Date: July 21, 1997
Docket: 6101-02064

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARILYN PEARL HOOVER

Petitioner

- and -

GORDON EARL HOOVER

Respondent

Variation of child support pursuant to the Federal Child Support Guidelines.

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

Heard at Yellowknife , Northwest Territories
on July 11, 1997.

Reasons filed: July 21, 1997

Counsel for the Petitioner: Jill A. Murray

Counsel for the Respondent: Lucy K. Austin

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REASONS FOR JUDGMENT

[1] The parties bring cross-applications for a variation of child support to be paid by the Respondent (the "father") to the Petitioner (the "mother") for the two children of the marriage. The variation is triggered by the coming into force on May 1, 1997, of the Federal Child Support Guidelines enacted pursuant to the *Divorce Act*.

[2] The parties were married in 1981. They have two children who are now 13 and 9 years old. They were divorced in 1991. At that time, care and control of the children was entrusted to the mother. By an agreement subsequently incorporated into the Corollary Relief Order, the father was ordered to pay child support of $200.00 per child per month.

[3] In 1996, the mother applied for a variation of child support due to a material change of circumstances. In his reasons for judgment released on January 9, 1997, Richard J. of this court increased the amount of support due to what he found to be a combination of an increase in the general cost of living and an increase in the actual needs of the children as they get older. He determined monthly child care costs of $2,000.00, and then after determining the parties' respective incomes and applying the approach set forth in *Levesque v Levesque* (1994), 4 R.F.L. (4th) 375 (Alta. C.A.), he set a new child

support figure of $440.00 per child per month which, when grossed up for tax purposes, resulted in a total monthly payment of $1,260.00.

[4] On May 12, 1997, the father filed his application for a further variation, this time to the amount set out by the new Guidelines, that being $454.45 per month in total. On July 8, 1997, the mother filed her cross-application seeking a variation from the Guidelines figure to the net amount calculated by Richard J. back in January, that being a total of $880.00 per month. She pleads both extraordinary expenses and undue hardship, as those concepts are defined by the Guidelines, in support of a deviation from the strict application of the Guidelines amount.

[5] The established threshold test for variation ‖ as set out in such cases as *Willick v Willick*, [1994] 3 S.C.R. 670 ‖ is not applicable in this situation. Pursuant to s.14 of the Guidelines, the very coming into force of the Guidelines is sufficient to trigger a variation. It is a deemed "change of circumstances" as required by s.17(4) of the *Divorce Act*.

[6] The presumption in the Guidelines is that the amount of child support payable in any given instance is the amount set forth in the tables attached to the Guidelines based on the payor's income and the number of children. The amounts in the various tables, differentiated by province and territory, are based on economic studies of average spending on children at different income levels: see notes to Schedule I of the Guidelines. Case-specific calculations, based on an apportionment of child care costs in accordance with the relative incomes of the parents, as directed in such cases as *Levesque*, have been replaced by a uniform amount based solely on the payor's income. There are exceptions for high income payors and where children are over the age of majority (neither of which applies here). The rationale for this regime was described by Norman Fera in his article, "New Child Support Guidelines ‖A Brief Overview", in (1997) 25 R.F.L. (4th) 356, as follows (at page 356):

> These presumptive tables, based on the average spending on children, will undoubtedly create a large degree of uniformity with reference to child-support obligations under the *Divorce Act*. In a sense, on the issue of quantum of child support, the new child-support tables focus on a system of "average" justice and move away from creating individual justice on a case-by-case basis. The tables in the guidelines provide a base or minimum amount, not a ceiling, and are expected to help encourage parties to settle their child-support differences speedily and with less acrimony.

[7] The father, in this case, relies on the presumptive rule. His sole source of income is a Workers' Compensation Board pension benefit of $22,900.00. This amount, however, is exempt from income tax. The Guidelines allow income to be imputed in certain instances, including, in s.19(1)(b), in cases where the payor is exempt from paying income tax. The grossed up amount, if the father were liable to pay tax so as to achieve an after-tax income of $22,900.00, is calculated as $29,565.00. The amount of child support, therefore, as stipulated by the applicable table for two children is the total sum of $454.45.

[8] The mother, however, while recognizing that some variation is necessary due to the changes in the tax treatment of support payments, suggests the amount set by Richard J. ($880.00 for the two children). She relies on two features of the Guidelines: (a) the recognition of "special or extraordinary expenses" in s.7; and (b) the facility to plead "undue hardship" pursuant to s.10.

[9] The Guidelines provide for the amount of any special or extraordinary expenses to be added on to the amount stipulated by the tables: s.3(1)(b). The amount of the expense, however, is to be shared by the parents in proportion to their respective incomes: s.7(2). What qualifies as a special or extraordinary expense is set forth in s.7(1):

> 7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> (b) that portion of the medical and dental insurance premiums attributable to the child;
>
> (c) health-related expenses that exceed insurance reimbursement by at least $100 annually per illness or event, including orthodontic treatment, professional counselling provided by a phycologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
>
> (d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child's particular needs;
>
> (e) expenses for post-secondary education; and
>
> (f) extraordinary expenses for extracurricular activities.

[10] It will be readily observed that the categories itemized in subparagraphs (a) through (f) above are exhaustive. Therefore, even if the custodial parent does have some "extraordinary" expense in relation to the children, if it does not fit into one of these categories it will not be considered. As Mr. Fera noted in his article (at page 357): "creativity in this area will be limited".

[11] In this case the mother relies on categories (d) and (f). She has provided an itemized list of expenses for school and extracurricular activities of the children. With the exception of one item, all of the activities and expenses listed by her are, in my opinion, not extraordinary. They are common activities that the average youth, of these children's ages, would take part in. I note that categories (d) and (f) make use of the specific term "extraordinary expenses" while the qualifier "extraordinary" is not used in reference to the expenses noted in the other categories. For example, subparagraph (e) simply refers to "expenses for post-secondary education". Hence, I conclude that the expenses claimed by the mother for school and extracurricular activities do not meet the criterion of "extraordinary" as required by subparagraphs (d) and (f). These activities, school supplies, school dances and the like, as well as recreational activities such as swimming, bicycling, going to the movies, are quite "ordinary".

[12] The one exception is with respect to computer equipment. I realize that computers are becoming quite common in schools. There is nothing unique or exceptional about using a computer in one's studies. But not every child has ready access to computers. In this case, the mother claims $178.78 per month as the cost of computer equipment and supplies to aid the children's education. I think that is an "extraordinary" expense as contemplated by subparagraph (d). Furthermore, I consider the necessity for the expense to be in the children's best interests, to aid in their education, and I consider the expense to be reasonable (as stipulated by s.7(1) of the Guidelines).

[13] The amount claimed should be added on to the Guidelines support amount but only that amount in proportion to the payor's income relative to that of the payee. The mother's annual income is $41,588.00 while the father's is imputed at $29,565.00. This gives a total of $71,153.00 with the father's income representing 42% approximately of the total. His proportionate share of this extraordinary expense is therefore 42% of $178.78, or $75.08.

[14] The plea of "undue hardship" is made pursuant to s.10 of the Guidelines:

> 10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court

finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(b) the spouse has unusually high expenses in relation to exercising access to a child;

(c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;

(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(i) under the age of majority, or

(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

(e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

[15] The circumstances listed in subsection (2), while not an exhaustive list of what could constitute undue hardship, are indicative of the type of circumstances that are contemplated. The discretion to invoke this ground is therefore somewhat circumscribed. The circumstances, which can be relied on by either the payor or the payee, relate primarily to expenses incurred outside of the parent-child relationship that is the focus of the support order: debts incurred prior to the separation and obligations to support other persons or other children. The undue hardship is not one related to circumstances caused by the amount per se of the support order. In other words, the fact that the stipulated amount of support, as determined by the Guidelines, may be low and may result in hardship to the custodial parent, that in and of itself does not appear to be the type of circumstance contemplated in subsection (2).

[16] As noted in the extract quoted from the Fera article earlier, the Guidelines establish a system of "average" justice. Therefore, just because the stipulated amount is insufficient to cover what would be the proportionate amount of the child care expenses of the non-custodial parent, that is not a circumstance that can be pleaded as causing undue hardship. The Guidelines, as well as the *Divorce Act*, refer to a proportionate sharing of expenses only in specific situations (such as s.7(2) for extraordinary expenses or the newly enacted s.17(6.2) of the Act respecting special provisions in an order or agreement). Other situations are where the payor's income exceeds $150,000.00 or the child is over the age of majority but neither one applies here. The use of the term

"undue" has to imply something more than the inconvenience that may be caused by a lower standard of living. Perhaps the policy-makers, in crafting the Guidelines regime, considered that there would be some "hardship" in all parental separation situations but only "undue hardship" would qualify for special dispensation.

[17] The real complaint of the mother is that the reduction in support caused by this variation is so great as to have a detrimental impact on the children's standard of living. But it is no different than if this were an application of first instance to set child support. Irrespective of the mother's income, irrespective of the actual child care costs, irrespective of any gross disparity in how those costs are proportionately divided as between the parents, the Guidelines set the support figure based on the payor's income. Unless the payee can come within one of the special circumstances stipulated in the Guidelines, that amount will be the one set. The court's discretion is severely limited in what are, like this one with all due respect, "average" situations.

[18] The father's counsel made a further point before me. She submitted that the Guidelines cannot impute "undue hardship" to a reduction in support resulting from the very application of the Guidelines. I agree. Such a situation would defeat the objectives Parliament adopted in s.1 of the Guidelines: to set a "fair" standard of support, to reduce conflict by making the calculation of child support more objective (and I would add predictable), to give guidance to the courts and litigants so as to promote settlements, and to ensure consistent treatment for those similarly situated. The fact that some support orders would be rolled back as a result of the application of the Guidelines must have been foreseen by Parliament. Unfortunately (from the mother's perspective) this is one of those cases. But, this result cannot equate to "undue hardship" as that term is used in the Guidelines.

[19] The cross-application is therefore dismissed.

[20] The terms of the Corollary Relief Order will be varied so as to provide for child support for the two children in the total amount of $529.53 per month ($454.45 as per the income table plus $75.08 respecting the extraordinary expense item).

[21] The father requested that the variation be made retroactive to June 1st. I am not certain why this request was made although I note that there was an earlier adjournment, evidently at the mother's request, which delayed the hearing of this matter for a month. It must have been serious because the judge in Chambers at that time directed that the adjourned-to date be peremptory on the mother. It seems to me that this variation will be a significant financial boost to the father. I see no reason to make the variation

retroactive. The variation comes into effect with the payment due on August 1st. All prior stay of enforcement orders are hereby vacated. It seems to me that the father should, in all fairness, be quite happy to pay the full amount of the previous support order for the brief period from February 1 (when the order of Richard J. took effect) to July 1.

[22] The father's counsel also asked for an opportunity to speak to the question of costs. I will give that opportunity to both counsel, if they wish, but I can say in all frankness that in a circumstance such as this I may not be readily inclined to make any order as to costs. Considering the modest incomes of the parties, an award of costs may simply detract from funds that should go to the care of these children. If, however, counsel wish to make representations, they should seek a special chambers date from the Clerk within the next 30 days.

J. Z. Vertes
J.S.C.

Dated at Yellowknife , Northwest Territories
this 21st day of July, 1997.

Counsel for the Petitioner: Jill A. Murray

Counsel for the Respondent: Lucy K. Austin

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