

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOANNE SINGH

Petitioner
(Respondent)

- and -

HARPER SINGH

Respondent
(Applicant)

MEMORANDUM OF JUDGMENT

This is an application by Mr. Singh for an order cancelling arrears of maintenance which have accrued under a corollary relief order of this court dated August 9, 1993 and reducing the monthly child maintenance payable under that order to amounts which will vary depending on whether Mr. Singh is receiving employment income, unemployment insurance benefits or neither one.

Counsel for Mrs. Singh advises that she has no instructions and has been unable to obtain material for filing from her client, despite efforts to do so.

The parties were divorced in 1993 in proceedings brought by Mrs. Singh as Petitioner. The court record shows that Mr. Singh was served with the Petition for Divorce but did not appear in or defend the proceedings. The corollary relief order dated August 9, 1993 provides that Mrs. Singh has custody of the four children of the marriage

and that Mr. Singh shall pay to Mrs. Singh the sum of \$200.00 per month per child in support of the children commencing August 1, 1993.

Mr. Singh has filed several affidavits detailing his financial situation. It appears that at the time of the divorce, he was in receipt of a disability pension of \$800.00 per month from the Workers' Compensation Board (the "WCB pension") as a result of an accident which occurred while he was employed at a mine in 1989. The accident affected his ability to work.

In 1994, Mr. Singh obtained employment, in part through a Workers' Compensation Board work evaluation programme. Throughout the spring and summer of 1995, he had temporary short-term employment and received some unemployment insurance benefits while still receiving his pension. For the months of September through December 1995 inclusive, he was in receipt of the pension and unemployment insurance benefits, both of which were being garnisheed by the Maintenance Enforcement Office. His application for variation was filed in November of 1995, and has been adjourned several times, at least in part so that counsel for Mrs. Singh could obtain instructions. Since January 15, 1996, the August 3, 1993 order has been suspended pending the outcome of Mr. Singh's application.

On February 28, 1996, Mr. Singh commenced employment doing janitorial and custodial work at Colomac Mine. He still has that employment and now earns \$100.00 per day gross for 28 days, then ceases work for 14 days, then works for 28 days and so on. He also has the WCB pension.

At the time the August 9, 1993 order was made, in the course of a "desk" divorce without oral hearing, the only information before the Court about Mr. Singh's employment or financial circumstances was a statement in the Petition for Divorce, filed by Mrs. Singh's former counsel, that his employer was the Workers' Compensation Board. This would logically lead the judge who issued the order to conclude that Mr. Singh was employed by the Board and receiving income. While the reference to the Board may well have been intended to refer only to the fact that Mr. Singh was receiving the WCB pension, the Petition does not say that and, as worded, was incorrect. In a case where the other party does not appear, it is incumbent on counsel to ensure that the information put before the court is accurate. Of course, the fact that Mr. Singh did not respond to the divorce proceedings is also to blame for the lack of accurate information.

What was Mr. Singh's financial situation in August 1993, at the time the order was made? From what I can glean from the affidavit material, his only income was the WCB pension of \$800.00 per month. He had closed out a video store business in 1992 and sent the proceeds of same to his wife. He then pursued upgrading.

Accordingly, the August 9, 1993 order in the amount of \$200.00 per month per child for four children was equal to Mr. Singh's only income, his pension.

Section 17(4) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) provides that before I vary the August 9, 1993 support order I must be satisfied that there has been a change in the condition, means, needs or other circumstances of either of the former

spouses or any of the children since the making of the support order. I must also take into consideration that change, if any, in making a variation order.

Section 17(8) also requires that any order I might make varying child support should recognize that both former spouses have a joint financial obligation to maintain the children and should apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation.

In Willick v. Willick (1994), 6 R.F.L. (4th) 161, the Supreme Court of Canada set out the test for variation of a support order. I draw a number of principles from the majority decision of Sopinka J. which are relevant to this case:

1. The original support order which a party seeks to vary is to be considered as having accurately assessed the needs of the children having regard to the means of the parents;
2. The change in circumstances must be a material one such that, if known at the time of the original support order, would likely have resulted in different terms;
3. Once the judge hearing the application finds that the conditions for variation exist, she must reassess the needs of the children in light of the change and determine what variation should be made.

Is there a material change in this case that would justify a variation in the support order made at the time of the divorce?

In Pelley v. Pelley (1995), 14 R.F.L. (4th) 1, the British Columbia Court of Appeal considered an appeal from dismissal of a variation application. The appellant payor in that case had ignored the divorce proceedings, which resulted in a support order being

made in the absence of any information about his circumstances. The Court of Appeal held that the judge who made the order must have imputed income to the appellant in an amount considerably higher than the amount of the support order. The appellant's income at the time of the variation application was significantly less than that. The Court of Appeal held that the effective reduction in his income from that originally imputed to him must be seen as material and that being so, the judge hearing the variation application should have embarked on an analysis of what variation in maintenance was justified as a result of the change in circumstances.

Based on the reasoning in Pelley, I can assume that when the corollary relief order was made in this case, income of considerably more than the support ordered to be paid (\$9600.00 per year) must have been imputed to Mr. Singh. In reality, however, his income then, being the WCB pension, was only \$9600.00 per year. Ironically, now when Mr. Singh is applying for a variation, his income is substantially higher than that. But it may not be as high as what was imputed to him at the time of the divorce.

I must also look at the circumstances of Mr. Singh's employment, bearing in mind that he has only in the last two years become employed after a serious accident and long convalescence and that his employment has not been continuous. His current employment at Colomac Mine is not permanent and could terminate at any time according to his affidavit material. I consider the existence of these circumstances, along with Mr. Singh's true income position, to be material.

It would clearly be unreasonable in this case to consider that the August 9, 1993 order accurately assessed the needs of the children having regard to the means of the parents. Had Mr. Singh's true circumstances been known at the time of the order, the terms of that order would no doubt have been different.

In Pelley, supra, it was said by the British Columbia Court of Appeal that the degree of variation of support and the cancellation or reduction of arrears of maintenance must be based on a "realistic assessment" of the circumstances of the ex-spouses and the children.

At the time of the divorce, the only information before the court about Mrs. Singh's income was contained in her financial statement, showing income from family allowance and Public Assistance only. Now, when it is Mr. Singh who seeks to have the support order varied, it is Mrs. Singh who has ignored the proceedings by not presenting current information as to her financial situation. Indeed, the only information I have as to her circumstances at all is that she has remarried and, for the last six or seven weeks, while she has been residing in other communities, has apparently left the children with an aunt. The circumstances of the children have not been satisfactorily explained. I do not know the extent to which Mrs. Singh is able to provide for their support; indeed, I do not even know whether they are still in her care. I am unable, therefore, to conduct a realistic assessment of the circumstances, save for those pertaining to Mr. Singh.

In my view, the material submitted by Mr. Singh as to his financial situation, both income and expenses, justifies the reduction sought in the amount of support.

Should Mrs. Singh eventually apply to vary the order I now make, the court will again be in the undesirable position of considering variation of an order made when only some of the necessary information was made available to it.

As to the arrears of support, the affidavits of Mr. Singh indicate that his WCB pension was in part garnisheed by the Maintenance Enforcement Program. As at January 1, 1995, which is the earliest date for which I was provided figures, he owed \$8,750.00. His income, consisting variously of employment income, the WCB pension and unemployment insurance benefits, was garnisheed throughout 1995 and 1996, leaving a balance owing of \$8,461.16 as at February 22, 1996.

Since the balance owing has not increased since January 1, 1995, it seems reasonable to conclude that the arrears are attributable to the period of time before Mr. Singh was able to obtain employment, in other words, to the period of time when his income consisted only of his WCB pension. Mr. Singh has been employed since shortly after February 22, 1996, so it seems appropriate to make that the cut-off date as far as the period for which the arrears should be cancelled.

In all the circumstances, I order as follows:

1. the arrears of child support under the August 9, 1993 corollary relief order are cancelled to the extent of \$8,461.16;
2. commencing February 1, 1996, Mr. Singh will pay child support in the amount of \$100.00 per month per child for each month in which he is employed;

3. commencing February 1, 1996, Mr. Singh will pay child support in the amount of \$50.00 per month per child for each month in which he is receiving unemployment insurance benefits;
4. commencing February 1, 1996, Mr. Singh will pay no child support for each month in which he is neither employed nor receiving unemployment insurance benefits;
5. commencing February 1, 1996, Mr. Singh will supply to the Director of Maintenance Enforcement written evidence of any change in his employment status.

The order of August 9, 1993, is accordingly varied to the extent set out above.

Dated this 27th day of May, 1996.

V.A. Schuler
J.S.C.

Heard at Yellowknife, Northwest Territories
on May 21, 1996.

To: Tom Boyd,
Counsel for the Respondent (Applicant)

Lucy Austin,
Counsel for the Petitioner (Respondent)

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**Memorandum of Judgment of the
Honourable Mdm Justice V.A. Schuler**
