SC CIV 95 042

6101-02467

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROSEMARY ANGELA EDER

Petitioner

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YELLOWKNIFE

- and -

MANFRED EDGAR EDER

Respondent

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**Application by respondent for interim child support. Cross-application by petitioner for interim spousal support. Applications are dismissed.**

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## REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on November 27, 1995

Reasons filed: December 5, 1995

Counsel for the Petitioner: Thomas H. Boyd

Counsel for the Respondent: Elaine Keenan Bengts

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## REASONS FOR JUDGMENT

The petitioner and respondent were married in 1981 and separated in 1994. They have two children ages 13 and 11. The children reside with the respondent father pursuant to an interim order made in June of this year. The respondent now seeks interim child support. The petitioner pleads poverty and, in turn, seeks interim spousal support.

**Legislative Framework:**

2 The factors that a court must consider, and the objectives sought to be achieved, in any child or spousal support order are set out in s.15 of the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.):

> (5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by the spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of the spouse or child.

> (6) In making an order under this section, the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
>
> (7) An order made under this section that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
>
> (8) An order made under this section that provides for the support of a child of the marriage should
>
> (a) recognize that the spouses have a joint financial obligation to maintain the child; and
>
> (b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.

These factors and objectives apply equally to interim and permanent support orders. As such, the traditional approach on interim applications of examining simply the means and needs of the parties should give way to a review of the broader implications mandated by the *Divorce Act*. But, as many cases point out, the lack of a complete evidentiary foundation on most interim applications leads oftentimes to a reliance on the "means and needs" approach so as to provide at least some immediate relief and await fine tuning at trial.

Interim Child Support:

The respondent seeks an interim order for $860.00 per month for child support. His counsel has provided a series of computer-generated calculations using the guidelines

set forth by the Alberta Court of Appeal in Levesque v Levesque, [1994] 8 W.W.R. 589. That case has been repeatedly followed in this jurisdiction.

5 The Levesque guidelines recognize the joint financial obligation of the parents to support their children. They also emphasize that, as required by the *Divorce Act*, the support obligation should be apportioned between the parents in accordance with their relative abilities to pay. This procedure requires, as the first two steps, a calculation of the parties' incomes and a calculation of the reasonable living costs for the children.

6 The respondent has a gross annual income in excess of $76,000.00. The petitioner's actual income this past year is only $10,000.00. The petitioner, however, is now in a new relationship with a man who earns a relatively high income. On a straight-forward ability to pay analysis, the petitioner by herself cannot pay any child support.

7 Respondent's counsel, however, submits that the appropriate income calculation is not what the petitioner actually earns but what she could be earning. Prior to the separation, the petitioner earned $35,000.00 per year. Since then she embarked on some new education courses but is now able to work only part-time in her chosen field.

8 In Levesque, the court held that one's ability to contribute, in the context of child support, must encompass not only income but also income-earning capacity. In that regard, respondent's counsel submits that I should impute an annual income of $35,000.00 to the petitioner. Counsel commendably, however, provided to me a series

of support calculations based on a series of income assumptions. The support sought of $860.00 per month is based on a notional annual income of $20,000.00.

9 I have no difficulty in imputing an income figure based on earning capacity when the lower actual income is the result of either a deliberate attempt to impoverish oneself so as to avoid support payments or a conscious life-style choice. But there is no evidence to support either supposition in this case. The petitioner undertook an education programme after her separation. As of now she is only able to obtain part-time employment. She may, in the future, have greater success in which case her income will no doubt be much higher than $35,000.00. But, at this time, I am satisfied that there is a bona fide lack of ability to contribute.

10 I am also not convinced that the child care costs set out by the respondent are reasonable. He has estimated monthly child care costs for each child in excess of his own living costs. Part of the reason is because he has simply divided the housing and transportation expenses in equal thirds as between himself and the two children. It seems unrealistic to think that if housing costs, for example, $1,500.00 per month for him and his two children then it would only cost $500.00 for him alone or $1,000.00 for him and only one child. Similarly it seems unrealistic to think that the respondent would not be paying the same vehicle expenses if he did not have the children with him. There should be some explanation given in the evidence for the child care cost allocations.

Some counsel may be under the impression that with guidelines such as Levesque the practice of setting child support becomes a mere mathematical exercise. It does not.

There is still wide scope for the exercise of discretion. But, because these guidelines do provide some greater degree of certainty, the mathematical calculations are important. Therefore they must be based on accurate and reliable information. The child care expenses should be supported by some explanation in the evidence. One cannot simply adopt a formulaic approach. This was recognized by the court in Levesque when it stated that the decision in any one case rests on the particular matrix of facts in that case.

12 These comments apply to both interim and permanent applications. But while the principles are the same, the approach on an interim application is slightly different because it is only interim. This point was recently highlighted by the Alberta Court of Appeal in MacMinn v MacMinn (Appeal No. 14792; October 3, 1995):

> Dealing first with the issue of the jurisdiction and ability of the trial judge to make adjustments at trial to interim support orders, we note that interim support is just that - interim support. It is frequently ordered without benefit of discoveries, full production of documents, viva voce evidence and generally the safeguards of a trial designed to determine the actual state of the parents' respective financial affairs. It is ordered, and the theory is that it is to be ordered quickly, to meet a need at the time on the basis of what is then the best evidence available to the court. One of the purposes of interim support is to relieve the custodial parent from the financial hardships which would undoubtedly arise while waiting for the perfect child support application to be made. And while we are well aware that interim awards often become permanent awards because of the costs involved in litigating these disputes through the courts, that in no way justifies a failure to adjust what turns out to be an inadequate, and therefore unfair, award, if and when the matter should proceed to trial.
>
> At the same time, we wish to encourage chambers judges to consider the matter of interim support carefully and with full recognition of the fact that for most families, the interim award usually becomes the *de facto* permanent award. Although the interim award may be adjusted at trial, the fact that this procedure exists ought not to be looked on by the parties as a reason not to pay careful attention to the appropriate quantum of support at the earlier stage. If the evidence at trial differs from that which was available to the chambers judge, such that it would have resulted in a different award having been made if the trial evidence had been available to the chambers judge, then we are of the view that this is a good reason to adjust the

> award at trial. The mere fact that the custodial parent did not appeal the interim award prior to trial is not a bar to adjusting that same award at trial.

13 In this case, I am satisfied that the petitioner has a bona fide present inability to pay child support. If I were to order her to do so on the basis of some imputed income, the reality is that it would come out of the pockets of the man with whom she now lives. He does not bear that responsibility. If, at trial, further evidence shows that I am wrong, then the trial judge will be able to make some adjustment to the award to make up for inadequacies in this interim period. The respondent's level of income should suffice for the time-being.

14 The claim for interim child support is therefore dismissed.

**Interim Spousal Support:**

15 The objectives of spousal support are those set out above from s.15(7) of the *Divorce Act*. All four of those objectives must be examined to determine whether spousal support is necessary in order to "achieve an equitable sharing of the economic consequences of marriage or marriage breakdown": per L'Heureux-Dubé J. in Moge v Moge (1994), 43 R.F.L. (3d) 345 (S.C.C.). It should be remembered, however, that marriage does not guarantee an award of support.

16 In this case the petitioner has few resources of her own to support herself. There is a matrimonial property claim and, at the time of separation, she took money from joint accounts. All of this will no doubt be sorted out at trial. The problem with this claim,

however, is that the petitioner fails to provide complete information as to her present need for support. There is, for example, no evidence whatsoever as to the contributions made by the petitioner's new "spouse" to her living expenses. I recognize that the mere fact that the petitioner has entered into a new relationship does not disentitle her to spousal support. But here there is insufficient evidence to make even a preliminary assessment of the petitioner's entitlement to support, much less the appropriate quantum.

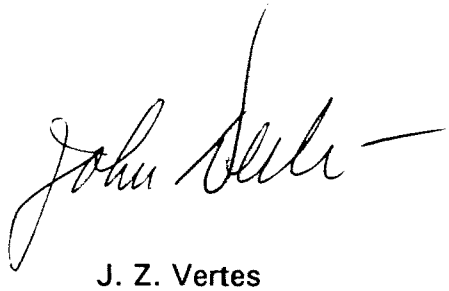
17 The difficulties just outlined are part of the nature of interim applications. As noted by Carr J. of the Manitoba Court of Queen's Bench in Labelle v Labelle (1993), 46 R.F.L. (3d) 341 (at page 345):

> With respect to the argument based on *Moge v. Moge*, S.C.C., December 17, 1992 [reported at 43 R.F.L. (3d) 345], in my view, it is not necessary, appropriate, or possible for a court to make the sort of inquiry contemplated by L'Heureux-Dubé J., in *Moge* on an interim application. Interim orders, by their nature, are "holding orders," and whereas the support objectives contained in the *Divorce Act* are, strictly speaking, applicable on an interim hearing, common sense dictates that the depth of the inquiry at this stage of the proceedings is quite different from that expected at trial. As a case such as this demonstrates, it is often difficult enough to prove ability to pay prior to disclosure, let alone compile all of the evidence necessary for a full and complete exploration of the facts necessary to apply s.15(7) objectives.

18 If the purpose of interim support is to enable the recipient spouse to maintain an acceptable standard of living until the trial, then there is a lack of evidence here to suggest that there is such a need. The petitioner may have a valid claim for permanent support of some type on the basis of economic disadvantage but that has not been shown as yet.

19 The claim for interim spousal support is also dismissed.

20 There will be no costs payable to or from either one of the parties with respect to these two applications.



J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 5th day of December, 1995

Counsel for the Petitioner: Thomas H. Boyd

Counsel for the Respondent: Elaine Keenan Bengts

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**Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes**