Date: 1998 02 24
Docket: 6101-02874

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

URSULA ELIZABETH RUSCH

Petitioner

- and -

GERHARD ADOLPH RUSCH

Respondent

MEMORANDUM OF JUDGMENT

[1] On this application, the Petitioner seeks interim child support for the child of the marriage, who is five years old. The Respondent seeks interim specified access to the child. I made an order on November 28, 1997 that the Petitioner have interim sole custody of the child.

[2] The only issue with respect to child support is whether I should impute income to the Respondent because he has taken a much lower paying job than he held while the parties lived together.

[3] The facts, as taken from the affidavit material, are as follows: The parties married in 1991. The Respondent commenced employment at the Giant Yellowknife Mine in 1992. His occupation is described as a first-class tradesman. He also has qualifications as a plumber, but they are from Germany and are not accepted in Canada. In 1996 his gross income from employment at Giant was $63,444.29.

[4] Sometime in the spring of 1997, the Respondent became involved with another woman, who lives in the state of Washington. In mid-August 1997, he moved out of the matrimonial home. In October of 1997 the Respondent quit his job at Giant and moved

to the Vancouver area. In his affidavit sworn October 14, 1997, he deposed to the fact that he was seeking employment in the Vancouver area, that he had applied for a number of mining jobs and jobs in the plumbing industry, but had not received any offers. In a later affidavit he referred to having had some interviews for jobs with trucking companies. His most recent affidavit indicates that since early December 1997, he has been employed as a truck driver in the Vancouver area. A letter from his employer indicates that his average gross income per month is $3000.00 and that his prospects of continued employment are good.

[5] The Respondent explains his decision to leave Yellowknife as an attempt to start a new life after the breakdown of the marriage. When he left, the child remained with the Petitioner in Yellowknife. They have recently, and since these divorce proceedings were commenced, relocated to Dawson Creek, British Columbia, where the Petitioner has family. The Petitioner says that this move was the result of her inability to keep up with the cost of living in Yellowknife on her salary and without help from the Respondent.

[6] Counsel for the Petitioner takes the position that the Respondent has made the choice to put his personal interests, his wish to start a new life with a new partner, before the interests of his son. She also takes the position that he may have limited his job opportunities by looking only in the Vancouver and Langley areas so as to live close to his new partner, who resides in Washington. The Respondent does, however, state in his affidavit that he has looked for mining jobs, which logically would have to be outside the Vancouver area. There has been no cross-examination on the affidavit. In the absence of further evidence, I am unable to conclude that he has deliberately refrained from pursuing mining employment, as opposed to having taken the job that was offered to him.

[7] Counsel for the Petitioner argues that I should impute to the Respondent income for a year at the level he had at Giant in 1996. Counsel for the Respondent argues that a move from the jurisdiction is not unusual on a marriage breakdown and that there is no evidence that the Respondent is intentionally underemployed.

[8] Reference was made by counsel for the Petitioner to s.17 of the federal *Child Support Guidelines*. For the reasons set out in *McCarthy v. McCarthy*, (S.C.N.W.T. No. 6101-01638; October 22, 1997), I am not convinced that s.17 applies in a situation like this one, where there is a change in employment. In my view, s.17 applies where there are fluctuations in a source of income, such that the yearly amount varies due to the nature of the source of the income.

[9] Section 19(1) of the *Guidelines* provides that the court may impute income to a spouse in certain circumstances, which include intentional underemployment:

> 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 underemployed 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 education or health needs of the spouse...

[10] In *Williams v. Williams*, [1997] N.W.T.R. 303 (S.C.), Vertes J. said the following about s.19(1)(a):

> 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 underemployment 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*.

[11] I agree with this interpretation of s.19(1)(a), at the same time noting that the assessment of motive will often be a difficult task. In this case, for example, one could say that there is a fine line between the Respondent (i) changing employment as a result of a move from the jurisdiction which itself resulted from the breakdown of the marriage and (ii) intentionally putting his own interests in a new relationship and new life before the ability to contribute a substantial sum to the support of his child. One might apply either interpretation to the actions of the Respondent. But in my view the court should be cautious about making a finding of intentional underemployment where a change in employment results from a reasonable and explained change in life, such as a change in residence.

[12] In my view, this case is quite different from that of *Rymut v. Rymut* (1995), 17 R.F.L.(4th) 163 (Alta.Q.B.), relied upon by counsel for the Petitioner. In *Rymut*, a case decided before the *Guidelines* came into effect, the payor spouse had given up employment in the oil patch for substantially less lucrative employment with a guiding company owned by his girlfriend. He was also a director and secretary of the company.

Those circumstances in themselves might suggest that he was trying to limit the employment income available for child support.

[13] In *Channer v. Hoffman-Turner*, [1997] A.J. No. 1022 (Alta.Q.B.), Kenny J. dealt with a situation where the payor spouse had chosen to leave his employment with the Crown Prosecutor's office to start his own law practice. As a result, his annual income decreased from $88,000.00 to virtually nothing, although the practice was steadily improving. Kenny J. imputed income to him in an amount somewhat more than what he expected he could earn, but less than what he was earning as a Crown Prosecutor. In doing so, she said, "This recognizes the fact that he has an obligation to ensure that he earns an income commensurate with his abilities to support the children but still allows him the ability to make reasonable lifestyle decisions which he has chosen to do".

[14] In the case before me, the Respondent has made the choice of leaving the north, after residing here for six years, to live in the Vancouver area. Although he gave up a well-paying job, I cannot say that his choice was unreasonable. Many people, for many reasons, choose to limit their time in the north, no matter the quality of the lifestyle and employment here. There is no evidence that the Respondent's choice to leave was made for the purpose of avoiding his obligation to support his son. Within a few weeks of relocating, he did obtain employment.

[15] This is an interim application. The child support order I make should be realistic in the sense that it should be based on the income that the Respondent is actually earning ($36,000.00 gross annually) and should provide the Petitioner with the reasonable expectation that the payments can and will be made. Whether the Respondent is in fact limiting his earning capacity is an issue that can be canvassed at trial.

[16] Accordingly, I order that the Respondent pay interim child support in the amount of $311.00 per month, commencing January 1, 1998 and payable on the first of each month thereafter. There are already orders in effect for the months of November and December 1997.

[17] With respect to access, no issue is raised about the Respondent's care of the five-year-old child. The Petitioner has concerns that he might leave the jurisdiction with the child and go back to Germany, but the Respondent denies having any intention to do so. Access is, of course, the right of the child and he should have as much contact with each parent as is reasonable. The main problem in this case appears to me to be the degree of animosity between the parties. I trust, however, that they can put aside their

differences so as to lessen the trauma of the marriage breakdown for the child. In my view, access should be structured so that each parent gets some holiday time with the child. For that reason, I am not prepared to accede to the Respondent's request that he have the child for two months each summer.

[18] I therefore order that the Respondent have interim reasonable access to the child on the following terms:

(a) telephone access each Wednesday evening between 7:30 and 8:30 p.m. and each Saturday evening between 5:00 and 6:00 p.m. B.C. time;

(b) alternate Christmas school holidays, commencing with Christmas of 1998;

(c) alternate school spring breaks, commencing with the spring break in 1999;

(d) one month every summer commencing with the month of August 1998;

(e) the aforesaid access may be exercised by the Respondent in his community of residence or elsewhere subject to the condition that the child is not to be taken out of the Province of British Columbia;

(f) the Respondent shall keep the Petitioner advised of the child's whereabouts at all times when access is being exercised by providing her with the address and telephone number where the child is located.

[19] Should any clarification of the above terms be required, counsel can arrange to speak to the matter.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this
24th day of February 1998

Counsel for the Petitioner: Jill A. Murray
Counsel for the Respondent: Angela Davies

6101-02874

IN THE SUPREME COURT
OF THE NORTHWEST TERRITORIES

BETWEEN:

URSULA ELIZABETH RUSCH

Petitioner

- and -

GERHARD ADOLPH RUSCH

Respondent

MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE V.A. SCHULER