6101-01638

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DONNA MARIE McCARTHY

Petitioner

- and -

KENNETH ARCHIBALD McCARTHY

Respondent

MEMORANDUM OF JUDGMENT

This was an application for variation of a Corollary Relief Order granted in a divorce action in 1987. The applicant, Ms. Young (formerly Mrs. McCarthy) seeks an increase in the amount of child support payable under the Order.

In 1987 the parties entered into a separation agreement dealing with custody of their two children, support and property. The separation agreement contained the following terms:

> 3. Maintenance for the Children:
>
> The husband shall pay to the wife for the maintenance of the children the sum of $20.00 per month per child commencing on the 1st day of April, 1987, and on each and every consecutive month thereafter until such time as the husband's circumstances change.
>
> The quantum of maintenance payable reflects the present impecunious circumstances of the husband and of his assumption of the debts incurred during the marriage. The husband and the wife agree that the quantum of maintenance is subject to variation upon changes in the circumstances of the husband.
>
> . . .

6. Matrimonial Debts:

(a) The husband and wife agree that they shall be responsible for discharging their respective indebtedness on their respective VISA accounts.

(b) The husband agrees that in consideration of the wife not requesting a greater amount of maintenance for the children, he shall assume the following debts and shall continue to make monthly payments on same until the loans are discharged or the debts have been retired:

i) Simpson Sears account in the approximate amount of $800.00;

ii) Avco loan in the approximate amount of $3,000.00; and,

iii) Trans-Canada Credit in the amount of $90.00.

The relevant provision of the Corollary Relief Order, granted December 1, 1987 on consent, in divorce proceedings in which Ms. Young was the Petitioner and Mr. McCarthy the Respondent, reads as follows:

4. THAT the Respondent shall pay to the Petitioner for the support of the children of the marriage the sum of $20.00 per month per child, on the 1st day of each and every month until such time as the husband's circumstances change, at which time the quantum of maintenance is subject to variation.

After the divorce, the parties reconciled in 1988, separated in 1989, reconciled in 1990 and lived together until January of 1995. They have lived separately since then.

Ms. Young has gross yearly income of approximately $45,000.00, therefore $3,750.00 per month. She deposes that she finds it extremely difficult to support the children, now 11 and 13 years old, in Yellowknife. She refers in her affidavit to the cost of food, clothing and other necessities as being the basis for her request for increased support.

Her monthly household expenses are approximately $2,100.00 This year she has, she deposes, because of insufficient means, moved from accommodations costing $1,190.00 per month to accommodations costing $1,000.00 per month.

Mr. McCarthy deposes that at the time of and since the divorce he has had short term positions for which he earned hourly wages in the range of $10.00 to $20.00. He has received unemployment insurance benefits during the times between those positions.

In his affidavit, Mr. McCarthy sets out his earnings since the year of the divorce as follows:

Year	Employer	Earnings Approximate
1987	NWT Air and U.I.C.	$13,000.00
1988	NWT Air	$27,000.00
1989	NWT Air and Brinks Canada	$22,000.00
1990	Northwest Transport and Brinks Canada	$25,000.00
1991	Northwest Transport	$28,000.00
1992	Northwest Transport, Territorial Treatment Centre, Northwestel, and U.I.C.	$35,000.00
1993	U.I.C.	$22,000.00
1994	Ballard Construction, Northwestel, and U.I.C.	$35,000.00
1995	Northwestel, Takama Slocan, and U.I.C.	$35,000.00
1996	Ucan Contracting, Northlands Maintenance, West Cantel, and U.I.C.	$10,000.00

The 1996 earnings are as at June 19, 1996.

Mr. McCarthy is involved in a new relationship. He lives with his new partner and her child. His partner earns approximately $780.00 per month. Mr. McCarthy shows their total household expenses as being $2,423.52 per month. This does not include debt payments (over which child support has priority in any event) but does include $200.00 per month for child support.

Mr. McCarthy voluntarily paid increased child support in 1995 and 1996. In 1995 he paid as much as $400.00 in some months. In 1996 he has paid $200.00 per month from January to May inclusive except for March, when he paid $350.00

As this is a variation application, I must, pursuant to section 17(4) of the *Divorce Act*, 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 original support order. The change must be a material one such that, if known at the time of the original support order, would likely have resulted in different terms: *Willick v Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C.).

Counsel for Mr. McCarthy argues that Ms. Young has not met the onus of showing that circumstances exist which would justify a variation of the 1987 order. He argues that the separation agreement is strong evidence that the support then agreed upon by the parties was considered by them to be adequate for the foreseeable future. He also points to section 11(1)(b) of the *Divorce Act*, which says that it is the duty of the court in a divorce proceeding to satisfy itself that reasonable arrangements have been made for the support of the children of the marriage, as evidence that the court which granted the McCarthys' divorce was of the view that the provisions agreed upon for child support were adequate. Finally, with reference to paragraph 3 of the separation agreement quoted above, Mr. McCarthy's counsel argues that the intention of the parties must have been that variation would take place only upon a change in the impecunious circumstances (to use the wording in the separation agreement) of the husband, i.e. only upon his no longer being impecunious.

I accept the proposition that the separation agreement is strong evidence that at the time it was entered into, the parties accepted its terms as adequately providing for the needs of the children. I accept further and assume that the original Corollary Relief Order adequately assessed the needs of the children having regard to the means of the parents at the time the order was made. Both of these principles are set out in *Willick v Willick*, supra.

It is clear from the separation agreement, the Corollary Relief Order and the evidence presented, that in 1987, when the agreement was entered into and the Order was made, Mr. McCarthy had very little income ($13,000.00 for 1987) and had taken on responsibility for debts incurred in the marriage. The question is not, in my view, whether he can still be described as impecunious. He makes that claim, as I understand it, based on the income and expenses set out in the financial statement he has filed, which shows gross income of only $1,636.00 per month. The real question, however, is whether there has been any change in the circumstances of Mr. McCarthy with respect to his ability to pay child support.

There has, in this case, been a significant increase in Mr. McCarthy's income since 1987. Although it appears that he now, as then, often experiences periods of reliance on unemployment insurance, that has not invariably been the case. The important thing is that his earnings have increased from $13,000.00 in 1987 to $35,000.00 in 1992, 1994 and 1995. His average yearly earnings for the years 1988 to 1995 are $28,625.00, over twice as much as he made in 1987.

The matrimonial debts which it was agreed Mr. McCarthy would assume amounted to $3,890.00 (paragraph 6(b) of the separation agreement, quoted above). There is no evidence that Mr. McCarthy continues to bear the burden of those debts. Mr. McCarthy has, as I have indicated above, voluntarily paid child support in amounts greater than provided for in the 1987 Corollary Relief Order; this confirms that he has the ability to pay increased child support.

I am satisfied on all the evidence that there has been a material change in Mr. McCarthy's circumstances, specifically in his income and therefore in his ability to pay increased child support. It follows that I am satisfied that Ms. Young has met the threshold test for variation.

The question to be addressed now is what the variation should be. The formula for calculation of child support used in this jurisdiction is set out in *Levesque v Levesque*, [1994] 8 W.W.R. 589 (Alta. C.A.).

The first step in the Levesque formula is to calculate the combined gross income of the parents. This requires an assessment of the income-earning capacities of each spouse (*Levesque v Levesque*, p.594). Based on Mr. McCarthy's earnings for 1992, 1994 and 1995, I am satisfied that he is capable of earning $35,000.00 per year.

The combined gross income is therefore approximately $35,000.00 (44%) for Mr. McCarthy and $45,000.00 (56%) for Ms. Young for a total of $80,000.00.

The second step is to calculate the cost of the upbringing of the children.

Ms. Young's financial statement shows total monthly household expenses of $2,188.27, taking into account the reduction in her monthly rent from $1,190.00 to $1,000.00. Having reviewed these expenses, I am satisfied that the sum of $1,400.00 is a reasonable figure for the monthly expenses pertaining to the children.

The $1,400.00 figure does not include any access costs. The affidavit material filed is not consistent on that issue. Mr. McCarthy deposes that he has the children for 2.5 months per year, during which he pays their costs. He says that he must also pay approximately $1,500.00 every year in transportation costs to exercise access.

Ms. Young, says in her affidavit that in 1995 her brother arranged airplane passes (for which I assume there was no or minimal cost) for the children's access travel. For 1996, she has paid $700.00 for summer travel for the children to visit their father and earlier in 1996 paid $70.00 for airplane passes arranged by her brother for a visit by the children with their father.

Because of the contradictory assertions regarding access travel costs, I am not going to include any amount for these costs in the expenses for the children's upbringing. I will therefore use the $1,400.00 figure referred to above.

The next step under the Levesque formula is to allocate the children's expenses proportionally between the parents according to their respective shares of the total gross

income. Ms. Young's share is therefore $784.00 and Mr. McCarthy's is $616.00.

Normally, the payor's share would be grossed up to offset the amount of tax that the receiving spouse would have to pay on the support received. However, counsel for Ms. Young submits that his client would be satisfied with a figure of between $500.00 and $600.00 per month inclusive of any tax gross-up.

I think it fair that I look at Mr. McCarthy's expense picture in considering whether he can pay the figure calculated as well as a tax gross-up. *Levesque v Levesque*, supra, says that after calculating the tax consequences, one can adjust further for special circumstances.

Mr. McCarthy submits that he has total household expenses of $2,423.52. These include expenses for his new partner and her child, to whom he has no support obligations. They also include significant amounts for non-necessities such as $304.00 per month for alcohol and tobacco, $100.00 per month for entertainment, $80.00 per month for meals outside the home, $50.00 per month for recreation and $44.39 per month for cable television. An expense of $100.00 per month for prescriptions is disputed by Ms. Young and there is no indication that this is an expense required by Mr. McCarthy himself.

In my view, when a parent claims impecuniosity, he or she should be scrupulous in disclosing expenses and the reason these expenses are required. The expenses referred to above have not been adequately explained by Mr. McCarthy. Nor has he explained

why he requires a vehicle and therefore the $250.00 per month in expenses he has claimed in that regard. In my view, the statement in *Levesque v Levesque* at p. 605, that "a parent who invokes poverty as a reason to adjust an award should be prepared to make the fullest disclosure, and show how there is no unavoidable expense" applies in a case like this, where a request for child support is resisted on the basis of impecuniosity.

As Mr. McCarthy has claimed expenses pertaining in part to his new partner and her child, I think it fair that I consider that his new partner has income of $780.00 per month which can be applied to those expenses.

Having considered all of the above, including Mr. McCarthy's ability to earn $35,000.00 per year, I am of the view that a reasonable figure for child support is $600.00 per month.

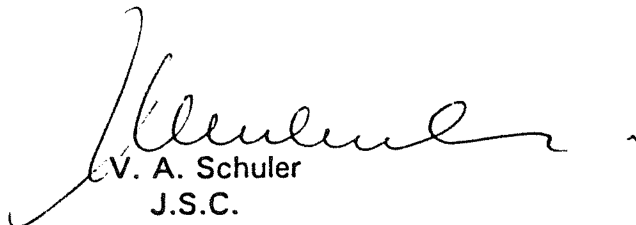
Counsel for Ms. Young has indicated that the parties have agreed that child support should be payable for only ten months of the year as the children are with Mr. McCarthy for two months. I agree that this is reasonable. I am not going to make any further upward adjustment for tax consequences and because of that I am also not going to make any further adjustment for access costs.

I decline to make a separate order to come into effect when the proposed federal child support payment programme comes into effect. The parties can deal with that at the appropriate time.

Accordingly, I order that the Corollary Relief Order made by this court on December 1, 1987 be varied to provide that Mr. McCarthy will pay child support in the amount of $300.00 per month per child for ten months per year.

Costs were not addressed. Counsel may speak to them by application within 30 days of the date of these reasons if they wish.

Dated this 5th day of July, 1996.



V. A. Schuler
J.S.C.

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