Date: August 14, 1997
Docket: 6101-02056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KAREN MARY WILLIAMS

Petitioner

- and -

CALVIN KENNETH WILLIAMS

Respondent

Cross applications to vary child support provision in Corollary Relief Order

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

Heard at Yellowknife , Northwest Territories
on July 25, 1997

Reasons filed: August 14, 1997

Counsel for the Petitioner: Olivia Rebeiro

Counsel for the Respondent: James R. Posynick

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REASONS FOR JUDGMENT

[1] The parties bring cross-applications to vary the child support provision in a Corollary Relief Order.

[2] The parties were divorced on September 5, 1995. They are the parents of a boy, born in 1992. By the terms of the Corollary Relief Order, custody of the child was vested in the father (the "respondent" named in the style of cause) while the mother (the "petitioner") was required to pay child support of $200.00 per month. The father now seeks to increase the amount of monthly support while the mother wishes to eliminate her obligation altogether.

[3] Since the divorce, the federal Parliament has enacted, pursuant to the *Divorce Act*, the Federal Child Support Guidelines. The enactment of the Guidelines itself provides the basis for a variation of a previously-made support order. There is no need for either party, on this application, to satisfy a threshold test of a change of circumstances, as required by s.17(4) of the Act, although here both parties point to changes in their particular circumstances.

[4] The father seeks to increase the monthly support to some unspecified amount on a number of grounds.

[5] First, the father provides information showing that his income has decreased, from approximately $80,000 gross to $64,000 gross per year, due to a change in job positions. This, in and of itself, is, to put it bluntly, irrelevant under the new regime created by the Guidelines.

[6] The presumptive rule in the Guidelines is that the amount of child support payable in any given instance is that amount set forth in a table based on the payor's income and the number of children. The payee's income does not matter (except in special circumstances not applicable here). It may seem anomalous to ignore the payee's income especially since one of the stated objectives of the Guidelines is to ensure that children benefit from the financial means of both parents. Also, s.26.1(2) of the *Divorce Act* embodies the principle of joint parental responsibility to maintain children according to their relative financial abilities. But the underlying assumption is that children will automatically benefit in their lifestyle in accordance with the custodial parent's income. In other words, the child will always live at the same standard of living as the custodial parent because the child is part of the same household. Therefore, the payor's contribution can be set independently and the child will benefit from any increase in the non-custodial parent's income. So the mere fact that the custodial parent's income has decreased is not a factor to consider.

[7] Second, the father says that I should impute a higher income to the mother than she reports so as to result in a higher support amount. The mother resides in Nova Scotia. She reports an annual income of $23,400. This would result, according to the Guidelines, in a monthly support payment of $194.00. The father submits, however, that I should impute an income to the mother of $30,000. This would result in a monthly support figure of $260.00. The father says I should do this because she is intentionally under-employed.

[8] At the time of the divorce in 1995, both parties lived in the Northwest Territories. The father and child continue to do so. The mother was earning, on average, over $30,000 per year while living in this jurisdiction and working as an employee. She subsequently suffered health problems and in the summer of 1996 she moved to Nova Scotia where she has family connections. She is now re-married or at least living common-law. She and her partner have become involved in a private business operating a pizza franchise. Each of them owns a one-third interest in the business. The mother's total income from this business is projected to be $23,400 per year calculated on the basis of her working 45 hours per week at $10.00 per hour. There is no explanation as to how these figures are arrived at but I note that, on this point, as on other financial information

provided, neither party chose to cross-examine on the assertions made in each other's affidavits. This is important because otherwise there is nothing to go by but bald assertions and speculative argument.

[9] The father's counsel submits that by entering into a risky private business venture the mother is intentionally earning less than she is capable of earning. Further, he submits that because it is a private business there may be financial benefits available to her that are not reflected in a nominal "salary".

[10] The courts have always recognized that the principle that parents contribute to the support of their children according to their "relative abilities" to contribute means identifying each parent's ability to generate income, that is to say, their income-earning capacity as opposed to actual income earned: see, for example, *Levesque v Levesque*, [1994] 8 W.W.R. 589 (Alta. C.A.), at page 594. The courts have also recognized that special care must be taken when dealing with essentially self-employed individuals. This was addressed by Rawlins J. of the Alberta Court of Queen's Bench in the recent case of *Elliott v Elliott* (Alta. Q.B. No. 4801-092591; March 27, 1997) at pages 6 - 7 of her unreported Reasons for Judgment:

> Historically, courts have been faced with payors who claim a lack of ability to pay. Often these cases involved wage earners and the issue of ability to pay was dealt with relatively easily because their tax returns were generally a true reflection of their income. Nowadays, due to changes in the economy and workplace, courts are faced with greater numbers of self-employed payors claiming lack of ability to pay based on their tax returns. When faced with such a party the court must meticulously examine the financial records placed before the court when determining ability to pay. In particular, where the payor is self-employed and operates the business the net income reported on their personal income tax for is note necessarily an accurate reflection of their personal income or their ability to pay for support purposes.
>
> If the payor is operating a business, legal academics and the courts have recognized the interplay of assets, debts and income: see D.A. Rollie Thompson, "Getting Blood From a Stone" or How to Find Ability to Pay When There "Isn't" Any" (1994-95) 12 C.F.L.Q. 117 at 150 and the cases cited within and S. Blom & A. Freedman, "Solutions to Difficult Financial Issues" (1996) 14 C.F.L.Q. 61. It has long been recognized that some legitimately deductible business expenses have a personal component to them: V. Krishna, ***The Fundamentals of Canadian Income Tax***, 2d ed. (Toronto: Carswell, 1986) at §§ 11 - 12. Under the ***Income Tax Act*** there is no requirement that an expense must be wholly and exclusively expended for the purposes of trade if it is to be deductible.

[11] The Guidelines also address this issue. Section 18 provides that the court may determine the party's income, where the party is a shareholder or director of a corporation and the court considers that the party's reported income does not fairly reflect all the money available to that party, by including in income all or part of the pre-tax income of the corporation or an amount commensurate with the services the party provides to the corporation.

[12] In this case, the lack of clarification that may have been provided by cross-examinations on the affidavits precludes the detailed analysis that would ordinarily be called for when a self-employed individual asserts a lower income. The corporate information provided shows a net loss for 1996. Some expenses are unexplained. But it would be pure speculation on my part to conclude that the estimated income is not a fair representation of the mother's current income.

[13] The father's point that the mother is intentionally earning less than her ability is a different point. Section 19(1) allows the court to impute an appropriate income amount in a number of circumstances, including intentional under-employment:

> 19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the spouse is intentionally under-employed or unemployed, other than where the underemployment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse...

[14] It seems to me that the use of the word "intentionally" implies a deliberate course of conduct related to the purpose of the Guidelines, i.e., the provision of support. The intentional under-employment must be for the purpose of undermining or avoiding the parent's support obligation. The court should not impute income in the absence of such a motive since to do so would impose an onerous financial obligation on any parent who chooses to make a change in employment, for example, however bona fide. One may legitimately choose a career path with short-term pain for long-term gain. In such a case the child should benefit as the non-custodial parent's income eventually increases. It should also be noted that, pursuant to s.25(1) of the Guidelines, the payor must provide annual financial information upon the request of the payee. This should provide some ready reference points to ascertain if indeed a payor, such as here the mother, is undervaluing her earning capacity.

[15] In this case there is no basis to conclude that the mother is deliberately trying to avoid her support obligations. She re-located for valid reasons; her career choice has substance to it; and, there is prospect of future gains. I reject the request to impute income.

[16] Finally, the father bases his request for increased support on what he says are increased child care costs. The Guidelines provide for certain special or extraordinary expenses to be added on to the support amount set by the tables. The amount of the expense is to be shared by the parents in proportion to their respective incomes. The relevant special expense claim here is provided for by s.7(1)(a) of the Guidelines:

> 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 separation:
>
> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment...

[17] The father says that he has recently had to change the child's baby-sitter and the new one charges higher fees. He estimates that his monthly child care costs have increased from $600.00 to $850.00. There is a need for more than the usual day care since the father is required to work shifts. This necessitates overnight care at times resulting in higher costs. The father says this will be a continuing expense notwithstanding the fact that the child will start in kindergarten next month.

[18] The mother's counsel points out that there is no explanation given as to why the babysitter had to be changed. Further, she submits that the increased child care costs are speculative at this time.

[19] It seems to me that the case for treating the child care costs as a "special" expense has been made out. This is not the usual situation because of the shift work requirement of the father's employment. I think there is sufficient evidence to support the claim. The question becomes how to quantify it for support purposes.

[20] The straightforward approach is to take the entire monthly child care cost of $850.00 and divide it proportionately according to the parties' incomes ($64,000 being

73% and $23,400 being 27% of the combined income). This would result in an amount of $229.50 being added to the Guidelines support figure.

[21] It could be argued, however, that the only "special" expense is the increased component of the child care costs. The parties, back in 1995, agreed to a monthly support payment of $200.00. The Corollary Relief Order was issued on consent. It could be said that the "base-line" child care cost of $600.00 was already factored into the calculation of the monthly support figure. Therefore the special expense item should be set at $250.00 instead of the full $850.00. In that case, the additional proportionate amount would be $67.50.

[22] The Guidelines provide for some flexibility and discretion in setting these special expenses. Section 18, quoted above, says that the court "may" provide an amount to cover all or "any portion" of the expense claimed. The court is also to take into account the necessity and reasonableness of the expense. In my view, the additional child care expense, in the father's employment situation, is a necessary and reasonable expense. Therefore, the sum of $67.50 should be added to the Guidelines figure of $194.00 to arrive at a total support figure of $261.50.

[23] The matter does not end here because the mother seeks to eliminate altogether or at least substantially reduce her support obligation. She pleads "undue hardship" due to the high costs of exercising access.

[24] The mother estimates her access costs at somewhere between $6,000 and $10,000. She states in one affidavit:

> "THAT I can only afford to pay for two or three trips per year for Kennedy to visit me. Two or three visits per year costs approximately $6 000 to $10 000 in airfare round trip from Yellowknife to Halifax depending upon frequent flyer points and seat sales. It is still nevertheless cheaper for me to escort Kennedy to and from Yellowknife than it would be for me to travel to Yellowknife, stay at a hotel, and exercise access through that manner. Exercising access outside Yellowknife also allows Kennedy the enrichening opportunity to see other parts of the world."

[25] It is evident, from reviewing the parties' affidavits, that there have been difficulties in access arrangements from time to time. Some of these were logistical while some may have been attitudinal. A greater degree of cooperation may help reduce access costs. Nevertheless I have no doubt that the costs of exercising access, if it is to be exercised in a meaningful way, will be high. The father's counsel says that this is due solely to the

mother's choice to move so far away. The vast distances, and the accompanying high costs, are a fact of life in Canada. And, in the absence of some oblique motive for the mother's choice, I must regard the high access costs as an aspect of that fact of life.

[26] The courts, prior to the enactment of the Guidelines, considered the costs of exercising access to be a valid factor in the determination of a suitable support amount: see *Levesque* (above) at page 602. This is consistent with the principle, enunciated in s.16(10) of the *Divorce Act*, that a child should have as much contact with each parent as is consistent with the best interest of the child. It is assumed that a parent who takes access seriously will commit funds so as to make access meaningful for the child. Hence reasonable access costs should be considered. The only proviso to this approach is that any allowance for access costs should not be used to reduce child support to such a level that a custodial parent cannot provide a reasonable lifestyle for the child: see annotation by J. G. McLeod to *Samson v Samson* (1996), 23 R.F.L. (4th) 241 (B.C.S.C.).

[27] The Guidelines also recognize access costs as a factor to consider but only if there is "undue hardship". This is outlined in 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...
>
> (b) the spouse has unusually high expenses in relation to exercising access to a child...

[28] There are three points to be made about the wording of s.10 in reference to the mother's submission. First, the section maintains discretion to the court. The court "may" award an amount different from the Guidelines figure but does not have to do so. Second, subsection (2)(b) refers to "unusually" high expenses. Presumably there is a difference, in the collective mind of the legislators, between merely high expenses and those that are unusually high. Third, even if one has unusually high expenses, the court may award a different amount only if the court finds that the party would "otherwise suffer undue hardship". It therefore seems to me that there is a burden on the party making the plea to lead evidence of "undue hardship".

[29] In this case, the mother clearly has high access expenses but, as I noted before, that is a fact of life when one moves to far off parts of Canada. There is nothing

"unusual" about the high costs of travelling between Nova Scotia and the Northwest Territories. The mother cannot say on the one hand that she has made a bona fide choice in moving to Nova Scotia and then ask to be relieved from the costs that would clearly have been foreseeable.

[30] I do not want to be misunderstood on this point. I do not want to discourage the mother from exercising access in a meaningful way. I recognize there are significant costs. But there are always significant costs in a parental separation. The legislators must have contemplated this fact otherwise there would be no point in using the word "unusually" to modify "high expenses". There is a basic principle in legislative interpretation that "every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": Sullivan, *Driedger on the Construction of Statutes* (3rd ed.), page 159. So the word "unusually" must be presumed to have a meaning and a function. Here the mother's expenses, while high, are certainly not unusual.

[31] I am also not satisfied as to the evidence of "undue hardship". The mother's most recent affidavit contains certain statements about how the mother would suffer undue hardship but provides very little by way of substance to support those conclusions. As such they are more argument than evidence.

[32] The mother's counsel also made the argument that the father's income was such that he could easily support his household without additional support from the mother. Various calculations were provided to me showing that the father's household standard of living is higher than that of the mother even when combined with the income of her new partner. These calculations were provided because s.10(3) of the Guidelines requires a comparison of the parties' respective standards of living. A claim of undue hardship must be denied if it turns out that the claimant's standard of living is higher.

[33] The dangers of any standard of living comparison are self-evident. As noted by Moreau J. of the Alberta Court of Queen's Bench in her recent judgment in *Middleton v Macpherson* (Alta. Q.B. No. 4803-103812; June 16, 1997):

> ...using s.10 as a vehicle to redistribute resources from one household to another raises the prospect of members of the payor spouse's household subsidizing the costs of the payee spouse's household. The joint financial obligation upon spouses to maintain the children of the marriage recognized in s.26.1(2) of the *Divorce Act* has not been legislatively extended to other members of each spouse's household.

> Of interest in this context are the comments of Professor Ross Finnie, School of Public Administration, Carleton University, before the Standing Senate Committee on Social Affairs, Science and Technology on January 25, 1997, at Hansard, p. 0840-25, which highlight some potential dangers associated with s.10 undue hardship applications:
>
> > ...there is the hardship condition and basing awards on the standard of living. I see that as being one of the fundamental flaws of these guidelines. No guideline anywhere that I am aware of has been based on such comparisons across the income spectrum ... In terms of implementation, I think it would be a nightmare. It would also be invasive. It would draw subsequent partners into the child support calculations with all sorts of negative repercussions....

[34] In this case the mother's new partner contributes to her household. He too is a partner in their business venture. While he has no legal obligation to support the child, his contribution to the mother's household would undoubtedly help cushion some of the hardship incurred by the mother due to her support obligations and access expenses. It makes it easier for the mother to meet her obligations.

[35] I use the term "hardship" in the preceding paragraph advisedly. As I noted in the case of *Hoover v Hoover* (N.W.T.S.C. No. 6101-02064; July 21, 1997), it is not mere hardship that must be established for a s.10 claim but "undue" hardship. It is the degree of "undueness" that will no doubt be debated in every future case.

[36] The above-quoted passage is also pertinent because of another one of the submissions made by the mother's counsel. She argued that a reduction in the support obligation would help to equalize the standards of living as between the two households. But that is the danger identified above: using undue hardship claims as a means of redistributing income. Here, the danger is compounded because the reduction of support would carry with it (in addition to an increase in the payor's standard of living) a decrease in the payee's standard of living. Hence, there would be a resulting reduction in the child's standard of living. And that cannot be the point behind s.10 of the Guidelines.

[37] In this case I need not comment further on the standards of living comparison since it makes no difference to the outcome; I reject the mother's undue hardship claim. She has income. She has business assets. She has an obligation to help support her child. The appropriate support figure, in accordance with the Guidelines, is the applicable basic amount ($194.00) plus the proportionate amount of the special expense for child care ($67.50). There will be no other adjustment.

[38] The Corollary Relief Order will be varied so as to provide for monthly child support payments of $261.50. The new amount will take effect with the payment due on September 1st.

[39] There were no submissions as to costs. Counsel may make submissions if they wish but, as I have noted in other similar cases, I am not readily inclined to award costs. It seems to me that the parties' funds could be better used for the child. If, however, counsel wish to make submissions they should schedule a special chambers date within the next 30 days.

J. Z. Vertes
J.S.C.

Dated at Yellowknife , Northwest Territories
this 14th day of August, 1997.

Counsel for the Petitioner: Olivia Rebeiro

Counsel for the Respondent: James R. Posynick

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