Date: 1998 04 08
Docket: 6101-02764

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GEOFFREY CHAMBERS

Petitioner
(Respondent)

- and -

DELORES CHAMBERS

Respondent
(Applicant)

Application for interim child and spousal support.

Heard at Yellowknife, NT, on April 2, 1998

Judgment filed April 8, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Counsel for the Petitioner (Respondent): Catherine Stark
Counsel for the Respondent (Applicant): James D. Brydon

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REASONS FOR JUDGMENT

[1] This is an application by the wife (respondent in the divorce action but the applicant here) for interim orders of child support and spousal support.

FACTS:

[2] The parties separated in 1995 after 15 years of marriage. There are two children of the marriage, Curtis (18 years old) and Geoffrey (almost 17 years old). After the separation the boys lived initially with the wife and then returned to live with the husband. Geoffrey, however, moved to his mother's home in Calgary in June of 1997 and attends high school there.

[3] In 1994, prior to the separation, the wife suffered a broken leg and, despite several surgical procedures, she has been unable to work since that time. She is currently on welfare and earns some extra cash by selling Tupperware. She and Geoffrey live with a man described as her "boyfriend" but she says she wishes to get her own place because Geoffrey and this man do not get along too well. At the present this man covers all housing costs.

[4] The husband is employed as a miner in Yellowknife. He had a very high taxable income in 1997, but his income is expected to drop significantly this year. He is in a new relationship and his partner is also steadily employed (although no details are given as to her income). The older son, Curtis, still lives with the husband and currently attends high school.

[5] These proceedings were commenced by the husband filing his Petition for Divorce in October 1996. In it he seeks a divorce judgment plus a child custody order. In November 1996, the wife filed her Answer and Counter-Petition seeking spousal support and a division of matrimonial property. On December 20, 1996, an order was made by a Chambers judge whereby the husband was required to pay spousal support of $1,000.00 per month for each of the months of January, February, March and April 1997. There was a further direction in that order for review: "Spousal support will be reviewed by this Court on May 2nd, 1997, at 10:00 a.m.".

[6] When the matter returned to Chambers on May 2nd, the wife's counsel requested an adjournment. Apparently they were having difficulty communicating with their client. The request was opposed by the husband's counsel. The presiding judge adjourned the application for spousal support *sine die* returnable on five days' notice. There were no further payments made. Finally, in February of this year, the wife filed her motion seeking interim child and spousal support.

CHILD SUPPORT:

[7] There has never been a formal order respecting child support. The husband has, since the separation, voluntarily paid various amounts from time to time either to the wife or directly to the children. In January 1997, an application by the husband for interim child support payable to him was dismissed with costs.

[8] The difficulty with the child support claim is the calculation of income for each parent. Since this is a case of split custody, the amount of child support will be the difference between the amount that each spouse would otherwise pay: *Federal Child Support Guidelines*, s.8.

[9] For the wife, her current income consists of $815.00 per month in welfare payments ($9,780.00 per year) plus earnings received from selling Tupperware part-time. She says she has earned approximately $200.00 so far from this but she does not say over what time. She swears to the fact that she is unemployable because of her

disability. She also receives some funds from the Government of Canada by way of child tax benefits and G.S.T. rebates. These would not be considered income.

[10] The *Guidelines*, in the child support tables, set a threshold income below which no amount of child support is payable. For Alberta, for one child, that amount is $6,730.00 per year.

[11] In calculating income, the *Guidelines* call, essentially, for the use of the income categories listed on the T-1 general form used by Revenue Canada: s.16. Social assistance payments are included. Social assistance income, however, must be adjusted to include only the amount attributable to the recipient: s.4, Schedule III. In this case I was not provided with a breakdown as to whether any portion of the social assistance received by the wife is attributable to the fact that one child is living with her. Such evidence would certainly be necessary in these situations. I can only assume, therefore, that the full amount should be attributable to the wife's income.

[12] The husband's counsel calculates an annual income for the wife at a level in excess of $13,000.00. This is arrived at by combining the applicant's welfare receipts and other benefits together with income of $200.00 per month for the Tupperware sales. Counsel argued that income should be attributed to the wife, not because she is intentionally underemployed, but because she could generate at least some more income by devoting more time to her sales endeavours. Counsel, however, acknowledged that the specific amount so attributed would be purely speculative.

[13] I do not think there is any basis for attributing income as suggested by the husband's counsel. The income, such as it is, from the Tupperware sales is, at best, sporadic and there is no evidence from which one can conclude that $200.00 is the monthly income she will make from it. The affidavit evidence suggests that this is a new endeavour since she made no mention of it in an affidavit sworn in January of this year. Further, one can assume that any income she earns will, if anything, reduce the amount of social assistance she receives. So, in the end, there would be little, if any, effect on total income.

[14] I therefore set the wife's income at $9,780.00 per year. This results in a basic monthly support rate of $93.74.

[15] The husband had a taxable income of $95,000.00 in 1997. That included significant amounts earned from overtime pay as well as production bonuses. As a result of a severe drop in the world gold prices, however, overtime has been stopped and bonus

pay has been eliminated by the employer. The husband's 1998 income, extrapolated from the pay he has received so far this year, is projected to be $53,536.00. His counsel submitted that it would be harsh and inequitable to attribute income at the 1997 level since there is evidence of a significant decline in income due to forces beyond the husband's control.

[16] The *Guidelines* do not specify whether income is to be based on the total income reported on the most recent tax return, or on the total of the income earned in the past 12 months, or on the income expected to be earned in the current year. All that the *Guidelines* say is that the most current information must be used: s.2(3). Based on the evidence provided to me, I set the husband's income at $53,536.00, that being taken from the most current information available. This results in a basic monthly support rate of $473.61. Deducting the amount payable by the wife from that payable by the husband results in a difference of $379.87.

[17] There will therefore be an order directing the husband to pay to the wife interim child support of $397.87 per month. The first payment is due April 15th, 1997, and shall continue on the 15th day of each month that the child Geoffrey resides with the wife, until further order of this court.

[18] The wife sought an order making the child support payments retroactive to June 1997, when Geoffrey started living with her. No submissions were directed to this point at the hearing before me. Suffice it to say that the timing of this application was in the control of the wife and no reasons were advanced as to why it took so long to bring it. The order will therefore not be retroactive.

SPOUSAL SUPPORT:

[19] Much of the argument on the question of interim spousal support centred on the scope of the "review" clause in the December 20, 1996 order and the effect of the May 2, 1997 adjournment.

[20] The husband's counsel characterizes the December order as a time-limited support order. The husband was required to pay interim support for four months. That period has passed. The order, it is argued, came to an end when the Chambers judge adjourned the spousal support application *sine die* on the date it was scheduled for review. Counsel submitted that the December order is no longer open to review as it is an order that is no longer in existence. Therefore, in counsel's submission, what the wife is really seeking is a variation of the December order. And, in that case, the criteria of s.17 of the

Divorce Act must be considered, in particular s.17(10) dealing with applications brought after the expiry of a time-limited support order.

[21] The pertinent parts of s.17 of the Act are:

> 17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses. . .
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration. . .
>
> (10) Notwithstanding subsection (1), where a spousal support order provides for support for a definite period or until a specific event occurs, a court may not, on an application instituted after the expiration of that period or the occurrence of the event, make a variation order for the purpose of resuming that support unless the court is satisfied that
>
> (a) a variation order is necessary to relieve economic hardship arising from a change described in subsection (4.1) that is related to the marriage; and
>
> (b) the changed circumstances, had they existed at the time of the making of the spousal support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order.

[22] The husband's counsel argued that the wife fails to meet the threshold requirement of a material change of circumstances. The wife was on welfare in December and she still is now. She was not economically self-sufficient then nor is she now. Hence, there is no economic hardship arising from any change nor would anything have resulted in a different order being made in December. The only thing that has changed is the fact that one child now lives with her, a fact that is sufficiently addressed by the child support order.

[23] As a point of departure on this issue, I must say I have serious reservations as to the applicability of s.17 at all to interim support orders. This question has been the subject of conflicting jurisprudence: see Hainsworth, *Divorce Act Manual* (1997 issue), at pages 15-16 and 15-17; and MacDonald & Ferrier, *Canadian Divorce Law and Practice* (1997 issue), at pages 17-13 and 17-14. The Act makes no express provision for the variation of interim orders. As some cases have held, there is no need to have such statutory provision since interim orders are always subject to review, alteration and variation: see, for example, *Stannard v. Stannard* (1991), 34 R.F.L. (3d) 249 (Alta.Q.B.).

[24] In my opinion the preferable view is that s.17 does not apply to interim orders. I say that for a number of reasons. First, s.17(1), quoted above, refers to variation of a support order on application by either or both former spouses. This suggests an application being made after a divorce and after the issuance of a final corollary relief order at the time of the divorce. In s.2(1) of the Act, the term "spousal support order" is stated to mean an order under s.15.2(1). That subsection simply says that a court may make an order requiring a spouse to pay support for the other spouse. That is the order that may be varied under s.17. Interim spousal support orders may be made by virtue of s.15.2(2). There is, however, no mention of variation of interim orders in s.17.

[25] Further, interim spousal support orders, while also coming within the scope of the economic disadvantage model set out in *Moge v. Moge*, [1992] S.C.R. 813, are not subject to the same strict analytical process. As is often noted in the case law, courts do not have the time nor the resources to conduct an in-depth analysis at the interim stage. Generally speaking courts try to make a determination that at least a triable issue as to permanent support exists and, if so, apply a means and needs analysis so as to issue a "holding" order until the trial. The courts also, therefore, do not have the resources to undertake the in-depth analysis required by s.17 with respect to changing an interim order. And, also speaking generally, variation applications for interim orders should be avoided. If the interim order is unsatisfactory then the parties should proceed to trial where all the relevant facts and circumstances can be considered in-depth.

[26] The husband's counsel referred me to two decisions of the Alberta Court of Appeal which she says support the proposition that s.17 applies to interim orders: *Dyck v. Dyck*, [1996] A.J. No.648; and *Poohkay v. Poohkay* (1997), 30 R.F.L., (4th) 9. I am satisfied, on a close reading of those cases, that they were not dealing with interim orders. Even though they refer to orders made by judges in Chambers, I think it is clear from the context that the orders under consideration in those cases were "final" orders.

[27] There is one more reason why I think s.17 does not apply to this case. In my opinion, the order made in December was a "review" order, not a time-limited one. Hence, the variation criteria of s.17(10) do not come into play.

[28] In his annotation to my reported judgment in *Tees v. Tees* (1997), 31 R.F.L. (4th) 290, Professor James McLeod reminds me of the difference between an order for limited term support and a review order. A limited-term order is considered to be a final determination of the term of entitlement to support and therefore any variation hearing must be conducted pursuant to s.17. And, if the request for variation or an extension comes after expiry of the term, the specific requirements of s.17(10) must be satisfied. If the order is a review order, however, then that simply means that the issue of support returns to court at a fixed time for review on the facts at that time. It is in effect a rehearing of the support issue and not a variation. Therefore, proof of a material change is not a precondition to the court changing the order, as it would be under s.17. On a review, the hearing is conducted on the basis of the criteria in s.15.2(4) of the Act:

> (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 the spouse during cohabitation; and
> (c) any order, agreement or arrangement relating to support of either spouse.

[29] The *Tees* case was one involving review of a final order. In my opinion, however, Professor McLeod's comments are equally applicable to an interim support order.

[30] In December, the Chambers judge directed a review of the question of ongoing interim support. That review was to take place on May 2nd. On that date no review was held. All that was done was that what was supposed to take place that day, the review, was adjourned *sine die*. That is what is taking place now. Hence it is a review under s.15.2, not under s.17. Even if I accept counsel's argument that the December order ceased to exist as of May (because no further support order was made), then all that means is that this is a new interim support application. Thus it would also have to be considered under s.15.2 and not under s.17. In the result there is no necessity for the wife to establish a material change in circumstances or to satisfy the conditions of s.17(10) of the Act.

[31] With respect to the wife's entitlement to interim support, the pleadings and some of the material filed for the December application provide additional information to that placed before me. The wife is now almost 37 years old; the husband is 38. While the parties were married in 1980, they lived together for some time before that. The wife has no educational qualifications to speak of although she apparently worked steadily throughout the marriage in various service-oriented jobs. The parties apparently had an arrangement whereby the husband worked during the day and the wife worked at night so that one of them would always be available to care for the children. The wife has been unable to work since suffering the disabling injury prior to the separation.

[32] The length of cohabitation, the pooling of resources, and the fact that the wife has no foreseeable prospects for economic self-sufficiency, satisfy me that there is an arguable case for permanent spousal support. Hence there is an entitlement to interim support until the trial.

[33] There is an obvious need for support on the part of the wife. For his part, the husband pleads that he does not have the means to pay spousal support. His counsel referred me to s.15.3(1) of the *Divorce Act*: "Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications." It is submitted that any obligation imposed on the husband to pay spousal support would detract from his ability to make the child support payments for the child in the wife's care and also detrimentally affect his ability to provide for the child in his care.

[34] The husband's last affidavit gives a breakdown of his monthly expenses and debt obligations. I do not need to review it in detail although I note that there are many expenses claimed that I would have thought would be shared to some extent with his new partner (who I was told is also employed on a full-time basis). There is no evidence as to the contributions of the partner to the husband's household. I think such evidence should be available if a party is claiming lack of means to pay support. I acknowledge, nevertheless, that the husband's income is projected to be significantly lower this year than last. Indeed the only two items of "change" since the December 1996 order are (a) the expected drop in the husband's income, and (b) the relocation of one child to the wife's home. Some people may be inclined to say that one should offset the other.

[35] The wife seeks support of $950.00 per month to offset the difference between her monthly expenses and the anticipated income from her part-time sales activities. Any amount she receives by way of support will be deducted from welfare. I am satisfied, based on all the evidence, that the husband, in light of his child support obligations, does

not have the means to pay this. I do think, however, that he has the means to pay $500.00 per month. I set this figure as interim spousal support because of the necessity to give priority to child support. The husband will have some tax relief as a result of these payments. In addition, since this is meant to be a "holding" order until trial, it should be relatively short-term. Once this matter comes to trial the parties should have a much better idea as to whether the anticipated drop in the husband's income has materialized, and to what extent, and, if so, whether it will be permanent. I also point out that, if there is any reduction or termination of child support, the quantum of spousal support can be re-evaluated. This is the intent of s.15.3(3) of the Act and I think that intent applies equally to interim orders.

[36] I therefore order that the husband shall pay interim spousal support of $500.00 per month. These payments will start on May 1st, 1998, and continue on the first day of each month thereafter until further order of this court.

[37] I note, from the record, that at both Chambers hearings in December 1996 and May 1997, the presiding judges encouraged the parties (and their counsel) to bring this case expeditiously to trial. The issues are relatively straightforward and neither party has the means to wage lengthy litigation. Offers were made to convene pretrial or case management conferences so as to facilitate the orderly progress of this case. I repeat those invitations.

[38] Costs of this application will be reserved to the trial judge.

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

Dated at Yellowknife, NT, this
8th day of April 1998

Counsel for the Petitioner (Respondent): Catherine Stark
Counsel for the Respondent (Applicant): James D. Brydon

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