Date: 19980807
Docket: 6101-02682

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

EILEEN MARY PITTMAN

Petitioner

- and -

WALTER GORMAN PITTMAN

Respondent

Trial of claims for spousal support, division of matrimonial property and rescission of arrears of support in a divorce action.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories
on July 20 & 21, 1998

Reasons filed: August 7, 1998

Counsel for the Petitioner: Jill Murray

The Respondent, Walter Gorman Pittman, on his own behalf

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REASONS FOR JUDGMENT

[1] This was a trial of various claims in a divorce action. The Petitioner, Mrs. Pittman, claimed a divorce, spousal support and division of certain property. The Respondent, Mr. Pittman, agreed that a divorce should issue but opposed the remaining claims. He advanced claims for spousal support for himself (although this was not claimed in the pleadings) and asked that arrears of spousal support payable under interim orders of this court be cancelled.

[2] Mr. Pittman was not represented by counsel at trial.

[3] The parties have lived separate and apart for in excess of one year and the jurisdictional requirements were established. Accordingly, at the end of the trial I ordered that a divorce judgment issue on the usual terms as to its effective date and I reserved on the remaining issues.

Background of the Marriage:

[4] The parties were married on September 28, 1967 in Newfoundland. All of their five children are now adults.

[5] At the time of the marriage, Mrs. Pittman had a grade 7 education and was 18 years old. She stayed at home with the parties' first child, who was born shortly before the marriage.

[6] Mr. Pittman was working as an automotive mechanic at the time of the marriage and obtained journeyman status. In 1971 the parties moved from Corner Brook to Labrador City where Mr. Pittman had obtained a job as a heavy duty mechanic. Mrs. Pittman continued to stay at home with the children. During this time, Mr. Pittman obtained status as a journeyman heavy equipment mechanic.

[7] In 1973 they moved back to Corner Brook despite the fact that Mr. Pittman was making good money in Labrador City. He wanted to move so as to be closer to his family. He took a cut in pay and worked at a garage. In 1977 he was laid off and got a job at an iron ore mine in Labrador City. The family moved back to Labrador City and bought a house.

[8] While in Labrador City the second time, Mrs. Pittman worked for six or seven months on an evening shift at Mary Brown's Chicken. She was paid approximately $6.00 per hour, which she testified she spent mostly on the children. She testified that Mr. Pittman also worked shifts and so she did not ask him to look after the children while she was working; instead, the oldest child, age 11, did that task. Mrs. Pittman left the job because she was concerned about the children and decided she should stay at home again.

[9] In late 1981 or early 1982, Mr. Pittman decided to return to Corner Brook because of his mother's health. By this time, the parties had five children. Mr. Pittman secured employment in Corner Brook but again took a cut in pay. He also worked as a cleaner in the evenings. After a year, he was laid off and drew unemployment insurance benefits.

[10] In August of 1983, Mr. Pittman obtained employment at Salmita mine near Yellowknife. He worked there from 1983 to 1986 as a heavy duty mechanic on a fly-in, fly-out basis, earning approximately $50,000.00 annually. When he left Salmita he obtained employment at Con Mine in Yellowknife. His income there was in the range of $55,000.00 to $60,000.00 annually.

[11] In 1986 Mr. Pittman and his brother started a cleaning business. They had employees; Mrs. Pittman worked for them for a time. Mr. Pittman testified that the net yearly profit from the cleaning business was in the area of $20,000.00 to $30,000.00, from which he and his brother took draws. At some point Mr. Pittman continued the business on his own and it appears that he was receiving income from it into 1996.

[12] After the move to Yellowknife, along with her work for the cleaning company, Mrs. Pittman worked for a short time in a casual position as a chambermaid at a local hotel. She then obtained employment cleaning and doing laundry at the hospital, first on a casual basis and then full time. During this time, 1984 to 1989, she continued to be the parent with primary responsibility for, and involvement with, the five children.

[13] There were disciplinary and other problems with some of the children as they got older and it is clear to me from the evidence that Mrs. Pittman bore most of the responsibility of dealing with these issues. She described Mr. Pittman as "distant" with the children. Although he did not agree with that description, Mr. Pittman's evidence did not indicate that he played a substantial role in the upbringing of the children. He considered his task to be their financial support. I take into account that he was absent from the home for long periods during his employment at Salmita Mine and this no doubt contributed to the responsibility for the children and their problems being left to Mrs. Pittman.

[14] In 1989, due to hip and back problems, Mrs. Pittman could not work and she received disability insurance payments for two years. During that time, she upgraded her education to a grade 9-10 level. Although it was her intention to continue, she withdrew from her program during the second year because of depression. She continued during the two years to do the housework and cooking and look after the family. Her disability payments of $1500.00 monthly went into the parties' joint account and were used mainly for the children's needs and her own.

[15] In 1991, the disability payments terminated and despite still having health problems and pain, Mrs. Pittman went back to work. She was able to obtain only casual work at the hospital but still did some cleaning for her husband's business in the evenings. This continued until sometime in 1995 or 1996.

[16] The parties began to live separate lives in April of 1995. They agree that it was Mrs. Pittman's decision to separate and that she asked Mr. Pittman to move out but he refused to do so. They both stayed in the matrimonial home but Mr. Pittman slept in the

master bedroom while Mrs. Pittman slept on the livingroom couch and they lived separate lives. Two of their children were still living with them at that time.

[17] I heard some evidence about conduct by Mr. Pittman that might be termed "spousal misconduct". This was evidence about alleged involvement with other women and drinking. Section 15.2(5) of the *Divorce Act* makes such conduct irrelevant and I do not take that evidence into account in reaching my decision in this case.

[18] During this period of separation, although Mr. Pittman made the mortgage payments on the house, he often took his meals outside the home and it appears he did little, if anything, to provide food for his wife and the two children. Mrs. Pittman used her credit cards and her earnings from part time work as a security guard.

[19] In March, 1996, Mrs. Pittman obtained assistance from social services agencies to get an apartment and lived there with the two children for two months. Mr. Pittman lost his job at that time. However, Mrs. Pittman was able again to obtain casual work at Stanton Regional Hospital and she arranged with Mr. Pittman that he move out of the house and she move back in with the children. The house was put up for sale. Mr. Pittman got his job back and made the mortgage payments on the house. Although he was to pay for the utilities and was ordered to do so as I will set out below, there were times when he did not comply.

[20] Mrs. Pittman has continued to be employed as a cleaner/housekeeper. For approximately a year and a half in 1996 to 1997, she did this work on a full time basis for a private contractor at the hospital, earning $10.00 an hour. She was off work for two months in 1996 when she had a hysterectomy. In early 1998, because of her back problems, she switched to doing similar work on a casual basis as an employee of the hospital. Her take home pay ranges from $900.00 to $1050.00 monthly; she sometimes works 30 hours a week. She shares an apartment with one of her sons and his girlfriend.

[21] Mr. Pittman lost his job with Con Mine in March of 1997. He grieved his dismissal through his union, but was unsuccessful. After that, he worked washing dishes for a week, then as a security guard for two months and then as a taxi driver for some time. Commencing in August of 1997 he worked for three months at Discovery Mine until it shut down. He received unemployment insurance benefits and then obtained employment at McDonald's Restaurant in May of this year. He testified that he is in the course of personal bankruptcy proceedings.

Previous Court Orders:

[22] These divorce proceedings were commenced in February of 1996. On May 6, 1996 an interim order was made that granted Mrs. Pittman exclusive possession of the matrimonial home and required Mr. Pittman to pay the mortgage arrears and the May, 1996 mortgage payment.

[23] A further interim order was made on June 17, 1996, continuing Mrs. Pittman's exclusive possession of the home and requiring that Mr. Pittman make the June and July mortgage payments as well as utilities arrears and the utilities payments for June and July.

[24] By order dated July 29, 1996, Mrs. Pittman was to pay the utilities starting in August, 1996 and Mr. Pittman was to pay as spousal and child maintenance both the mortgage and a further $400.00 per month.

[25] On January 31, 1997, an order was made increasing the monthly cash payment to $600.00. Vertes J. indicated that the order could be reviewed on completion of the sale of the matrimonial home.

[26] The home was sold in March of 1997 for much less than the parties had hoped. The sale proceeds amounted to less than $4000.00 and remain in a solicitor's trust account. The January 31, 1997 order was not in fact reviewed until April 17, 1998, at which time Mr. Pittman was ordered to pay spousal support in the amount of $300.00 per month. The children had their own means of support by then.

[27] Mr. Pittman has not been diligent in paying as required and the orders made have been enforced through the Maintenance Enforcement Program at least since January of 1997. As at July 20, 1998, arrears were outstanding in the amount of $5353.00.

[28] Mr. Pittman took the position that no payments were owing after sale of the matrimonial home in March of 1997. He relied in that regard on words said by Richard J. when the order of July 29, 1996 was made. The transcript of the court appearance which led to that order indicates that Richard J. said the following:

> Well, I'm going to make an order today that hopefully will provide for the issues of interim and spousal support and interim child support between today and the date that the matrimonial home is sold. Once the home is sold, presumably there will be some equity there that is to be divided in some fashion between Mr. and Mrs. Pittman. It appears that that figure will be, at most, $20,000 and then presumably shortly after that date when the house is sold, Mr. and Mrs. Pittman will come to court for finalization of their divorce

> proceedings and at that time, in all likelihood, the Court will be making a permanent order with respect to spousal support and child support.

[29] Mr. Pittman said that he interpreted the above as meaning that spousal and child support would cease when the matrimonial home was sold. Clearly that is not what Richard J. said; he was simply anticipating that soon after the home was sold, the parties would come before the court so that a final order could be made. No steps were taken by either party in that regard until Mr. Pittman made an application in March of 1998, which led to the order of April 17, 1998. In the meantime the orders of July 29, 1996 and January 31, 1997 were in effect and Mr. Pittman was to abide by them.

[30] In my view, if Mr. Pittman misinterpreted what Richard J. said, it was largely because he simply did not feel he should have to pay child and spousal support. His attitude seems to have been that if his wife did not wish to live with him, it was up to her to support herself. This attitude is evident from his testimony about why he did not pay support voluntarily when Mrs. Pittman moved back into the matrimonial home after having lived in the apartment for two months in the spring of 1996. He said words to the effect that since she had the two children with her, she took the responsibility of them. I infer from this that Mr. Pittman did not feel obligated to support her or the children if they were not living with him.

Division of Matrimonial Property:

[31] The only assets which are in dispute in this action are the following:

(i) the net proceeds from the sale of the matrimonial home, in the amount of $3534.30 as at July 16, 1997, with interest accrued since then;

(ii) Mr. Pittman's pension which accumulated while he was employed at Con Mine. He testified that the pension was in the amount of $23,000.00 when his employment terminated and that he then transferred it into another retirement savings plan with the Toronto-Dominion Bank which is locked in until he reaches age 65. No evidence was adduced as to its current value, but since his employment terminated in 1997, the value is not likely to have increased to any great extent.

[32] During Mr. Pittman's testimony, he indicated that he is in the process of claiming bankruptcy and is dealing with Browning Smith Inc. as trustee.

[33] I was not made aware of whether the trustee has had notice of these proceedings. No submissions were made about whether the bankruptcy proceedings affect the property issues. I will refer below to why I take the view that they do not.

[34] The *Matrimonial Property Act*, R.S.N.W.T. 1988, c. M-6, provides that a Judge may make an order that he or she considers fair and equitable, notwithstanding that the legal or equitable interest of the husband and wife in the property in question is otherwise defined. Section 27(4) of the Act requires the Judge to take into account the respective contributions of the husband and wife, whether in the form of money, services, prudent management, caring for the home and family, or in any other form.

[35] In this case, Mr. and Mrs. Pittman both contributed during the 28 years they lived together. Mr. Pittman's contribution was mainly a financial one; he was the main breadwinner in the family. Mrs. Pittman's contribution was not only childcare and running the household, both of which were almost solely her responsibility, but also, when she was employed outside the home or had her disability income, she did contribute financially over a number of years. She also contributed her hospital superannuation of $5000.00 to the downpayment for the purchase of the matrimonial home and spent her income and savings on its renovation.

[36] Where both spouses have, as in this case, contributed fairly equally to the family assets, whether financially or otherwise, an equal distribution of matrimonial property often follows: *Bartolozzi v. Bartolozzi*, [1992] N.W.T.R. 347 (S.C.); *Kucey v. Kucey*, [1990] N.W.T.R. 234 (S.C.).

[37] The court can, however, depart from an equal distribution where it considers it fair and equitable to do so.

[38] During the marriage, Mr. Pittman was able to obtain skills and certifications that permit him to earn more than can Mrs. Pittman. She, on the other hand, having had the primary responsibility for the care of the children and the upkeep of the home, was not able to acquire skills beyond what she had at the time of the marriage. Her health problems have also disadvantaged her as compared to Mr. Pittman in terms of the employment and income she can reasonably expect to obtain.

[39] In *Rolls v. Rolls* (1996), 70 B.C.A.C. 314 (at p. 317), McEachern C.J.B.C. said the following:

> In my view authorities binding on this court, such as *Moge v Moge*, [1992] 3 S.C.R. 813; 145 N.R. 1; 81 Man.R. (2d) 161; 30 W.A.C. 161; [1993] 1 W.W.R. 481; 43 R.F.L. (3d) 345 and others, make it clear that when there is a breakdown of a traditional marriage such as this one, the law must ensure as best it can that the disadvantages imposed upon a wife upon a marriage breakdown will be taken into account in the division of property and the other financial arrangements that are made. This is to offset the almost certain impoverishment of the wife over a period of time following a divorce, such impoverishment resulting in almost all cases, from the fact that the husband had spent the married years acquiring the skills which permit him to earn more than the wife will be able to earn and the absence of the skills that she might have acquired but for the years spent as a home maker during the marriage.

[40] I do not find it necessary to decide whether the Pittmans' marriage was a traditional one, a modern one or whether it falls somewhere in the middle. In my view, the principles referred to in *Rolls* are applicable to this case.

[41] The amount of money available from the sale proceeds is minimal. In all the circumstances, I view it as just and equitable that all of the proceeds be distributed to Mrs. Pittman and I so order. As she is entitled to one hundred percent of the proceeds, Mr. Pittman is not entitled to any of them and therefore the trustee in bankruptcy has no claim to them.

[42] No documentary evidence was presented about Mr. Pittman's pension from Con Mine. Neither party was questioned about whether they had any plans or understanding as to what the pension was for.

[43] Despite the absence of evidence on that point, I think I can infer that the parties expected Mr. Pittman's pension to be a joint asset that would accrue for their mutual benefit. It is reasonable to think that the parties would have viewed the pension in this fashion when one considers that they made use of Mrs. Pittman's superannuation for their joint benefit in applying it towards the purchase of the matrimonial home. Mrs. Pittman now has no savings or investments. In cross-examination, Mr. Pittman acknowledged that neither he nor Mrs. Pittman had brought any assets into the marriage and that anything they accomplished was accomplished by both of them.

[44] Accordingly, in my view it is just and equitable that the pension plan be divided between Mr. and Mrs. Pittman. I note that the plan accumulated until Mr. Pittman lost his job at Con Mine in March of 1997, which was approximately two years after the separation. There is no information before me to tell me what the value was at the time

of separation. However, had the plan been divided then, Mrs. Pittman's share would likely have earned interest. In all the circumstances, I think the appropriate thing to do is to order that $11,500.00 (being one half of $23,000.00) out of the Toronto-Dominion Bank retirement savings plan be paid to Mrs. Pittman, either rolled over in a plan in her name or as otherwise directed by her.

[45] I have dealt with the pension in a way that is similar to what Vertes J. did in *Cowger v. Cowger*, S.C.N.W.T., April 3, 1998, 6101-02508/CV 06668 (unreported). For the reasons set out in that case, I take the view that the retirement savings plan is exempt from Mr. Pittman's bankruptcy.

Spousal Support:

[46] At the time of trial, Mrs. Pittman's sources of income were as follows:

(a) monthly take home pay of between $900.00 and $1050.00 from casual employment at the hospital. Mrs. Pittman did not say what her hourly wage was, but I assume it must be at least $13.53 per hour since that is what she was making doing the same work on a casual basis for the same employer in 1991. She sometimes works 30 hours a week;

(b) spousal support of $300.00 per month pursuant to an interim order of this Court, which is being enforced through Maintenance Enforcement.

[47] Mrs. Pittman's age at the time of trial was 49 years.

[48] At the time of trial, Mr. Pittman, age 53, had been employed as a maintenance worker at McDonald's Restaurant for two months. He testified that he earns $11.00 per hour for 40 hours of work per week. After the deductions made by Maintenance Enforcement ($300.00 per month), he takes home approximately $800.00 per month.

[49] The law is set out in sections 15.2(4) and (6) of the *Divorce Act*:

> 15 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

(6) Objectives of spousal support order - An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[50] I am also bound by the law as set out by the Supreme Court of Canada in *Moge v. Moge*, [1993] 1 W.W.R. 481. In *Moge*, Madam Justice L'Heureux-Dubé said the following:

> ... Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects.
>
> This approach is consistent with both modern and traditional conceptions of marriage in as much as marriage is, among other things, an economic unit which generates financial benefits ... in today's marital relationships, partners should expect and are entitled to share those financial benefits.
>
> Equitable distribution can be achieved in many ways; by spousal and child support, by the division of property and assets or by a combination of property and support entitlements. But in many if not most cases, the absence of accumulated assets may require that one spouse pay support to the other in order to effect an equitable distribution of resources. ...

[51] I am satisfied that Mrs. Pittman has been economically disadvantaged or impaired by the primary role she assumed in this lengthy marriage, which was to look after the children and the household. On the other hand, Mr. Pittman has been economically advantaged in that he was able to achieve journeyman status and to pursue better paying jobs as he wished because his career and wishes were what motivated the family's various moves. He also had the freedom to pursue his work because he did not have to look after the children or tend the household, while at the same time having the benefit of a home and a family life.

[52] This can be contrasted with Mrs. Pittman's role when she was working outside the home. She described how, when working at Mary Brown's Chicken in Labrador City, she still worried about who would look after the children and still kept an eye on the house from where the restaurant was located down the road. In contrast, Mr. Pittman went to work and did not have to worry about what was happening at home.

[53] I am satisfied that Mrs. Pittman has suffered economic hardship and her standard of living has declined as a result of the breakdown of the marriage. Without support from Mr. Pittman, she would have to live on her own earnings, which are minimal due to the fact that she has only ever done unskilled work and has no particular training.

[54] Mrs. Pittman also has health problems. A letter from Dr. Woodside was filed as an exhibit at trial. It states that Mrs. Pittman is seen on a regular basis for chronic sinusitis, diabetes, obesity, hypertension and chronic back pain. Her diabetes is under control and her hypertension is controlled by medication. The letter makes no reference to how Mrs. Pittman's medical condition affects her ability to work. Mrs. Pittman testified that her health is the reason she switched to casual work in 1998. The evidence does not suggest otherwise. What is not clear is the extent to which Mrs. Pittman's medical problems can be expected to affect her future ability to work, considering that some of them may be controlled or alleviated by medication or weight loss.

[55] I do, however, take into account that Mrs. Pittman is now left on her own to face the economic consequences of her health problems as a result of the marriage breakdown. Had the marriage not broken down, she would still have Mr. Pittman to rely on. This is relevant when considering whether Mr. Pittman should continue to provide support for her rather than leaving her to her own limited resources, or leaving it to the state, to do so: *Tees v. Tees*, [1997] N.W.T.R. 315 (S.C.); *Kloos v. Kloos* (1996), 20 R.F.L. (4th) 1 (Man. C.A.).

[56] Because she has been economically disadvantaged by the breakdown of the marriage and because she has need, I find that Mrs. Pittman is entitled to spousal support.

[57] I must also consider Mr. Pittman's ability to pay.

[58] Mr. Pittman's standard of living has also declined since the separation. Since his employment at Con Mine was terminated in March of 1997, he has had only three months of similar employment, that being the work he did at Discovery Mine. His unemployment insurance was approximately $1280.00 monthly. His gross annual income at this time from McDonald's must be approximately $21,000.00 based on his hourly wage.

[59] The breakdown of the marriage did not have any financial consequence to Mr. Pittman. His current lack of a job similar to what he had during the marriage occurred for reasons unrelated to the marriage.

[60] Counsel for Mrs. Pittman argued that Mr. Pittman's situation is entirely of his own making and that he is limiting his employment prospects.

[61] She relied on *Viswalingam v. Viswalingam*, [1996] N.W.T.R. 342 (S.C.) as authority for the proposition that I should consider Mr. Pittman's situation as it was at the time of separation rather than as it is now.

[62] In *Viswalingam*, the Court recognized that the wife was entitled to spousal support so as to alleviate the economic disadvantage she had suffered as a result of the marriage breakdown. Because of the husband's financial situation at the time of trial, counsel in that case agreed that her entitlement to support be addressed by a division of property and a monetary judgment. In the end, a monetary judgment based on the value of various properties was given.

[63] Section 15.2(4) of the *Divorce Act* makes it clear that the means of the payor spouse have to be taken into account. In my view, the means must be those at the time of trial: *Sherry v. Sherry* (1994), 1 R.F.L. (4th) 146 (P.E.I.S.C.). I understand "means" to include resources. In the *Viswalingam* case, the payor spouse's means consisted not just of income, but also of property. I do not understand that case to state that the income at the time of separation is to govern when assessing the means of a payor spouse.

[64] Counsel for Mrs. Pittman argued that I should attribute income to Mr. Pittman in the amount he was earning at Con Mine. She submitted that he is intentionally under-employed.

[65] Mr. Pittman testified about jobs for which he has applied and been refused or had no reply. He submitted two letters from prospective employers, refusing his applications for employment. He testified that he has applied for jobs in Yellowknife and in Hay River, the Yukon, Alberta and British Columbia. He acknowledged in his evidence that his wish is to stay in Yellowknife and said that he is not particularly interested in working at a mining camp because of his age. He is also reluctant to work underground because of trouble he sometimes has with his foot resulting from a 1989 accident. He took a computer course while on unemployment insurance benefits because he felt it might help him get employment since the ability to use a computer is often needed in his line of employment for ordering parts and similar tasks.

[66] The employment Mr. Pittman testified he would like to obtain is as a foreman or supervisor of mechanics. He testified that if he can get the wage he wants ($17.00 to $18.00 per hour) at McDonald's, he may stay there if given the opportunity.

[67] Mr. Pittman agreed in his evidence that there are jobs available in his usual line of work. While he admitted that he had not applied for every job that counsel for Mrs. Pittman referred him to in her cross-examination, he was not shaken in his evidence that he had applied for a number of jobs.

[68] In my view a court should be cautious about attributing income unless it is shown that the payor has acted unreasonably or in order to avoid support obligations. Mr. Pittman did not quit his job at Con Mine; his employment was terminated. The job at Discovery Mine ended because the mine shut down. There is no evidence that similar employment has been made available to him and that he has refused it.

[69] In an annotation to *Giorno v. Giorno* (1992), 39 R.F.L. (3d) 345 (N.S.C.A.), Professor James G. McLeod wrote the following:

> Attributing income to a payer is an interesting concept. Although the court should not allow a payer to act unreasonably or to deprive another deliberately of his or her bona fide rights, does it make sense to make an order that cannot be paid? If the husband could get employment and the attribution forces him to take the job, the use of attribution is acceptable. The court can point to a real opportunity. On the other hand, if the reality is that after the payer quits his job and no job can be obtained, should that order have been made? Arrears will accrue and the court will have to deal with "inability to pay", jail, and whether a change in circumstances has occurred. ...

[70] As noted, this is not a case of quitting employment. If I make an order now based on income of $50,000.00 to $60,000.00 a year, as suggested by counsel for Mrs. Pittman, the very concerns raised by Professor McLeod will come into play.

[71] Section 15.2(1) of the *Divorce Act* says that I may make an order for payment of such amounts as I think **reasonable**. In my view, it would not be reasonable to order that Mr. Pittman make payments based on an income of $50,000.00 to $60,000.00 when his actual income is approximately $21,000.00. Nor would it be realistic, another factor which I think is important.

[72] Obviously it is to Mr. Pittman's benefit to obtain better paying employment. While, as I shall refer to later, he appears not to be spending alot of money because he relies to a great extent on his girlfriend, his current living circumstances seem to be very unsettled. Although Mr. Pittman clearly does not feel he should have to pay spousal support, he did not strike me as being willing to do without for himself only so that he would not have to help Mrs. Pittman, although it is also clear to me that any payments ordered are not likely to be made voluntarily.

[73] Should Mr. Pittman obtain more lucrative employment in the future, or should his salary at McDonald's increase, application can be made under section 17(4.1) of the *Divorce Act* for variation of any order I make.

[74] Mrs. Pittman testified that her monthly expenses are $505.00 for rent (her portion of the total $905.00 for the apartment she shares with her son), $95.00 for power, $38.00 for telephone and $65.00 for cable television. She also pays $50.00 monthly on credit card debts of $6000.00 to $7000.00. Mr. Pittman agreed that some of those debts existed before the marriage ended but there was no evidence as to the exact figure. Those expenses leave Mrs. Pittman with approximately $147.00 to $297.00 from her take-home pay for food, gas, clothing and other expenses each month.

[75] Mr. Pittman testified that in the past he has rented a room of his own, stayed at the Salvation Army for two weeks, stayed with friends, and for some time in 1996 shared an apartment with a woman friend. He was evasive about his relationship with this woman and did not want to answer questions about her. At some point he rented a trailer by himself and she would visit him there. He has stayed off and on with her at her present residence which is in public housing. He had been staying there for two months at the time of trial.

[76] There were some inconsistencies in Mr. Pittman's testimony. In his evidence in chief, he said that he was staying with friends and paid $400.00 to $500.00 in rent when he had the money. In cross-examination, he acknowledged that he is staying with the woman referred to above and that he does not pay rent, just buys groceries. He

acknowledged that the rent on the home was subsidized and that if he was known to be living there, it would be adjusted. I found Mr. Pittman to be evasive about this situation and my impression was that it was only when he was faced with admitting that he was staying in public housing that he did not want to admit to paying rent. In any event, it is not clear to me exactly how much Mr. Pittman is paying to stay where he is staying. I do note, however, that the situation does not appear to be a stable one as his relationship with the woman in question is on again and off again. Mr. Pittman said in his testimony that he would not be staying at her house if he could afford an apartment.

[77] Apart from whatever he contributes to the household where he stays, Mr. Pittman testified to having transportation expenses of $50.00 per month (he puts gas in the vehicle of the woman he is staying with) and to paying $100.00 per month to the trustee in bankruptcy. He is hoping that the bankruptcy will extinguish his debt load, which includes a debt of $11,000.00 from the marriage as well as other debts of his own.

[78] It is clear that Mr. Pittman relies to some extent on the woman he lives with, who he said makes approximately $30,000.00 per year.

[79] This case presents a difficult situation. Neither spouse is very well off. Both are living in conditions that I expect they never thought they would be in at this point in their lives. Both should have a reasonable standard of living. This is not a case where the spouse from whom support is sought is living more comfortably than the spouse seeking support.

[80] Neither party provided a current financial statement at the trial and I expect that the evidence I heard about expenses is only part of the picture. But I have to do the best with what was provided to me.

[81] Mr. Pittman's evidence suggests he has expenses of $650.00 per month in his current living situation. If he has to obtain accommodation other than what he now has, which seems likely based on what I heard about the relationship he is in, that amount will increase. I am going to base Mr. Pittman's expenses on what Mrs. Pittman currently has for expenses, that is, approximately $750.00 per month. That leaves from his take-home pay of $1100.00, the sum of $350.00 for all other expenses. It should be noted that using the same expenses as Mrs. Pittman to make up the $753.00 means that out of that $350.00, Mr. Pittman would have to pay for groceries and clothing. I also note that the cable television expense is not a necessity for either party.

[82] There is obviously very little money to shift around and any order for payment of support can, in the circumstances, be only a minimal one. Having considered the matter, I see no alternative but to try to place the spouses in relatively equal positions. The result

of the order I make should not put Mr. Pittman below a subsistence level: *Hancock v. Hancock* (1974), 17 R.F.L. 184 (N.S.C.A.).

[83] I take into account that there will be tax consequences to Mrs. Pittman of any order I make and that Mr. Pittman will obtain some tax relief.

[84] I also take into account that Mrs. Pittman will have the proceeds of the sale of the matrimonial home, which will help her in the short term.

[85] In all the circumstances, I order that Mr. Pittman pay Mrs. Pittman the sum of $200.00 per month for spousal support. That order will be effective as and from May 1, 1998, the month when Mr. Pittman's employment with McDonald's started.

[86] There is no reason to think that Mrs. Pittman can become completely self-sufficient in the foreseeable future and, in light of her health problems, there is good reason to question whether she can. Accordingly, the support will be payable for an indefinite period.

[87] Mr. Pittman's claim for spousal support for himself is accordingly dismissed. There is no basis upon which to find that Mrs. Pittman should contribute to his support even if she were in a position to do so, which she is not.

The Arrears of Support:

[88] The test that has been accepted in a number of cases is that set out by Hetherington J.A. in *Haisman v. Haisman* (1994), 7 R.F.L. (4th) 1 (Alta. C.A.):

> 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 eliminative *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 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 f 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].

[89] Although *Haisman* dealt with arrears of child support, in my view the same principles should govern when it comes to spousal support.

[90] There is no question that Mr. Pittman was in a position to pay the support ordered up to March of 1997 as he was employed until then by Con Mine. He also had the ability to pay while on unemployment insurance benefits and while working at Discovery Mine until November or December of 1997.

[91] After his employment terminated at Discovery Mine, Mr. Pittman was on unemployment insurance and had various other jobs. I am not satisfied that he was unable to pay the support payments as they came due. I do not have sufficient evidence as to his financial situation during that time or what resources he had.

[92] The arrears were $5353.00 as at July 20. The effect of my order making spousal support payable in the sum of $200.00 monthly will be to reduce the arrears by $300.00 ($100.00 for May, June and July). I am not satisfied that Mr. Pittman will never in the future be able to pay off the remaining $5053.00. He may have to take on some extra work for a period of time in order to do so.

[93] Accordingly, I deny Mr. Pittman's request that the arrears be rescinded or cancelled.

<u>Costs:</u>

[94] Counsel for Mrs. Pittman did not ask for costs. Although her client was largely successful, and the successful party is normally awarded costs, I would decline to order costs in any event in this case because there is so little money available and what there is should go to the support order. Accordingly, the parties will each be responsible for their own costs.

Summary:

[95] In summary, the orders I make are as follows:

1. Mrs. Pittman is entitled to all of the proceeds of the matrimonial home and they will be paid to her;

2. Mrs. Pittman shall be entitled to an interest in Mr. Pittman's retirement pension plan to the extent of $11,500.00 which is to be rolled over to a plan in her name or as she otherwise directs. Should this not be possible under the terms of the plan, a declaration can issue that Mrs. Pittman has a beneficial interest in the plan to the extent of $11,500;

3. Mr. Pittman shall pay to Mrs. Pittman the sum of $200.00 per month for spousal support effective May 1, 1998 and continuing monthly thereafter;

4. Mr. Pittman's application for spousal support for himself is denied;

5. Mr. Pittman's application for cancellation of arrears of spousal support is denied;

6. The parties will each bear responsibility for their own costs.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 7th day of August, 1998

Counsel for the Petitioner: Jill Murray

The Respondent, Walter Gorman Pittman, on his own behalf

6101-02682

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

EILEEN MARY PITTMAN

Petitioner

- and -

WALTER GORMAN PITTMAN

Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER