Date: 1998 04 24
Docket: 6101-02439

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CAROL ELIZABETH DIPASQUALE

Petitioner

- and -

RONALD PETER DIPASQUALE

Respondent

Trial of divorce petition and issues of child custody, support and access.

Heard at Yellowknife, NT, on April 7 and 8, 1998

Judgment filed: April 24, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Counsel for the Petitioner: Elaine Keenan Bengts
Counsel for the Respondent: Sheila M. MacPherson

6101-02439

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REASONS FOR JUDGMENT

[1] In these proceedings the parties seek a divorce judgment as well as orders respecting child custody, access, and support.

[2] The divorce is uncontested. The parties have been separated for seven years. A divorce judgment will therefore issue in the usual terms to be made final 31 days from the date of these reasons. To address the primary issues relating to the children I must review the history of this family.

FACTS:

[3] The parties were married in 1984 and separated in 1991. There are two children of the marriage: a daughter, Dietrie, who is now 14 years old, and a son, Christopher, now 11 years old. Dietrie is not the natural child of the parties. Her late mother was the sister of the petitioner. She has been in the care of the parties since she was sixteen months old and was formally adopted by the parties pursuant to an adoption order issued by this court in 1997.

[4] At the time of separation, the parties made an agreement respecting care of the children and a division of their assets. This agreement provided for "joint custody" of the children with their principal residence being with the respondent. The specific clauses respecting custody and support were as follows:

> 3. Both parties have agreed to joint custody with shared responsibilities of the children, Dietrie Elizabeth Jung born October 19th, 1983 in Victoria, British Columbia and Christopher Allan DiPasquale born February 21st, 1987 in Yellowknife, Northwest Territories. The children's principle (sic) residence will be with Ron at 5405 45th Street, Yellowknife, N.W.T.
>
> 4. It is agreed that Carol will pay to Ron seven hundred ($700.00) dollars per month ($350.00 per child) for child support while the children are dependent and under the care of Ron DiPasquale.

[5] The petitioner testified that she was the one who typed up the agreement and she consulted with a lawyer on the wording of the joint custody clause. Other than that the parties did not seek legal advice on the agreement. The petitioner said she understood that joint custody meant that both of the parents would maintain involvement with the children. The respondent testified that they had no discussions as to what was meant by joint custody. According to him the primary motivation in labelling the custodial arrangement as "joint" was to secure Dietrie's status should there be interference from her natural father. The petitioner acknowledged that at the time she and the respondent were united in their concern that the father posed a risk to Dietrie.

[6] Shortly after separation the petitioner commenced a new relationship. It is an ongoing and stable one. She and her partner plan to marry. At the separation the family was living in Yellowknife. In 1992, however, due to her new partner's job requirements, the petitioner and her partner moved to Iqaluit. They then moved back to Yellowknife in January of 1997. The petitioner maintained her relationship with the children while living in Iqaluit. She would see them on trips to Yellowknife; they would sometimes visit her in Iqaluit; and on occasion they would take vacations together.

[7] The children have lived with the respondent continuously since the separation. He has been their primary care-provider. By all accounts they are bright, energetic, well-adjusted children. In April 1997, the respondent moved with the children to Calgary. There were suggestions made at trial to the effect that the move was to somehow curtail the petitioner's contact with the children. I reject those implications. I am satisfied that

the move was made for bona fide reasons (primarily related to the respondent's career prospects).

ISSUES:

[8] Prior to the trial of this action I had the opportunity to meet with the parties and their counsel in a private, informal meeting to discuss the issues. The hope was that by such an informal discussion the parties may be able to come to a resolution of their concerns without the need for a formal trial (and all the attendant costs, both emotional and financial). That hope did not come to be realized. Why, I cannot say. But, as a result of that meeting, I think I was able to form a better understanding of the nature of the issues that have brought the parties to court. Nothing I heard in court changed the impressions I formed from that meeting.

[9] The parties' concerns are all centred on their expectations as to their role in the joint custody arrangement. To a great extent this case is about the attributes of joint custody. It is also about the parties' attitudes. They both recognize that their primary responsibility is to act in the best interests of their children. No one can doubt that. What they do not appreciate fully, or perhaps not at the same level, is how they should act vis-à-vis each other.

[10] I identify four distinct issues.

[11] First, should the joint custody arrangement continue? The petitioner, in her trial brief, advanced a claim for sole custody (even though that was not claimed in her Petition for Divorce). It was abundantly clear, however, from the arguments advanced on the petitioner's behalf at trial that she was content to have the joint custody provision continue. So was the respondent.

[12] Second, if the joint custody arrangement is to continue, then on what terms? Where is the children's primary residence to be? What specific conditions if any should be attached to the joint custody arrangement? It was clear to me that the petitioner would be content with the children continuing to live with the respondent. She wants, however, a clearer definition of their respective roles as joint custodians. The respondent, for his part, wants to in effect continue the status quo in which he views himself as the primary and ultimate decision-maker with respect to the children.

[13] Third, what access arrangements should be in place for the parent who does not maintain principal care for the children? And finally, fourth, what support payments

should be made by that parent to the one who is the principal care-provider for the children?

CUSTODY:

[14] It is almost trite to make the observation that child custody matters are ill-suited for the adversarial court process. A custody case is not the same as ordinary litigation since the paramount issue is one outside of the interests per se of the litigants; the paramount issue is solely the best interests of the children. For that reason any reasonable resolution by the parties is much to be preferred over some court-imposed decree.

[15] Counsel at trial did not address specifically the fact that there has been an agreement in place for many years now respecting the custodial arrangements. Perhaps that was because no one seriously contested the continuation of joint custody (notwithstanding the position outlined in the petitioner's trial brief). Generally speaking the courts will defer to the wishes of the parties as reflected in an agreement. The court maintains the power to override the terms of any agreement if those terms are not in the best interests of the children. But, generally, the courts regard an agreement as strong evidence that the parties, at the time, regarded the terms as appropriate and therefore those terms should not be readily interfered with in the absence of good cause. The courts wish to encourage people to take responsibility for their own decisions.

[16] The encouragement of mutual agreement is justified by social science research into the effects of divorce on children. The research data is consistent in showing that divorce presents a challenge to even the healthiest children. Adversarial proceedings inevitably lead to bitterness and hostility as between the parents but it is the children who suffer the most. That is because the child's well-being is highly dependent on the child's perception of the quality of the relationship between the parents as parents: R. Freeman, "Parenting After Divorce: Using Research to Inform Decision-Making About Children", (1998) 15 Canadian Journal of Family Law 79 (at pages 86-87).

[17] The most common thread in the research is that "success" in parenting after divorce comes not from the formal structure put in place but from the attitudes of the parents. This was summarized by Arthur Leonoff, a psychologist in family practice in Ottawa, in a paper entitled "Joint Custody and Beyond" reprinted in Volume 24 of the Law Society of Upper Canada Gazette (March 1995):

> The descriptive research on divorce does stress how difficult an occurrence divorce is for children and their parents. Children can adapt and accommodate to its stresses, especially if they have understanding and supportive parents. Empathic parents can make a success of any custody model whereas rigid, projecting or blaming parents will often fail their children no matter what custody arrangement is in place. In those cases where negative factors predominate, the challenge becomes one of damage control as compared to the promotion of well being. A primary conclusion, then, is that custody is important but is less pervasive an influence on post-divorce adjustment than the parents themselves in their close encounters with their children.

[18] Here the parties agreed to joint custody. Their understanding of all that this concept entails may have been incomplete at the time but the intention is clear enough. They are each to have an ongoing legal and practical role to play in the lives of their children.

[19] The applicable statutory provisions respecting custody are set out in s.16 of the *Divorce Act*:

> 16.(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody or and access to, any or all children of the marriage . . .
>
> (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.
>
> (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.
>
> (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.
>
> (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[20] The statute reinforces the research data and common sense. The best interests of the children are the only consideration. Children should have as much contact with both parents as is consistent with their best interests. Even the parent who does not have custody is still entitled to information about the health, education and welfare of the children.

[21] It is important to remember, however, that custody is not a question of parental rights. Deschamps J.A. of the Quebec Court of Appeal wrote in *Augustus v. Gosset*, (1995) R.J.Q. 335, that "if parental status entails responsibilities, it is the source of few rights" (p.357). All rights of custody and access exist only to the extent that they permit the custodial or access parent to act in the best interests of the child: *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (per L'Heureux-Dubé J. at p.68).

[22] Joint custody is viewed as a particularly apt vehicle for recognizing the ongoing role that both parents should play in the lives of their children. In this case there is no question that each parent is capable of providing the love, care and affection that their children are entitled to. The parents cannot, however, be looked at in isolation as individuals. They are linked together, even after divorce, by their children and the children's needs. So inevitably, whether they truly want to or not, they will have to work together in their children's interests for many years to come.

[23] In this case one of the petitioner's complaints was that the respondent merely gives lip service to the notion of joint custody. When it comes time to make a decision then he will make the decision. And he will consult only when it suits him. To some extent, based on my observations, the petitioner has a point. But it is also fair to say that the respondent's perspective is that he is the one who has had to shoulder the bulk of the

responsibility for the children for the past seven years and therefore he is in the best position to decide on what is in their best interests. He has a point as well.

[24] The respondent complains that the petitioner has been inconsistent and unreliable at times in her past dealings with the children. He has a point here too but some of those situations arose due to circumstances that were not completely in the petitioner's control. I think it is fair to say, however, that the petitioner's motivation in now demanding and expecting a greater role in the children's lives is due in part to what she may perceive as missed opportunities in the past. The point that arises clearly from the evidence, however, is that none of these complaints reveals any fundamental flaw in either parent as parent. What flaws there may be are all related to their abilities to communicate and consult with each other.

[25] Joint custody means that the parents have equal legal control over the course of their children's lives. It necessarily implies equal responsibility for the important decisions relating to their children's welfare. This in turn necessitates cooperation and consultation between the parents.

[26] The courts' traditional approach to joint custody was that each parent must be fit to have custody and that they both agree to cooperate and be capable of cooperating. Some courts held that joint custody should be awarded only if both parents favoured it: *Baker v. Baker* (1979), 23 O.R. (2d) 391 (C.A.); *Stewart v. Stewart* (1994), 2 R.F.L. (4th) 53 (B.C.C.A.). The irony in that approach is that those are the type of people that should not need a court order. This was a point made by McKeigan C.J.N.S. in *Zwicker v. Morine* (1980) 16 R.F.L. (2d) 405 (N.S.C.A.), at page 302:

> A joint order may be helpful, and not harmful, only where the parents agree to cooperate and are capable of cooperating. Paradoxically, such an order would thus be unobjectionable only when the parents are the kind for whom no controlling order is necessary at all! For such parents, an order would merely affirm or approve their agreement as to how they propose to bring up their children. Such parents, and their children, do not need to care whether any order is issued, or whether a formal order purports to give legal right of custody to the father, to the mother or to both.

The flip side of this is that when parents litigate to determine custody, the suitability of those people for some shared custody arrangement is likely low.

[27] More recently courts have been willing to order joint custody even where the parents had problems cooperating: *Nurmi v. Nurmi* (1988), 16 R.F.L. (3d) 201

(Ont.U.F.C.); *Colwell v. Colwell* (1992), 38 R.F.L. (3d) 345 (Alta.Q.B.). In some cases joint custody has been ordered over the objections of one of the parents. In each case it is a question of whether joint custody is likely to work and in the best interests of the children: *Woodland v. Ceeco*, [1995] B.C.J. No.226 (S.C.). The approach was explained by MacDonald J. in the recent case of *Godfrey-Smith v. Godfrey-Smith*, [1997] N.S.J. No. 544 (S.C.), at paragraphs 20 and 21:

> It seems to me that when facing a contested application for joint custody a court should make a distinction between the parties' inability to communicate as opposed to the parties' unwillingness to communicate. To do so it will be necessary to explore their relationship both pre- and post-separation with a view to determining how they have historically handled parenting issues.
>
> Unfortunately all too many divorcing couples have never been able to properly communicate. In fact an ability to communicate is very often why couples separate in the first place. If historically there has been very little communication one can expect a corresponding inability to co-operate. In such circumstances an order for joint custody would likely do more harm than good. If, however, the parents have historically demonstrated an ability to communicate with corresponding co-operation on parenting issues, then an order for joint custody may be appropriate even if one party resists. This is especially true if throughout the relationship the parties have not displayed fundamentally different parenting styles.

[28] It seems to me, based on what I have seen and heard, that there is no reason why the parties here, once they fully appreciate what joint custody entails, could not have a successful shared parenting arrangement. They both exhibit an underlying commitment to their children. Notwithstanding their differences, I think they also share a respect for each other's abilities as a parent. There was ample evidence reflecting cooperation between the parties with respect to child care issues since the separation. The most outstanding example is the united position they took with respect to their adoption of Dietrie. I think that the shared parenting encompassed by joint custody would also be in the best interests of these children considering what I have heard about their relationship with each parent.

[29] Mr. Leonoff, in his paper noted above, set out a paradigm of the rights and responsibilities of joint custodial parents:

- the right to exercise care and control of the children during the time period in which the children reside with that parent;

- the right to contribute to the important decisions regarding health, education and welfare that are far reaching in their impact on the children;
- the right to be accorded equal respect and value as a parent and to have this sentiment communicated to the children;
- the responsibility to communicate and cooperate in the raising of the children in conjunction with the other parent;
- the responsibility to affirm and support the equal value and authority of the other parent in the eyes of the children;
- the responsibility to coordinate and cooperate in the formation of plans and schedules concerning the children;
- the responsibility to contribute financially to the welfare of the children.

It is to be noted that the unique aspect of joint custody is more discernible in terms of its "responsibilities". The "rights" are ones that should be found in every custodial arrangement.

[30] If joint custody, in this case, is going to be anything more than just a "feel good" label, then the parties will have to give more than lip service to the responsibilities noted above. And, just to show that there is something in this for the parents as well, it should also be noted that there is a large body of research that shows that, when families can function within the joint custody model and exploit its opportunities, the mothers and fathers in such arrangements tend to be far more satisfied individually than those in sole custody arrangements: J. Folberg, *Joint Custody and Shared Parenting* (1991).

[31] I have concluded that a joint custody arrangement can work with these parties. How well it works will be up to them. I will, however, stipulate some specific provisions when I outline my order.

[32] The petitioner's counsel submitted that the primary residence of the children should be changed to the petitioner's home. In support of this change she stressed the fact that the petitioner is best able to meet the emotional needs of the children. She also noted that, as a general rule, it is in children's best interests to be with the parent who will be best able to maximize the children's contact with both parents (see *Tremblay v. Tremblay* (1987), 10 R.F.L. (3d) 166 (Alta.Q.B.), as an example), something that she said the petitioner is most willing to do.

[33] These are valid points but they are difficult to assess. I heard nothing to suggest that the respondent has failed to meet the emotional needs of the children. Indeed I heard how the respondent was particularly sensitive to the needs of Dietrie by involving

the petitioner. Further, there is a well recognized principle that where a living arrangement has been successful for many years, there is little point, and some potential harm, in disturbing that status quo unless there is some obviously superior alternative. I have concluded that the children's primary residence should continue to be with the respondent.

[34] The petitioner expressed a special concern that the wishes of the children should be taken into account should they express a desire to live with her. There was no evidence placed before me as to their current wishes because the parties have, quite rightly, attempted to shield them from this litigation. Courts generally do take into account the wishes of children who are somewhat older. Courts also recognize that children's desires can sometimes be fickle or volatile and subject to manipulation. But as a matter of common sense I think everyone realizes that children, certainly as teenagers, will have the effective say no matter what a court may order. In this case, certainly with Dietrie, it will not be long before she will decide where she wants to live and when she will spend time with her parents. I think both parents would ignore their children's wishes at their peril.

[35] The following order will issue. The petitioner and respondent will have joint custody of the children of the marriage. The primary residence of the children will be with the respondent who will have day-to-day care and control of them. In ordering joint custody, I further order that:

(a) the children's best interests are to be always paramount in the parties' decision-making respecting the children;
(b) the petitioner and respondent are to consult with each other on significant decisions with respect to the children's education and health care and with respect to significant expenditures respecting the children where both parties will be contributing to such expenditures;
(c) all discussions and decision-making are to be done in an atmosphere of cooperation and mutual respect so as to promote the emotional well-being of the children;
(d) the petitioner and respondent both have a right to receive significant information with respect to the children's education and health care, including the right to review report cards, health records, etc., and to discuss matters with teachers, doctors, etc., respecting the children;
(e) parenting responsibilities in a general sense shall be shared on the basis of the needs of the children and the ability of each parent to take on such responsibilities; and

(f) the daily responsibility for the care of the children shall be exercised by the parent with whom the children are residing at the particular time.

There will be a further order, pursuant to s.16(7) of the Act, requiring the respondent to provide the petitioner with a minimum of forty-five (45) days' notice of any intention to relocate with the children.

[36] I have spelled out these terms expressly because I want to emphasize the fact that decisions of importance must be made with the participation of both parents. There may, of course, be times when the parents cannot or will not agree. My anticipation is, having seen the parties, that those situations will be few if they genuinely put the needs of the children first. If they honestly cannot agree, they can put the issue to an impartial third party. Or, they can come back to court. I make no specific direction on that point. But I also want to emphasize that if they come back to court or if either one of them acts unilaterally then they do so again at their peril. A court could decide, in the face of non-cooperation, to simply change the joint custody arrangement to one of sole custody: see, for example, *Lucken v. Hopkins* (1994), 8 R.F.L. (4th) 226 (B.C.C.A.).

ACCESS:

[37] The parties are agreed that the parent who does not provide the primary residence for the children should have generous access. There is broad agreement on the terms. The contentious issues are notice and cost of access.

[38] Based on the submissions made I order that the petitioner have access for six (6) weeks every summer. It does not matter to this, or any, court which six weeks but to avoid problems I will direct that this period not include either the first week after school finishes or the full week before school starts. I heard how the respondent, because of his employment, must bid his vacation time in the previous November of each year. Therefore I direct that each year, on or before October 31st, the petitioner advise the respondent as to which six week period she wishes to exercise access in the following summer. For this year the six week period will be the last two weeks of July and the first four weeks of August.
In addition I order that the petitioner shall have access:

(a) alternating Christmas breaks starting in 1999;
(b) alternating Easter breaks starting in 1999; and,
(c) alternating Thanksgiving weekends starting in 1998.

There will be a further provision that the parties are at liberty to vary this access or make alternative or additional arrangements by agreement.

[39] With respect to costs of access, quite some time was expended at the trial over the question of airline passes. The respondent, through his employment, is able to obtain passes for free travel (on a seat availability basis) or reduced rates (on what is called "ID-50" basis). He is reluctant to let the children travel on their own on a seat availability basis because of the need to change airplanes in Edmonton. The concern is that if no seats are available on the connecting flight the children would be stuck there. Various proposals were made as to how to deal with this should it arise but I do not see why this should even be the subject-matter of debate. I think the respondent's concerns are reasonable. Accordingly, there will be a further order that the petitioner will be responsible for the costs of access subject only to the proviso that the respondent will make passes available so that the children can travel at reduced rates.

CHILD SUPPORT:

[40] The petitioner does not dispute that she should pay child support. Based on her annual income, the basic child support payable for the two children, according to the *Federal Child Support Guidelines*, is $907.00 per month. The dispute comes with the respondent's claim for extraordinary expenses.

[41] The Guidelines provide for the amount of any special or extraordinary expense to be shared by the parents in proportion to their respective incomes. The criteria as to whether any such expense is to be provided for are 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 parents and any pre-separation spending patterns. The relevant provisions are found in s.7(1) of the Guidelines:

> 7(1) In a child support order the court may, on either spouses'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 the separation:
>
> . . .

> (d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child's particular needs;
>
> . . .
>
> (f) extraordinary expenses for extracurricular activities.

[42] Here the respondent seeks an apportionment of expenses for Dietrie's figure skating lessons and youth choir activities and for Christopher's hockey activity and tutorial fees. In a previous case, *Hoover v. Hoover*, [1997] N.W.T.J. No.43, I had said that the use of the qualifier "extraordinary" must have a purpose. Therefore, I concluded in that case that similar types of activities and expenses were not extraordinary at all but quite common activities. That is essentially the position taken here by the petitioner.

[43] The developing jurisprudence on s.7 claims suggests that the term "extraordinary expense" is related to unusual cost in the context of the particular family's means and circumstances. The courts recognize a connection between s.7 claims and the assumptions implicit in the establishment of the guideline payment levels generally. Those levels are based on an average of what parents at various income levels spend on their children. In most middle-class families the cost of extracurricular activities are ordinary and quite common. They are to a great extent already covered by the guidelines amount. In a low-income family these costs would be extraordinary. The support payments would go totally to meet basic needs. But, in either case, the custodial parent does not have *carte blanche* to enrol children in any activity and then demand an automatic contribution from the other parent: *Forrester v. Forrester*, [1997] O.J. No.3437 (Fam.Ct.); *E.K.R. v. G.A.W.* (1997), 32 R.F.L. (4th) 202 (Man.Q.B.); *Kofoed v. Fichter*, [1998] 2 W.W.R. 685 (Sask.Q.B.).

[44] The first appellate court decision dealing with s.7 claims appears to follow this line of reasoning. In *Raftus v. Raftus*, a decision of the Nova Scotia Court of Appeal released on March 25, 1998, the court addressed specifically the approach to claims for extraordinary expenses. That case dealt with claims for extracurricular activities and unanimously held that those expenses, in the context of that case, were not extraordinary. The judges on *Raftus* agreed that, since the guidelines amounts are based on an average of what parents at various income levels spend on their children, and since the Guidelines employ the adjective "extraordinary" to describe expenses covered by subsections 7(1)(d) and (f), it is reasonable to infer that the applicable table amounts include a component for "ordinary" expenses for education programmes and extracurricular activities. One judge, Bateman J.A., would apply what she called a "subjective" approach, that is to take into

account the income levels of the parents to decide if an expense is extraordinary. Two other judges, Flinn and Jones, JJ.A., would apply an "objective" approach, that is to determine if the expense is exceptional, not in light of parental income, but in considering the nature of the activities and the nature of the expenses. Only after concluding that an expense is extraordinary does one go on to consider respective income levels to decide whether an amount, and what amount, should be ordered.

[45] It seems to me that the distinction between a "subjective" and an "objective" approach is more apparent than real. These claims are by their nature fact-specific. One cannot avoid doing a case-by-case analysis. Perhaps that is why this is one of the few areas where the Guidelines provide discretion to the trial judge.

[46] I suggest one has to start with the "necessity" of the expense. Is the activity a necessary one for the child, a merely enjoyable one, or is it an extravagance? When I say "necessary" I include activities (such as sports) that would aid in developing a child's character and health to their full potential. Is the expense "reasonable"? Again the same considerations come into play. Is it reasonable to pay for top-of-the-line equipment or will less expensive equipment do? Is the expense reasonable in the context of the financial circumstances of the parents? I am sure most parents would gladly pay for expensive programmes for their children if they could. Most, however, must set limits and priorities on their spending. There is this constant mix of considerations.

[47] In this case the expenditures relating to figure skating and hockey are quite common expenses for children of this age, this milieu, and this family's income level. Those expenses are not extraordinary. The choir activities of the daughter, however, are different. I heard evidence about Dietrie's artistic talent that suggests she has special gifts that should be encouraged. This cost ($630.00 per year) is an extraordinary expense. Additionally I heard how the respondent has hired a tutor to assist Christopher with his reading skills. This was not absolutely necessary in an objective sense but recommended by Christopher's teachers. It is, in my view, necessary and reasonable from the perspective of the child's best interests. The respondent spent approximately $1,200.00 over the year for tutoring. It is, in my opinion, an extraordinary expense for an educational programme to meet this child's needs.

[48] The total "family" income is approximately $94,300.00 of which the petitioner's is $64,300.00 (68%) and the respondent's is $30,000.00 (32%). There will therefore be an order requiring the petitioner to pay to the respondent child support in the sum of $942.70 per month ($907.00 basic amount plus $35.70, being 1/12 of 68% of $630.00, representing the extraordinary expense claim for Dietrie's choir costs). These payments

are to commence on May 1, 1998, and continue on the first day of each month thereafter. In addition, I direct that every 6 months, the respondent will provide an accounting for any expense incurred for Christopher's tutoring and the petitioner will reimburse the respondent for 68% of those costs.

[49] There was some suggestion by the petitioner's counsel that I should impute a higher income for the respondent. He is capable of earning more but he works shortened hours so as to meet his child care responsibilities. I think his actions are reasonable in the circumstances. He is not intentionally underemployed for any reason other than a bona fide one in the interests of the children. I therefore refuse to impute a higher income.

[50] The respondent seeks retroactive child support. Much of the argument on this point is more relevant to the question of costs since they relate to who was responsible for failing to achieve an early resolution of these issues. Certainly the court can make an order for retroactive support so as to make up deficiencies in past support or because no meaningful steps to provide support had been taken: *MacMinn v. MacMinn* (1996), 17 R.F.L. (4th) 88 (Alta.C.A.). In this case the petitioner has not been evading her support obligations. It was open for the respondent to bring on an application at any time to vary the support payments to the Guidelines amount. Therefore, I deny the claim for retroactive support.

CONCLUSION:

[51] My directions with respect to the corollary relief order are contained within these reasons. Counsel may make submissions on the issue of costs should the parties be unable to agree.

J.Z. Vertes,
J.S.C.

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

Counsel for the Petitioner: Elaine Keenan Bengts
Counsel for the Respondent: Sheila M. MacPherson

6101-02439

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