6101-02064

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

MARILYN PEARL HOOVER

Petitioner

- and -

GORDON EARL HOOVER

Respondent

REASONS FOR JUDGMENT

1 The applicant mother seeks an increase in the level of child support ordered by this Court on July 15, 1991.

2 The parties were married in 1981 and separated in April 1989. There are two children of the marriage, born in February 1984 and September 1987.

3 In May 1991, the applicant mother commenced divorce proceedings. In her petition she sought child support in the amount of $200 per month per child. Attached to the petition was the financial statement in which she stated total income as $2,229.00, including $400.00 in child support payments. She also stated monthly expenses for she and the two children as $2,068.00.

4 In June 1991, the parties executed a document entitled "Separation Agreement and Minutes of Settlement". This agreement dealt with matters of custody, access, child support, spousal support and matrimonial property. With respect to child support, the respondent father, in the agreement, agreed to pay to the mother child support of $200.00 per month per child. The mother acknowledged that she had been receiving from the father child support in the amount of $400.00 per month since May 1, 1989. The agreement provided that the child support payments would continue until the child reached the age of 18 years, married, became self-supporting, or completed his education, whichever first occurred. The agreement contained no provision for any increase in the quantum of child support by reason of an increase in the cost of living, or otherwise.

5 A Divorce Judgment and Corollary Relief Order issued on July 15, 1991. The contents of the Corollary Relief Order were consented to by the parties, both represented by counsel. Paragraph 2 of the Corollary Relief Order states:

> 2. The Respondent shall pay to the Applicant for the support of the children of the marriage the sum of $200 per month, per child, commencing on the first day of the month following the issuance of this order and continuing to be paid on or before the first day of each and every month thereafter so long as the child in respect of whom the maintenance is paid remains a child of the marriage within the meaning of the *Divorce Act* 1985.

6 The present application for a variation of child support is made pursuant to

s.17 of the *Divorce Act*. Relevant excerpts from that section are:

> s.17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
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> (a) a support order or any provision thereof on application by either or both former spouses; or
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> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
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> ...
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
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> (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 or 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.

7 Thus, the "threshold" for the present application is subsection 17(4). That threshold was considered by Sopinka, J., writing for the majority of the Supreme Court of Canada in *Willick v Willick* (1994)6 R.F.L.(4th)161, in the following terms:

> "This subsection authorizes the court to vary a previous

support order if a change of circumstances occurs. The approach which a court should take is to determine first, whether the conditions for variation exist, and if they do exist, what variation of the existing order ought to be made in light of the change in circumstances.

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time, it cannot be relied on as the basis for variation. The controversial aspect of this appeal is whether it is also a precondition to variation that there be a change in the circumstances of the payor spouse and the child or children in whose favour the support provisions were made. In determining this issue it is important to bear in mind that an order for maintenance of children is made by assessing the needs of the children having regard to the means of the parents. The purpose of s.17(4) appears to be to permit the court to vary the order when the relationship between those factors changes in a material way. There can be a material change in the relation of the factors if one of them undergoes a significant change because the relationship between them is altered. The following passage from the reasons for judgment of Keenan D.C.J. in *Moosa v Moosa* (1990), 26 R.F.L.(3rd) 107 (Ont.Dist.Ct.), at pp. 110-111, is apt:

> 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 the 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 that 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.*" [Emphasis added.]

...

> "Having found that the conditions for variation exist, the trial judge should proceed to determine what variation should be made. The trial judge must reassess the needs of the children in light of the change. The needs of children are not assessed in a vacuum but are affected by the standard set by the means of the parents. When the means of parents are limited, the children's needs may be satisfied by the bare necessities. In these circumstances the children are required to do without some things which would be available to them if the means of the parents were greater. The reasonable expectation of the children for future support upon marriage breakup are conditioned by the standard of living of the parents at the time. This expectation is not frozen as of the date of the marriage breakup. If there is a significant change in the circumstances of one of the parents subsequent to the support provisions, the reasonable expectations of the children will be affected. In this regard I agree with the statement of Kelly J.A. in *Paras v Paras*, supra, at p.134, when he states:
>
> > Since ordinarily no fault can be alleged against the children which would disentitle them to support, the objective of maintenance should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occurred."

8 In the present case, the applicant mother states that there are two material changes since the Court's 1991 order: a) an improvement in the respondent's financial circumstances, and b) an increase in the monthly expenses of maintaining the two children.

9 While it was strenuously urged by the applicant's counsel that the respondent's financial means have improved, upon my review of the evidence submitted, I cannot agree. In 1991, the respondent was working for NWT Air at a salary of

$32,850.00. Today, because of a work related injury, he receives a disability pension from Workers' Compensation and works part-time for his previous employer under an arrangement with the Workers' Compensation Board. His pension is tax free, but is equivalent to a regular taxable salary of $32,000.00. That is his sole source of income.

10 The respondent has remarried and lives with his present wife in a home owned by her (as he did in 1991). He contributes to the monthly mortgage payment and other household expenses (as he did in 1991).

11 On the evidence submitted on this application, I am not satisfied that there has been a material change in the respondent's circumstances (i.e., financial circumstances) as contemplated by s.17(4) of the Act.

12 I turn then to a consideration of the children's circumstances. Has there been a material change in their condition, means, needs or other circumstances?

13 As indicated earlier, at the time of filing the divorce petition in 1991, the applicant mother provided the Court with a financial statement, the contents of which were confirmed by her affidavit filed with the Court at the time the Corollary Relief Order was issued. That financial statement shows monthly expenses for the mother and her two sons of $2,068.50, plus a further $210.00 in monthly debt payments. The Court in granting the Corollary Relief Order in terms sought by the mother, was satisfied that the

parties had made reasonable arrangements for the support of their children, recognized that both had a joint financial obligation to maintain the two children (then aged 7 years and 3 1/2 years) and apportioned that obligation between the two parents according to their relative abilities. See s.11(1)(b) and s.15(8) of the Act. I note that in 1991 the two parents, in general terms, earned the same level of income.

14 On the present application, the mother asserts that there has been a marked increase in the cost of maintaining the two children in the intervening five years (actually it is seven years since the parties mutually set the level of child support at $200.00 per month per child in May 1989.)

15 The mother presents a financial statement in which she shows actual monthly expenses for herself and her two sons at $2,778.54 plus monthly debt payments of $598.95. In addition, she presents a document entitled "Children's Estimated Monthly Expenses". Included in this list of "estimated" expenses (which totals ($2,779.69) are what I would describe as three categories of expenses: (a) an estimate of the children's portion of the family's core expenses; for example, rent, utilities, food, etc., (b) actual expenses incurred for the children alone; for example, daycare, babysitting, school fees, recreation fees, etc., and (c) a wish list; for example, expenditures the mother would make for the children if she had the money; for example, swimming lessons, hockey equipment, better clothing, etc. This is in contrast to the 1991 financial statement of bare necessities totalling $2,278.50, of which a portion ($800.00 or less) was apparently attributable to

the maintenance of the children.

16 In her affidavit filed in support of the present application, the mother cites in particular the increased cost of clothing two growing boys - now aged 13 and 9 - and the additional demands (needs) of children of that age for things such as school supplies, sports equipment, sports registration fees, entertainment, recreational outings, etc. Her counsel also asks that the Court take judicial notice of the fact that the cost of maintaining children increases as they get older and that the increased age of the children is itself a significant change which triggers the threshold of s.17(4) of the Act.

17 In *Chelmick v Chelmick* (1991) 37 R.F.L.(3d) 155, Veit J. of the Alberta Queen's Bench, while not deciding whether the increased cost of meeting a teenager's needs was in itself grounds for invoking the s.17(4) threshold, accepted the premise of a "natural" increase in expenses, with these words:

> "As to specifics, I accept that a normal 13-year-old child eats more, needs more clothes, needs more privacy, and needs more expensive means of self-development than a normal six-year-old. I can take judicial notice of this based on Canada's pattern of family allowance increases based on age. I also accept that a C.O.L.A. clause only attempts to keep dollar values constant and not to incorporate normal increases in expenses." (at p.l64)

18 In a similar vein, in *Marshall v Marshall* (1992) 43 R.F.L.(3d) 303, Huband, JA stated:

> "The child is older. It simply costs more to clothe and feed and pay for the normal activities of a child of 11 compared

with a babe in arms."

19 In contrast to this latter observation is the comment of Beilby J. in *Vervoorst v Vervoorst* (1991) 37 R.F.L.(3d) 178 (Alta.Q.B.) at p.183 to the effect that a child's actual expenses at age four "may have been greater than at age nine because she would have required full-time babysitting at that time as she was not yet in school".

20 In any event, and apart from the "judicial notice" aspect, there are reported decisions which hold that the increasing costs of maintenance as a child grows older are circumstances which were foreseen or were reasonably foreseeable at the time of signing the original Minutes of Settlement, and that therefore these are not circumstances that can trigger the s.17(4) threshold described by Sopinka J. in *Willick*. See *Potter v Potter* (1989) 19 R.F.L.(3d) 104 (Ont.S.C.), *Lennox v Frender* (1990) 27 R.F.L.(3d) 181 (B.C.C.A.) and *Vervoorst, supra*.

21 I agree that the increased expenses of a growing child is a circumstance that can be and is anticipated by parents, and that their circumstance in itself is insufficient to trigger subsection 17(4).

22 However, as in most litigation before the Courts, there is more than one factor to be considered on this application, and various factors intermingle and relate to one another. Here, there is the associated factor of the increase in the cost of living since 1989 when the $200.00 per month level of child support was set. The costs of

maintaining these two young boys has increased over the intervening seven years not only by reason of their increased needs/consumption/activity, but also because of the fact that the "cost of living" itself has increased.

23 I note that the published Consumer Price Index at Yellowknife in 1989 was 111.0. In May 1996, when the present application was filed, that index was 135.2, an increase of approximately 22%. This is a significant change in the circumstances of the parents and the children within the parameters of s.17(4) of the Act. See *Vervoorst, supra*, at p.182, and *Marshall, supra*, at p.304. Such a change was apparently not within the contemplation of the parties, as no C.O.L.A. clause was included in the Minutes of Settlement.

24 I find that the increase in the cost of living, combined with the increase in the actual needs of the children today compared to 1989, is sufficient to trigger the s.17(4) threshold. The conditions for variation exist, and it should now be determined what that variation ought to be.

25 As stated in previous cases, calculating the specific costs of raising children is fraught with difficulty. Here, the applicant mother presents a monthly estimate of $2,779.69 which, as indicated earlier, includes items on a "wish list". The respondent in his affidavit and through his counsel's submissions, questions the reasonableness of a number of specific items included in the mother's estimate. I also remind myself that the

needs of the children cannot be set in a vacuum (as stated by Sopinka J. in *Willick*) but rather are affected by the standard set by the actual means of the two parents. In the present case, the means of the two parents is not unlimited. These children must do without some things which might be available to them if the means of the two parents were greater.

26 With this in mind, my review of the mother's estimate of monthly expenses, including the allocation of core household costs and the wish list items, leads me to the conclusion that the estimate is on the high side, and that $2,000.00 is a more reasonable monthly amount for the maintenance of the two children.

27 At present, the mother's stated income is $40,000.00, that of the father is $32,000.00, for a total of $72,000. The father's share of the children's monthly expenses is 44%, or $880.00, i.e. $440.00 per month per child. At present, child support payments received by the mother are taxed as income and therefore the figure of $880.00 must be grossed up to account for income tax.

28 At the request of the respondent's counsel (made at the hearing of this application) I will withhold any final decision on the actual gross-up factor until counsel have an opportunity to make further written submissions on that specific point. These submissions should be provided to me within 21 days of the date of issue of these reasons.

29 I therefore order that the terms of the Corollary Relief Order be varied to provide that the respondent shall pay to the applicant for the support of the children of the marriage the sum of $440.00 per month (plus a tax gross-up to be determined), per child, commencing with the payment due on the 1st day of February 1997. I further order that the payments shall be adjusted on the 1st day of July in each year, commencing July 1, 1998, to reflect any change in the Consumer Price Index at Yellowknife from July 1 of the preceding year.

Other Relief Sought by Applicant

30 In paragraphs 3 and 4 of her notice of motion, the applicant mother sought variations in the access provisions of the Corollary Relief Order. At the hearing of the motion, her counsel withdrew the request in paragraph 3. Paragraph 4 seeks a specific restriction on access related to the presence of the respondent's stepson during access periods. On the evidence presented, I am not satisfied that there has been any problems encountered with respect to the stepson since 1993 and that there is therefore no merit in the restriction requested.

1 As the mother has been substantially successful in her application, I direct the respondent to pay the applicant's costs of the application, taxed in column III.

J.E. Richard

J.S.C.