Date: 19981014
Docket: 6101-02925

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRENDA SODERBERG

Petitioner

- and -

JOHN SODERBERG

Respondent

Application for variation of an interim child support order.

Heard at Yellowknife, NT, on October 2, 1998

Judgment filed: October 14, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Counsel for the Petitioner: Lucy K. Austin
Counsel for the Respondent: Elaine Keenan Bengts

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REASONS FOR JUDGMENT

[1] This is an application to vary an interim child support order.

[2] The parties are the parents of two children, a boy who is now 8 years old and a girl who is now 6 years old. The parties separated in 1997 and the petitioner (mother) commenced divorce proceedings in January of this year.

[3] The parties have been able to agree on child care arrangements. The children alternate as between each parent on a weekly basis. They spend more or less the same amount of time with each. On February 27, 1998, a consent order was issued by this court whereby the parties have interim joint custody. Further, the order provided that the respondent (father) pay interim child support of $421.00 per month in addition to assuming responsibility for daycare costs. This was based on his income at the time. The need to vary this amount was foreseen since the order expressly provided for a review in July of this year. This was due to, as expressed in the order, the "impending retirement" of the respondent. In July an order was made, again on consent, extending the terms of the February order to the end of August.

[4] The respondent is now retired from his employment. His pension income is set at $53,444.50 per year. The petitioner is employed and earns $40,400.00 per year. The children continue to alternate on a weekly basis living between the two homes of their parents. There is no further need for daycare or after-school care services since the

respondent is able to, and does, provide that on a regular basis. There is now a dispute as to how much, if anything, should be paid by the respondent as child support.

[5] The calculation of support amounts was intended to be made much easier and predictable by the enactment of the Federal Child Support Guidelines. The amount to be paid is based on the income of the payor parent. The scope of discretion to deviate from that set amount is limited. One of the discretionary areas is that raised by this application, the situation where custody is shared more or less equally by the parents.

[6] Shared custody is addressed in s.9 of the Guidelines:

> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[7] As counsel pointed out to me, much of the early case law on this section deals with the question of how to calculate the 40% threshold. That is not the issue in this case. Counsel agree that the threshold is met. The issue is the calculation of the support to be paid, if any, based on the three considerations set out in the section. On this issue the early case law has not been consistent.

[8] The starting point is, of course, the amount that would be payable by each parent to the other, based on income, were it not a shared custody arrangement. That is the criterion set out in subsection (a). But, as pointed out by Moreau J. in *Middleton v. MacPherson* (1997), 29 R.F.L. (4th) 334 (Alta. Q.B.), s.9 requires the court to consider each of the criteria set out in subsections (a), (b) and (c). Unlike s.8, which deals with split custody situations, s.9 does not indicate that the amount to be awarded is simply the difference between what each parent would otherwise pay if a child support order was sought against each parent. But, given the broad discretion to be exercised, the court would not be prevented from using a s.8 type of calculation as a starting point for comparison purposes. The rationale for this is so the court could avoid delving into

considerations of child care budgets which do not produce predictable results and are prone to miscalculation.

[9] In *Hubic v. Hubic* (1997), 157 Sask.R. 150 (Q.B.), Dawson J. reviewed the criteria set out in s.9 and the discretion afforded the court. He concluded that the discretion should be exercised on the basis of the principle enunciated by s.26.1(2) of the *Divorce Act*, that being that the parents have a joint responsibility to support their children: "The total cost of raising the children should be allocated between the parents having regard to the costs each parent incurs, and their relative incomes." In the end, however, Dawson J. calculated support in accordance with subsection (a) only since the parties failed to identify any increased costs of shared custody or set out their monthly child care costs.

[10] In *Mertler v. Kardynal* (1998), 35 R.F.L. (4th) 72 (Sask. Q.B.), McIntyre J. reviewed this jurisprudence in a case where the child's time was split equally between the parents and the parents had relatively equal incomes and sufficient resources to meet their child's needs. He basically used the difference between what each would pay to the other pursuant to the Guidelines (topped up by a proportional sharing of some specific expense items). In doing so he quoted from an article prepared by Prof. James G. McLeod in June, 1997, for the Department of Justice reference manual on the child support guidelines (at page 80 of *Mertler*):

> Once the 40 percent child care threshold is met, a judge must decide the nature and scope of the Section 9, shared custody discretion. The starting point seems to be a pro-rated set off of the amount each parent would pay the other under the tables to reflect the custody each has with the child: Section 9(a). A judge should then identify the extra housing, transportation and other costs associated with the shared parenting arrangement: Section 9(b). Presumably, the extra costs should be apportioned between the parties according to their abilities to pay: *Wright v. Wright* (1996), 21 R.F.L. (4th) 201 (SCA). Then, a court should ensure that each parent has sufficient resources under such arrangement to meet the child's reasonable needs while the child is with him or her. If the set off and sharing of extra costs will leave a parent unable to meet a child's reasonable needs, a court should restructure support to better share the family resources and ensure that each household has sufficient resources for the child.
>
> According to the words of Section 9, if there are no significant extra costs arising out of the shared custody arrangement and the parties are able to meet the child's reasonable needs from a set off of table amounts, a court should not vary the table amount set off.

> However, the wording of the section is sufficiently ambiguous that a court could hold that in shared custody cases, a court should total all of the child care costs, apportion them between the parents according to their ability to pay: Paras Formula and then order a "make-up" payment subject to ability to pay and meeting a child's needs. This should lead to a similar result in most cases as applying the set off and judges are likely to follow the wording and structure of the section. According to the Section 1 objectives, judges should apply the guidelines to cut down on the time, cost and confrontation of child support determinations and maintain consistency of results among judges. The time, cost and inconsistency among judges in child support cases was sufficiently detrimental to the parents, children and legal system that the Government reacted by enacting child support guidelines based on a table system. If courts insist on maintaining past practices or routinely reviewing the guideline tables in cases, the government initiative will achieve little.

[11] The conclusions I reach from reviewing these sources are these. While s.9 gives discretion to the court and requires that consideration be given to factors other than the guidelines table amounts, there is an onus on the parties to bring forth evidence as to any increased costs due to the shared custody arrangement or as to any special circumstances relating to the parents or the children. In the absence of such evidence, the discretion should be exercised in favour of applying the table amounts. To do otherwise (as suggested in *Hubic*) would be a regression to the pre-guidelines regime with all of its attendant haphazard calculations and inconsistent results.

[12] In this case neither party has put forth evidence as to specific increased costs due to the shared custody arrangements. Neither party produced a child-care budget nor any evidence as to aspects of the conditions, means or needs of the parties or the children that may have significant impact on the parties. They were content to rely on general statements contained in their respective affidavits. It was accepted, however, that each party maintains a "home" for the children, more than merely a visiting place. My impression is that this is a true sharing of custody.

[13] In *Hunter v. Hunter*, [1998] O.J. No. 1527 (Q.L.) (Gen. Div.), Brockenshire J. was confronted with a similar situation where there was no evidence as to increased costs and no detailed child-care budgets. He accepted, as do I, the proposition that shared custody entails greater cost since each parent is providing a home for the children. In the absence of evidence, he relied on what was termed the "Colorado Method", that being a study from Colorado that determined that, since 50% of the costs of a custodial parent relate to fixed costs, in shared custody arrangements there should be an increase of 50% in the adjusting payment from one parent to the other. He applied this formula, in the absence of other evidence, since s.9 requires a consideration of increased costs.

[14] I am not convinced that one can simply rely on such a formula as a substitute for evidence. While one can assume there are increased costs to shared custody, one cannot assume what those costs are. The application of a formula may have the benefit of simplicity but it sacrifices accuracy. If there are identifiable increased costs, then it is up to the parties to identify them. If not, then the court should be entitled to assume that the costs can be met from the application of the table amounts.

[15] Based on the parties' respective incomes, the amount that would be paid by the petitioner to the respondent, according to the guidelines tables, would be $591.00 per month. The respondent would pay $766.00 per month. The difference is $175.00. The petitioner's position is that this is the amount that should be ordered. Both parents are sharing the costs of parenting. There are no unusual circumstances. Therefore it is reasonable to simply offset the amounts that would be paid under the guidelines. That would also help to offset the difference in the respective incomes of the parents.

[16] Respondent's counsel made a number of submissions with respect to circumstances that should result in either nothing being paid by the respondent to the petitioner or at least a significantly lower amount than the guidelines offset being paid.

[17] First, counsel submitted that the guidelines amount should be prorated to the actual amount of time that the children spent with each parent. In her submission the children spent 55% of their time with the respondent and only 45% of their time with the petitioner. Therefore, it was argued, the petitioner should receive only 45% of the guidelines amount. While Prof. McLeod, in his article quoted above, does not directly address this point, it may be that this is what he had in mind when he wrote: "The starting point seems to be a pro-rated set off of the amount each parent would pay the other under the tables to reflect the custody each has with the child." If this is what he contemplates, then I must respectfully disagree with it.

[18] In this case, there is no evidence to substantiate this calculation nor is there agreement on it. It may be that, since the respondent is available because of his retirement to provide after-school supervision for the children, he spends a little more time with them. But, this case was presented on the basis that the parties shared custody on an equal basis.

[19] Also, I am not convinced that this type of prorating is contemplated by the guidelines. Section 9 identifies a threshold of <u>not less than</u> 40% of the time over the course of a year for which a parent has access or custody. Subsection (a) refers simply

to the amounts set out in the applicable tables. It would have been an easy matter for the legislation to have said that the guidelines amount is to be prorated according to the actual percentage of time. But it does not. It does not, I think, because it recognizes that once the 40% threshold is met the differences, both in time spent and costs incurred, are going to be difficult if not impossible to calculate and would no doubt be quite small to the point of immaterial. Once the threshold is met then I think the assumption is that custody is shared equally.

[20] The pro-rating approach was also adopted in the *Hunter* case (noted above). There, Brockenshire J. concluded that, in applying the guidelines amounts, one should only calculate support for the time each parent has the children. So, for example, if each parent has the children for the equivalent of one-half of the year, each should pay the other the equivalent of six months support, or to put it on a twelve month basis, one-half of the monthly amount each month. In this case that would result in a monthly payment by the respondent of $87.50. This approach was not followed in either the *Middleton* or the *Mertler* cases.

[21] In my respectful opinion, this approach is not appropriate. It has some logical appeal but it fails to recognize that there are ongoing costs incurred by the parent even when the children are not in that parent's actual physical custody. To apply this approach is no different in principle than saying that an access parent should not have to pay his or her monthly support payment for the time access is exercised. The guidelines do not allow that even if a parent exercises access for up to 39% of the year. I fail to see why reaching the 40% mark should result in a different approach.

[22] Respondent's counsel also submitted that I should consider the respondent's spending pattern on the children. He maintains the children on the health insurance plan available to him as part of his retirement package. He has also paid for all costs of the children's extra-curricular activities. He is willing to continue doing so (even though the petitioner has offered to share these expenses).

[23] With respect to the insurance coverage, the respondent does not need to maintain this since the children are covered through the petitioner's employment. The respondent says he is doing this as a precaution should the petitioner's employment ever be terminated. That is all very considerate but it is his choice to incur this expense. It is not an obligation. I fail to see why this should affect the monthly support payable.

[24] With respect to the extra-curricular expenses, I was told that, even though the petitioner offered in the past to share these expenses, the respondent insists on paying

them. Again, that is his choice. Why should he now say that he should pay less in support because he unilaterally decided to make all these payments in the past? The petitioner offered to share these expenses so why should she be penalized now? These parties, from what I have been told, have been able to work together to a remarkable degree. They make joint decisions as to their children, including decisions as to what expenses should be incurred on their behalf. Apparently, the only thing they cannot agree on is the sharing of these expenses.

[25] It seems to me, having regard to the financial circumstances of the parties, that extraordinary expenses should be shared by them in proportion to their respective incomes. The petitioner thinks this is fair and reasonable. I agree. The respondent, for some reason, would rather pay all of these expenses and pay less in regular support. I fail to understand the rationale for that.

[26] Respondent's counsel also noted that the petitioner is now living in a new relationship with someone who is employed. The argument is that presumably because of this the petitioner's expenses are lower. Therefore, this is a relevant circumstance to consider under subsection (c).

[27] The fact that one parent has lower costs, or has the opportunity to share some costs with a new partner, may be a relevant consideration in some cases. I make no decision on that point. Suffice it to say that there is no evidence to support the proposition the respondent wishes to advance here. All we have is the bare assertion that the petitioner is living with someone else. That is not enough.

[28] Based on all of the evidence, I have concluded that it would be appropriate to apply the guidelines amounts in this case. There have been no significant extra costs identified as arising out of this shared custody arrangement. The parties are able to meet the children's reasonable needs.

[29] I therefore order that the respondent pay to the petitioner interim child support of $175.00 per month. This order will be retroactive to September 1st, 1998, so as to avoid any interruption in the support regime. The payments are to be made on the first day of each month until further order of this court. I also direct that all extraordinary expenses are to be shared by the parties in proportion to their incomes. This direction will also be retroactive to September 1st. I was told that the parties will be able to identify the extraordinary expenses as they arise so I am not going to define them further.

[30] The petitioner seeks costs. Her counsel submitted that this matter could and should have been easily resolved. Respondent's counsel argued that, having regard to the lack of clarity in the case law with respect to s.9, it was not unreasonable to come to court for a resolution of this issue. It seems to me that the crux of the problem was not the state of the law but the insistence by the respondent that he should pay no or little ongoing support because he insists on paying all of the extraordinary expenses (notwithstanding the petitioner's offer to share those). In these circumstances I fail to see why the usual costs rules should not apply.

[31] The petitioner will have her costs of this application on a party-and-party basis in accordance with the Rules of Court.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT this
14th day of October 1998

Counsel for the Petitioner: Lucy K. Austin
Counsel for the Respondent: Elaine Keenan Bengts

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Reasons for Judgment of the Honourable Justice J.Z. Vertes