

Date: May 19, 1998
Docket: CV03436

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SANDRA MCINNES

Applicant

- and -

WILLIAM (BILL) YOUNG

Respondent

MEMORANDUM OF JUDGMENT

[1] The parties to these proceedings lived together in a common-law relationship and have a son, now age 14. The parties ceased co-habiting and the Applicant mother commenced this action in 1991, seeking custody and child support. An order was made on January 13, 1992, in which the mother was granted custody and the Respondent father ordered to pay \$1000.00 per month in child support. The order was made in the absence of any information from the father and he subsequently was successful in having it varied to \$400.00 per month. The information he provided to the court at the time the variation was granted was that his annual income was \$36,000.00.

[2] In March of 1992, the court issued an order directing a trial of the issue of the quantum of child support payable. The proceedings sat dormant after that. It appears that the father continued to pay \$400.00 per month. He had worked in Taiwan in 1991 and the mother's affidavit suggests that she was under the impression that he continued to work in that area of the world. In August of 1997, the mother discovered that the father was living in British Columbia and she revived this action, seeking to have it set for trial and to have child support payments

increased in line with the federal *Child Support Guidelines* based on a substantial income which she understood the father to earn.

[3] In response, the father applied to vary the \$400.00 monthly payment previously ordered on the basis that his income had decreased. After numerous adjournments, and cross-examination of the father on his affidavit, the matter came before me on May 15, 1998.

[4] The parties agree that the issue of quantum of child support will go to trial. The issue before me is whether a variation should be made on an interim basis pending trial, which is expected to take place in the fall of this year.

[5] On behalf of the father it is argued that payments should be reduced to the *Guideline* amount of \$214.00 per month based on his 1997 gross income of \$24,239.00. On behalf of the mother it is argued that the father's work history is such that he may in fact make more than what has been disclosed, that he has in the past been able to make the payments as ordered and that he may not be diligent in seeking employment because his wife is well off and he relies on her support. For all these reasons, the mother resists the father's application for reduction of support. She also points out that she is having financial difficulties.

[6] The information before me (which includes a transcript of the cross-examination on his affidavit) indicates that the father's employment income has decreased over the past few years. Although he earned approximately \$3000.00 per month for a year and a half to two years commencing in 1991 in Taiwan, his gross income for 1994 was \$18,000.00, for 1995 was \$2,190.00 and for 1996 was \$21,000.00 (whether the latter was in U.S. or Canadian dollars is not clear). Although trained as a heavy equipment operator, he now works in golf course maintenance and construction.

[7] The sole question is whether I should vary the child support payments based on what is said to be the father's 1997 income. As this is an interim application, any such variation would only be for the period pending trial. Counsel for the father suggested that it be without prejudice such that if the mother is able to demonstrate at trial that the father earns more, the payments could be adjusted.

[8] In the circumstances of this case, I am not persuaded that the interim order made in January of 1992 for \$400.00 per month should be further varied on an interim basis. I note that the father did not see fit to seek variation until after the

mother brought her application. He has been making the payments ordered, at least until now; I was advised by counsel that the May payment has not been made.

[9] This is not a situation where the payor has full-time employment but does not earn very much money. In this case, the father takes contract employment and the history of that employment is such as to raise an arguable issue as to whether he is diligent in seeking to be employed on a regular basis. For example, his 1997 income was made up of \$14,000.00 from a three month golf course construction contract in Canada and approximately \$10,000.00 from a five month contract in China. It is not clear what efforts he made to obtain work for the remaining four months of the year.

[10] I also note from the father's cross-examination that he has recently purchased a new vehicle, with financing payments of \$649.00 per month. Yet he now claims to be unable to meet his monthly child support payments. While income rather than expenses is determinative under the *Child Support Guidelines* (which should apply notwithstanding that this is not a divorce action, on the basis that there is no valid reason to differentiate for child support purposes between the children of married parents and those of unmarried parents), this discrepancy in my view lends an air of reality to the possibility that the father has other resources and is not fully utilizing his ability to obtain employment.

[11] Finally, the \$400.00 that the father has been paying is deductible to him for income tax purposes so the burden of it is lessened to a degree.

[12] In these circumstances, and particularly because the father has in the past been able to make the payments required, I take the view that it is preferable not to vary the 1992 order on an interim basis. Should a determination be made at trial that the payments be decreased, that variation may be applied retroactively and future child support payments adjusted accordingly. That will be up to the trial judge.

[13] For the reasons given, the father's application for an interim variation is dismissed.

[14] I urge counsel to set this matter for trial at the earliest date available to the parties so that the matter can be determined on a final basis.

[15] Dated at Yellowknife, this 19th day of May, 1998.

V. A. Schuler
J.S.C.

To: Elaine Keenan-Bengts
Counsel for the Applicant

Lucy Austin
Counsel for the Respondent

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