

Date: October 02, 1997
Docket: 6101-02360

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CARMEN COLLEEN TEES

Petitioner

- and -

GARY ROBERT TEES

Respondent

Application to vary Corollary Relief Order with respect to spousal support.

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

Heard at Yellowknife , Northwest Territories
on September 24, 1997

Reasons filed: October 2, 1997

Counsel for the Petitioner: Lucy Austin

Counsel for the Respondent: Sheila McPherson

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REASONS FOR JUDGMENT

[1] In this case the petitioner seeks to vary the Amended Corollary Relief Order so as to continue indefinitely what was a term-limited award of spousal support. The application is granted.

[2] The spouses agreed to terms which were subsequently incorporated into the Amended Corollary Relief Order of August 18, 1994, by consent. That Order provided for spousal support of \$300.00 per month, such support to cease on August 1, 1997. There was a further proviso:

5. AND IT IS ORDERED that the Petitioner shall have the right to apply for spousal support beyond the termination date set out in paragraph 3 above if the Petitioner suffers physical incapacitation and involuntary substantial reduction in her income resulting from complications arising from the Petitioner's affliction of Multiple Sclerosis.

[3] The proviso took into account the fact that at the time of the divorce the petitioner was already suffering from multiple sclerosis. She was, however, able to work and was gainfully employed at the time. Since then her condition has deteriorated to the point where she is totally disabled and unable to work. Her sole sources of income are a disability pension from Canada Pension Plan and monthly payments from a private

insurance plan. Her income and standard of living are substantially lower than at the time of the divorce.

[4] There is no need to meet a threshold test of a material change in circumstances as stipulated in s.17(4.1) of the *Divorce Act*. The parties recognized the materiality of the change relied on by the petitioner by the inclusion of paragraph 5 in the Amended Corollary Relief Order. The respondent's counsel acknowledged the petitioner's entitlement to bring this application. The issues therefore are whether there should be a continuation, for how long, and in what amount.

[5] In my opinion, the circumstances of this case and the applicable principles are indistinguishable from those in *Kloos v Kloos* (1996), 20 R.F.L. (4th) 1 (Man. C.A.). Whether or not the petitioner's illness is causally connected to the marriage is irrelevant. Of course it is not. But the focus of the inquiry is whether there is hardship due to the breakdown of the marriage no matter how it was caused. As noted in *Moge v Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), an equitable sharing of the economic consequences of divorce does not exclude considerations other than those stipulated in sections 15.2(6) or 17(7) of the Act, particularly when dealing with sick or disabled spouses. The issue in this type of case is not whether the illness should generate a claim for support but, rather, whether all of the circumstances, including the disability, are sufficient to attract a support award. It is an exercise of the court's residual discretion.

[6] Here it can be said that, but for the marriage breakdown, the petitioner would not now have to bear the significant economic consequences flowing from her disability. It can also be said that, in a marriage of 20 years such as this one, the spouses, even though they now have separate lives, still have some obligations of support to each other so that one of them does not become totally dependent on the state.

[7] Respondent's counsel submitted that I should take into account the capital sum received by the petitioner on the settlement of the matrimonial property claims. This capital of approximately \$50,000.00 is invested in an R.R.S.P.

[8] It is true that *Moge* spoke in terms of taking all circumstances, including property settlements, into consideration for purposes of determining spousal support. This capital sum, however, represents a distinct settlement on a property entitlement. It is the only investment possessed by the petitioner for future need. It seems to me that it would not be fair to force her to encroach on this fund to support daily living expenses. In this case I think a clear distinction can be drawn between the two entitlements: property settlement and on-going support.

[9] Counsel did not refer to it, but an amendment to the *Divorce Act*, proclaimed in force on May 1, 1997, may have some bearing. The amendment is found in a new s.17(10):

(10) Notwithstanding subsection (1), where a spousal support order provides for support for a definite period or until a specified event occurs, a court may not, on an application instituted after the expiration of that period or the occurrence of the event, make a variation order for the purpose of resuming that support unless the court is satisfied that

(a) a variation order is necessary to relieve economic hardship arising from a change described in subsection (4.1) that is related to the marriage; and

(b) the changed circumstances, had they existed at the time of the making of the spousal support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order.

[10] In this case there is a change (the total disability of the petitioner) and there is economic hardship arising from that change. It is “related” to the marriage in that it was a condition that was recognized during the marriage and taken into account at the divorce. There is no doubt in my mind that if the new circumstance (total disability) had existed at the time of making the Amended Corollary Relief Order, it would have likely resulted in a different order. Specifically, it would have likely resulted in an indeterminate order for a higher amount.

[11] I am satisfied that the Amended Corollary Relief Order should be amended so as to provide for spousal support for an indefinite term. It is sheer speculation to set some new term limit. No one can foretell what will happen or when. If there is a change of circumstance, e.g., a change in the respondent’s financial situation or if by chance the petitioner’s disease goes into remission, then either party may apply for a further variation.

[12] With respect to quantum, there is an obvious need on the one hand and something of an ability to pay on the other hand. I recognize that the respondent has significant financial obligations to his new family. Nevertheless his new family’s combined income is relatively high. His income on its own is quite good. The petitioner’s situation on the other hand is quite meagre.

[13] In my opinion an increase is warranted but not to the level sought by the Petitioner (\$750.00 to \$1000.00 per month). I acknowledge that the total cost to the respondent will not be as great as it seems due to the fact that he will obtain some tax relief for these payments. Nevertheless I think the amount sought would detrimentally affect the respondent's ability to pay.

[14] Accordingly, the Amended Corollary Relief Order will be varied to provide for on-going spousal support of \$500.00 per month, payable on the first day of every month, commencing November 1, 1997. Interim orders covered the months of September and October. There will be no costs.

[15] My appreciation to both counsel for their helpful submissions.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 2nd day of October, 1997

Counsel for the Petitioner: Lucy Austin

Counsel for the Respondent: Sheila McPherson

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