation to the children.

34 In *Carla Shuparski v. Norman Mair, Jr.*, as yet unreported, January 18th 1995 (CV 05191), the *Levesque* guidelines were applied by Hetherington J. (sitting as a member of this Court). And while, under the doctrine of ***stare decisis***, those guidelines are strictly not binding upon this Court; and it does not appear that their applicability within the Northwest Territories was at issue in that case; it is of course true that decisions of the Alberta Court of Appeal (whose members are all also members of the Court of Appeal of the Northwest Territories) generally carry exceptional weight in this jurisdiction, especially where rendered *per curiam* by a panel of seven judges, as in *Levesque*. No issue has been raised in the matter now before me as to whether the *Levesque* guidelines are appropriate in cases arising in the Northwest Territories.

35 Bearing in mind that the mother is now living in Alberta, and plans to remain there for two years, and that the father is a permanent resident of British Columbia, it is apparent that the application of these Alberta guidelines is thus *ex facie* more appropriate in this particular instance than they may prove to be generally in the Northwest Territories.

36 Counsel for the father made reference to *Vervoorst v. Vervoorst*, [1992] 3 W.W.R. 221, 122 A.R. 280, 85 Alta. L.R. (2d) 244, 37 R.F.L. (3d) 178, (Q.B.). This decision was cited for the proposition that the comparatively higher cost of raising older children does not qualify as a significant change in circumstances for the purposes of s.17(4) of the *Divorce Act*. However that may be, it does not alter the situation before me here, this being a case in which the parties expressly agreed (and consented to orders of the Court) to the effect that the amount of child support to be paid is subject to

variation at any time on application by either party in the event of "a material change in the condition, means, needs or other circumstances of either party or of any child of the marriage" (my emphasis). These words are evidehtly closely modelled on s.17(4) of the *Divorce Act*.

37 In my respectful view, the comparatively higher cost of maintaining and raising the two children in this case today, as opposed to 1989 when the last child support order was made, need not be justified on the basis of their increased age alone; it is evident that this cost has increased significantly in any event since then, and not only due to life-style changes associated with the mother's increased income during that period, although I do not altogether ignore that aspect of the matter.

38 Counsel for the father has referred to two other fairly recent decisions made at first instance, namely: *Delleman v. Delleman* (1993), 118 Sask. R. 79 (Q.B.); and *Zerr v. Zerr* (1993), 48 R.F.L. (3d) 31 (B.C.S.C.). It is counsel's submission on behalf of the father that these decisions point in the direction which this Court should take in the matter at hand.

39 In the *Delleman* case, the father of three children, who was subject to an Ontario child support order when he moved to Saskatchewan, quit his job and enrolled in a computer training program which he financed through student loans. The father applied to the Saskatchewan court to suspend the order and cancel the arrears which had accumulated under the order. The children were meanwhile on public assistance in Ontario. In dismissing the application, the Saskatchewan Unified Family Court held that

although the father was entitled to quit his job, he was not entitled to pass on to the children and their mother, or to the public purse, the economic consequences of his decision.

40 The parallels between the facts in the *Delleman* case and those of the present case are apparent. However, it should be noted that the father in that case was the non-custodial parent who was seeking to reduce his monetary contributions to the support of his children; whereas in the present instance the mother is the custodial parent who is seeking an increased contribution from the father on account of her unilateral decision to quit a well-paid job and instead take relatively unremunerative further training with a view to later earning a better income.

41 The *Zerr* case also reveals certain parallels with the instant matter; but, once again, there are certain factual divergences to be noted. That was a case in which the mother of two children was in receipt of child support from the father under a consent order based on the respective incomes of the parents. She entered another relationship and gave birth to another child. In doing that, she left her employment and did not intend to return to work for several years. And so, she applied to the court to increase the amount of child support payable for the first two children by their father.

42 This application was also dismissed. The mother was in receipt of unemployment insurance benefits during her period of maternity leave, in addition to a "top up" from her employer which in effect maintained her level of income for that period close to what she would have earned if on the job. The focus, in cases of this kind, is

thus primarily on the capacity of the parent to contribute towards the support of the children. In the *Zerr* case the mother was found to have suffered no reduction in her means since her capacity to contribute to the support of the first two children remained undiminished by the addition of her third child to her new family.

43 Counsel have also referred to the decision of the Supreme Court of Canada in *Willick v. Willick* (1994), 6 R.F.L. (4th) 161. That was a case in which the father's capacity to contribute to the support of his two children was significantly increased following the divorce, in which custody of the children was awarded to the mother. As in the present case, the mother sought an increase in the monthly child support payable by the father, relying upon s.17(4) of the *Divorce Act*.

44 The *Willick* case shows that the needs of the children are to be assessed in the context of the parents' means and consequent life-styles. The reasonable expectations of the children in that context are to be taken into account. This approach to the interpretation of s.17(4) of the *Divorce Act* appears to be equally correct in a case such as the present, where there has been a diminution in the means of a parent which reduces that parent's capacity to continue contributing at the same level to the support of the children.

45 Among other things, Sopinka J. for the majority (4:3) in *Willick* quoted with approval the words of Keenan Dist. Ct. J. (as he then was) in *Moosa v. Moosa* (1990), 26 R.F.L. (3d) 107 (Ont. Dist. Ct.) at page 110:

> It is established beyond dispute that a dependent child is entitled to look to both parents for support. It is also established beyond dispute that each parent has an obligation to provide for the support of the child. The amount of support to be provided is the amount that will meet the needs of that particular child. The measure of those needs depends on a number of factors including the age of the child and the standard at which the child could reasonably expect to be supported. The reasonableness of the expectation is to be measured against the means and circumstances of the parents who have the obligation to provide the support. I know of no reason why that expectation should be any different for a child who is the innocent victim of the breakdown of the relationship between its parents. If the ability of the parents or either of them increases or decreases, it is reasonable to expect that the level of support of the child will increase or decrease.

46 Taking into account the guidelines propounded in *Levesque* and the present circumstances of both parents, together with the contextual approach approved in *Willick*, I am compelled to conclude that the present amount of child support payable by the father to the mother must be substantially increased over the two years of the mother's course if, as the present application presumes, the children are to remain with her during that period.

47 As counsel for the mother presented the application, there are two questions to be considered: (a) What should the increase have been if the mother had chosen to remain in her job at Yellowknife? and (b) What further increase, and on what terms, should be made to meet the additional requirement for cash to enable the mother to continue to provide a home for the children while the mother is engaged in her course at Edmonton?

48 The answer to question (a) is not difficult. As mentioned earlier, the mother's estimated expenses of the children would be divided equally between the parents, so that the father would be required, on this basis, to pay $450 a month for each of the children making for a total monthly increase of $300. This increase is appropriate in any event and is in no way affected by the mother's departure to take a course at Edmonton.

49 The answer to question (b) is much more problematic. The outcomes reached in *Delleman* and *Zerr* are in my respectful view entirely valid in the factual context of those cases. However, a similar outcome in the present case, given that the mother is now three months into her course of studies at Edmonton, would only have unfortunate consequences for all concerned. As mentioned earlier, the parties may decide to arrange for the children to stay with the father at Victoria during the remaining duration of the course, perhaps beginning with the next school year, so as to minimise the overall expenses to be borne. Failing that, the mother asks for a further increase to $1,200 a month (or $600 for each of the children), subject to adjustment to take income taxes and deductions into account.

50 If the children are to remain with the mother and if the father is then to pay any amount in addition to the $900 a month above mentioned, it would appear to be only just and equitable to place terms on the payment of such additional amount so that the mother would in effect reimburse the father for that amount after the course is completed.

51 Keeping the children's needs and best interests in the forefront of our considerations, but recognizing that their expectations too must be modified somewhat by the present circumstances of their respective natural parents; and hoping that those parents may yet find it possible to modify their present positions so as to meet the children's needs by agreement, the following order shall issue:

(a) the father shall pay the mother the monthly sum of $450 for the support of each of the children, making a total of $900, subject to what follows;

(b) the term "monthly" in paragraph (a) means from and including January 1st 1995 to and including December 31st 1997, or as the Court may otherwise order;

(c) the father shall pay the mother the additional monthly sum of $150 for the support of each of the children, making a total of $300 in additional monthly support, commencing on May 1st 1995 and continuing until December 31st 1997 or as the Court may otherwise order;

(d) the amounts of additional monthly support paid pursuant to paragraph (c) are by way of an advance on support payments which may become payable after December 31st 1997, as the Court may order or as the parties may agree;

(e) the amounts of support above mentioned shall be reduced *pro rata* during any period during which either or both of the children resides with the father in his home at Victoria, British Columbia;

(f) the parties shall make their best endeavour to minimise difficulties for the children and, in particular, to ensure that they may continue to enjoy access to both parents so far as circumstances allow and the children so wish.

52 If counsel wish to see me to work out any details of this order, they may do so by appointment.

53 Each party shall bear his or her own costs, in the circumstances.

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

Yellowknife, Northwest Territories
April 3rd 1995

Counsel for the Applicant: Ms. Lucy K. Austin

Counsel for the Respondent: Ms. Karen Shaner

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