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6101-2676

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DAVID GEORGE IAN MONTEITH

Petitioner

- and -

SUZANNE TOONGALUK EVALUARDJUK MONTEITH

Respondent

MEMORANDUM OF JUDGMENT

The Respondent applies for variation of an interim order dated June 3, 1996, requiring her to pay child support in the amount of $200.00 per month for each of the three children of the marriage, who are in the care of the husband.

The Respondent was served but did not appear on the application which led to the order. The order itself contains a clause entitling the Respondent to apply to vary it.

On behalf of the Respondent it is argued that the oldest child is no longer a child of the marriage and accordingly support should not be payable for him, that the expenses claimed by the Petitioner are excessive, that the Respondent's non-monetary contributions should be taken into account and that the Respondent's actual income rather than what she is capable of earning should govern.

<u>The oldest child</u>

The oldest child, Iain, is 20. In his affidavit sworn April 26, 1996, for purposes of his application for child support, the Petitioner indicated that Iain was still in high school and residing with him.

In her affidavit sworn July 10, 1996 (and in response to which the Petitioner has not filed an affidavit), the Respondent says the following:

> That Ian *(sic)* has his own employment in Iqaluit at Mary's Video and is looking for a second job. While he resides with the Petitioner, Ian is or could be financially independent. He has been accepted at college in Ottawa for the fall and will receive financial support from the Government of the Northwest Territories in this regard.

From the two affidavits, and the fact that the Respondent does not deny what was in the Petitioner's affidavit, I assume that the employment Iain has is for the summer only. There is no information as to how much money he makes and no information as to how much financial support he will receive from the Government for purposes of his education.

The applicable definition of "child of the marriage" in the Divorce Act is a child of the spouses who 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".

The fact that a child is over 16 but a student in a full-time programme, even if receiving financial support from another source, does not necessarily mean he

is self-supporting. Ongoing education has been accepted as a cause by reason of which a child is unable to withdraw from the charge of his or her parents: *Hoadley v. Hoadley*, [1996] 4 W.W.R. 48 (Alta. Q.B.).

The onus is on the parent seeking maintenance to establish that the child is unable to withdraw from the charge of his parent and provide for himself: *Hoadley, supra*.

The onus is accordingly on the Petitioner in this case.

In light of the Petitioner's failure to put forward any evidence on this issue, I find that he has not met the onus of showing that Iain should still be considered a child of the marriage and accordingly no interim support will be payable for Iain.

Expenses claimed by the Petitioner

Counsel for the Respondent submits that the expenses which the Petitioner has claimed relating to the children are excessive. Clearly they would have to be reduced by one-third in light of my finding that the Petitioner has not satisfied the onus of showing that Iain is still to be considered a child of the marriage. Apart from that, however, counsel for the Respondent questions the amounts claimed for such items as vacations, gifts, repairs and maintenance and food. Counsel for the Petitioner responds that it is expensive to live in Iqaluit, as the Petitioner and the children do.

I am not prepared to say that the amounts claimed are excessive without specific evidence on that point, except that it does seem to me somewhat unrealistic to claim, as the Petitioner has done, three-quarters of the housing repair and maintenance costs as relating to the three children. Presumably the Petitioner would have the same or substantially the same costs were he living in the home by himself.

Respondent's ability to pay

The Respondent clearly has an obligation to contribute to the support of the children: s. 15(8)(a) of the *Divorce Act*.

Section 15(8)(b) of the *Act* states that child care costs should be apportioned between the spouses according to their relative abilities to contribute. The authority most often cited, *Levesque v. Levesque*, [1994] 8 W.W.R. 589 (Alta. C.A.), directs me to assess the income-earning capacity of the spouses.

The information that the Respondent has provided about her ability to earn income is as follows:

- during the time that she and the Petitioner lived together in their jointly owned home, she was employed on a full-time basis and contributed to the family's joint account.

- the parties separated in 1992; in 1993, the Respondent worked for ten months on contact to I.T.C.. She describes her income as "marginal" but does not say what it was.

- during the past year she has done only contract work, primarily in interpreting and translating.

- the last contract she had was from September of 1995 to June of 1996, for which she expects to receive approximately $3000.00.

- she has received approximately $100.00 as a census worker.

- she is on a Board for which she receives honoraria in the amount of $250.00 per day for meeting days which take place approximately twice a year for two to three days per meeting; I calculate the result at about $1500.00 per year.

- she is awaiting confirmation of acceptance into a two-year full-time management training course in Rankin Inlet, for purposes of which she hopes to obtain financial assistance from the Government of the Northwest Territories and a Nunavut-related source.

- at present she has no income and is dependent on her partner.

- she worked with C.B.C. at one time and believes that fact, her age, which is not disclosed, and other circumstances have disadvantaged her in obtaining full-time work, although she has been looking for same.

The Respondent also submits that her non-monetary contributions to the children should be taken into account. She says in her affidavit that one of the children comes to her house for lunch every day and often for dinner and that she provides the others with spending money if she has it. The provision of lunches and dinners will obviously cease if she moves to Rankin Inlet as the children reside in Iqaluit.

I am not persuaded that the Respondent's contributions as described amount to any more than what a parent exercising access to his or her children would expect to provide. It is difficult to assess the contribution of spending money without knowing what amounts are involved. While I do not view these contributions as fulfilling the Respondent's financial obligation to support her children, I might be inclined to take the daily meals for the one child into consideration if they were going to continue but it appears that they will not.

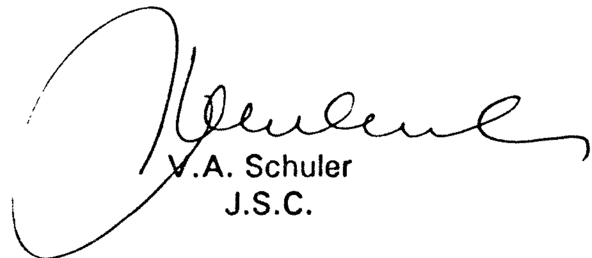
I bear in mind that the order which I am asked to vary is an interim order. In this particular case, in light of the Respondent's intention to pursue a full-time training course, any order is also likely to be temporary in the sense that such training one hopes will enable her to obtain permanent employment which should then better enable her to contribute to the support of her children.

The Respondent has provided little information about her past income, which makes it difficult to determine what she is capable of earning. On the other hand, she was not cross-examined on her affidavit. I consider that even if she takes the training she proposes, she should still be able to do some part-time work

interpreting or translating. Therefore, taking into account that she has been able to make $3000.00 from such a contract in the last year and can expect $1500.00 from the Board meetings, I consider that she has the ability to earn approximately $4500.00 per year (this is of course apart from the funding which she expects to receive) and can therefore contribute to the two youngest children's expenses in the amount of $100.00 per month per child.

Conclusion

The order of June 3, 1996 is accordingly varied to provide that the Respondent shall pay child support to the Petitioner for the children Joseph and Scott in the amount of $100.00 per month per child commencing on June 15, 1996 and continuing on the 15th of every month until further order of the court.



V.A. Schuler
J.S.C.

Counsel for the Petitioner: Lucy K. Austin

Counsel for the Respondent: K. Peterson, Q.C.

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HONOURABLE JUSTICE V.A. SCHULER