Date: 09 09 1997
Docket: CV 07109

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WILLIAM CEDERLAND

Petitioner

- and -

KIM PATRICIA CEDERLAND

Respondent

MEMORANDUM OF JUDGMENT

pursuant to s. 19(12)(c) of the *Divorce Act*

[1] This matter came on before me on August 28, 1997 as a hearing to confirm, vary or refuse to vary a provisional order made by Boyd J. of the Supreme Court of British Columbia on August 30, 1995 (No. 22462, Kamloops Registry). Mr. Cederland, although served with notice of the hearing before me, did not appear.

[2] The parties were divorced in proceedings taken in the Supreme Court of the Northwest Territories. A Corollary Relief Order filed December 31, 1991 provided that Mr. Cederland pay child support in the amount of $350.00 per month for each of the two children of the marriage.

[3] The provisional order made August 30, 1995 provides for three matters:

1. that arrears of support accumulated under the Corollary Relief Order be reduced by $4,800.00;
2. that child support be reduced to $250.00 per month per child commencing August 1, 1995; and
3. that Mr. Cederland pay an additional $100.00 per month against outstanding arrears, commencing August 1, 1995.

[4] At the conclusion of the hearing in this court, I made an order:

1. refusing confirmation of the provisional order reducing arrears by $4,800.00;

2. confirming the provisional order for child support in the amount of $250.00 per month per child but varying it to provide that the quantum of child support be $477.00 total per month commencing September 1, 1997;

3. refusing confirmation of the provisional order for payment of $100.00 per month against outstanding arrears.

[5] Section 19(2)(c) of the *Divorce Act* provides that where an order is made confirming a provisional order with variation or refusing confirmation of a provisional order, the court shall give written reasons to the Attorney General of the province (or territory) in which the court is situate and to the court that made the provisional order. These are my written reasons.

Order Refusing to Confirm Reduction of Arrears

[6] The transcript of the hearing held before Boyd J. on August 30, 1995 indicates that counsel submitted, and the court accepted, that the test for cancellation of arrears of child support is that cancellation ought to be ordered unless it can be shown that it would be grossly unfair to do so. No authority was cited for that test, which appears to create a presumption in favour of the party seeking cancellation of the arrears.

[7] With respect, a review of the authorities leads me to conclude that the generally accepted test is the one also used in this jurisdiction, which may be summarized as follows:

(a) has there been a change in circumstances;

(b) was the payor, in this case Mr. Cederland, unable to pay the child support ordered during the time that the arrears accumulated; and

(c) is the payor presently unable to pay the arrears.

{Hainsworth, T.W.; Divorce Act Manual, Canada Law Book Inc., 1997, pp.17-49 to 17-51; also *Whalen v. Boivin*, [1996] N.W.T.R. 111 (S.C.)}.

[8] In my view, the test to be followed is that described (*obiter dicta*) by Hetherington J.A. in *Haisman v Haisman* (1994), 7 R.F.L. (4th) 1 (Alta. C.A.), which clearly places the onus on the spouse seeking cancellation of the arrears:

> Where a former spouse has not been able, for relatively *short* periods of time in the *past*, to make child support payments *as they came due*, this circumstance does not justify a variation order which has the effect of reducing or eliminating *arrears* of child support.
>
> Where the *past* inability to make child support payments *as they came due* has lasted for a *substantial* period of time, but the former spouse did not apply during that time for a variation order, the situation may be different. On a later application to vary, a judge will have to decide, with the benefit of hindsight, whether it would have been appropriate to suspend enforcement of the support order during the time when the former spouse was unable to pay, or whether at least a temporary reduction in the child support payments would have been in order. A judge should view with considerable scepticism any claim that a reduction in the support

> payments, temporary or indefinite, would have been proper. However, if he or she decides that it would, the judge may for this reason reduce accordingly the arrears of child support which have built up. In my view, this is a special circumstance.
>
> I wish to emphasize that the mere accumulation of arrears, without evidence of a past inability to pay, is neither a change under s.17(4) of the *Divorce Act* nor a special circumstance.
>
> A *present* inability to pay *arrears* of child support does not by itself justify a variation order. It may justify a suspension of enforcement in relation to the arrears for a limited time, or an order providing for periodic payments on the arrears. However, in the absence of some special circumstance, a variation order should only be considered where the former spouse has established on a balance of probabilities that he or she cannot pay and will not in the future be able to pay the arrears.
>
> In short, in the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay, the arrears. [emphasis in original text]

[9] To the extent that the test used by Boyd J. may have been based on what have been called the "one-year rule" and the "anti-hoarding rule", (although neither rule was argued before her nor referred to in her reasons for making the provisional order) the test is also faulty because those "rules" have been criticized for allowing a debtor spouse to avoid payment of child support and are not generally accepted: see *Haisman*, supra. In any event, in this case, Ms. Cederland has tried for some time to enforce the child support payments through Maintenance Enforcement.

[10] In this case, Mr. Cederland requested and was granted by Boyd J. a reduction of arrears, representing arrears for 1993 only. The reduction appears from the transcript of the proceedings before Boyd J. to have been based on a notional ability to pay half the amount required by the Corollary Relief Order.

[11] Mr. Cederland's affidavit, which was before Boyd J., stated as follows:

> 16. That I believe that in particular, in 1993, due to a lengthy period of unemployment I was unable to make the commitment to the maintenance order as ordered by the Supreme Court of the Northwest Territories.

[12] Also before Boyd J. were copies of income tax returns for Mr. Cederland showing employment income of $18,663.17 for 1993 and $49,453.40 for 1994. The affidavit of Mr. Cederland, sworn July 6, 1995, estimated his 1995 gross income from his own business to be $2,500.00 per month, net $2,000.00 per month.

[13] No explanation was tendered before Boyd J. for Mr. Cederland's unemployment, in 1993, save for his counsel's opinion that it was due to difficult economic times in the community where he resided. Nor was there evidence as to how long he was unemployed.

[14] The evidence falls short of demonstrating on a balance of probabilities that Mr. Cederland could not pay, cannot pay and will not at any time in the future be able to pay the 1993 arrears. His income did increase after 1993. Although this may be a case where, had Mr. Cederland applied in 1993, a temporary suspension of enforcement of the child support order would have been appropriate, I am not satisfied on the evidence that reduction of the arrears would be appropriate, and therefore have not confirmed that part of the order of Boyd J.

Order Varying Child Support to $477.00 per Month

[15] Section 19 (7.1) of the *Divorce Act* provides that a court confirming, varying or refusing to confirm a provisional child support order shall do so in accordance with the applicable Child Support Guidelines. The Guidelines have, of course, come into effect since Boyd J. made her order.

[16] Counsel for Ms. Cederland served Mr. Cederland with a Notice to Disclose the information required under ss. 21(1) and (2) of the Guidelines. Mr. Cederland did not respond to that Notice.

[17] Counsel provided me with a calculation of $32,705.55, representing the average of Mr. Cederland's gross income for 1993, 1994 and 1995 as disclosed by the financial information before Boyd J. I therefore imputed that income, $32,705.55, to Mr. Cederland as I am entitled to do pursuant to s. 19(1) of the Guidelines.

[18] Section 3(3)(a) of the Guidelines states that the applicable table is the table for the province in which the spouse against whom the order is sought ordinarily resides. In this case, that province is British Columbia. The applicable table provides that on an income of $32,705.55, support for two children shall be $477.00.

[19] Accordingly, I have confirmed the Provisional Order of Boyd J. varying the child support payable to $250.00 per month per child but varied that order so that, to conform with the Guidelines, child support will be payable in the total amount of $477.00 per month commencing September 1, 1997.

Order for Payment of $100.00 per Month Against Arrears

[20] As counsel for Ms. Cederland submitted, that part of the provisional order which allows Mr. Cederland to pay $100.00 per month against arrears in effect allows him to avoid, or at

least significantly delay, enforcement proceedings by Maintenance Enforcement in relation to the arrears.

[21] Ms. Cederland's evidence before me was that Mr. Cederland has made only a very few voluntary payments in the past. Some other payments have been received through Maintenance Enforcement. He has not made payments in the recent past, despite the provisional order made at his request.

[22] It was also Ms. Cederland's evidence that during the marriage Mr. Cederland sometimes worked for cash without declaring it for income tax purposes and that he has admitted to her that he continues to do so. When she saw him during the summer of 1997, he was working.

[23] In all the circumstances, I declined to confirm the order for payment of $100.00 per month against arrears.

[24] Dated this 9th day of September, 1997.

V. A. Schuler
J.S.C.

To: James Brydon, Counsel
for the Respondent,
Kim Patricia Cederland

No one appearing for
the Petitioner, William Cederland.

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HONOURABLE V. A. SCHULER