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CV 06922

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRADLEY KNOWLES

Applicant

- and -

MARYELLEN KNOWLES

Respondent

MEMORANDUM OF JUDGMENT

This is an application to (a) vary spousal and child support ordered to be paid pursuant to the *Divorce Act*, and (b) reduce the amount of accumulated support arrears.

The application is brought pursuant to s.17(1) of the *Divorce Act*. The respondent did not appear at the hearing. Service was effected substitutionally, by order, on the Director of Maintenance Enforcement for the Province of Alberta. An issue arose as to this court's ability, in the circumstances, to issue a "final" variation order, as opposed to only a "provisional" one, and I will address that issue later in this memorandum.

The parties were married in September, 1977; they separated in January, 1978; and, they were divorced in July, 1979. A child, Mary–Louise, was born in September, 1978. By an order issued by the Court of Queen's Bench of Alberta on August 21, 1979, the *Decree Nisi* was varied

so as to provide for spousal support of $50.00 per month and child support of $150.00 per month. As of this month, the accumulated arrears total $22,886.80.

I am satisfied that there has been a material change of circumstances justifying a variation. The child turned 16 in September, 1994, and is no longer, in the absence of contrary evidence, considered a "child of the marriage" as that term is used in the *Divorce Act*. The applicant has been unemployed for many months with no reasonable prospect of employment in the foreseeable future.

The child support payments by law should have ceased in September, 1994. This results in a reduction of $4,500.00 to the arrears. In the absence of evidence that the child is still a "child of the marriage", the order should be varied to delete the obligation to pay child support.

Applicant's counsel also points out that the calculation of arrears fails to account for the sum of $1,879.00 collected through federal intercepts of the applicant's U.I.C. benefits. That should be taken into account.

With respect to spousal support, applicant's counsel points out that the marriage was of extremely short duration and that it is extremely unlikely that a court would now order indefinite spousal support in these circumstances. If any support would be ordered it would likely be time-limited. Counsel refers me to a judgment of Rawlins J. of the Alberta Court of Queen's Bench, *Gosnell v Gosnell* (1993), 138 A.R. 205, in which, under somewhat similar circumstances, spousal support obligations were retroactively cancelled as if it was originally a time-limited order.

In this case I accept the submission of applicant's counsel that spousal support should be retroactively varied so as to be time-limited. It seems to me that a five year support obligation is more than appropriate in these circumstances. I have no doubt that this obligation would have been varied in the past if the applicant had applied to do so. Such a retroactive variation eliminates the further sum of $7,600.00 (July, 1984, to March, 1997).

With respect to the remainder of the arrears, the evidence shows that the applicant had only sporadic employment between 1983 and 1990 and also in 1993 and 1994. He is now older and suffers from some physical limitations. His future employment prospects are quite bleak. He receives U.I.C. benefits but his major financial support is his current wife's income (which itself is quite modest).

Applicant's counsel says that what is needed is a "practical" solution, quoting from *Currie v Currie* (1989), 74 Sask. R. 52 (C.A.). Commendably she has suggested a solution which I accept as reasonable. For the period of 1983 to 1990, the child support payments should be retroactively reduced to $100.00 per month. This results in a further reduction in the arrears by $4,800.00.

This approach, in my view, accords with the guiding principle in dealing with arrears, as noted in *Haisman v Haisman* (1994), 7 R.F.L. (4th) 1 (Alta. C.A.), at page 11:

> 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 of 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.

In the result, the order of August 21, 1979, is varied so as to eliminate the requirements for both spousal and child support payments. The arrears are reduced to $4,107.80 by applying the following factors:

(a)	balance as of March, 1997 –	$22,886.80
	Less:	
(b)	cessation of child support since child turned 16 –	4,500.00
(c)	federal intercepts –	1,879.00
(d)	spousal support variation –	7,600.00
(e)	child support variation –	4,800.00
	Balance -	$4,107.80

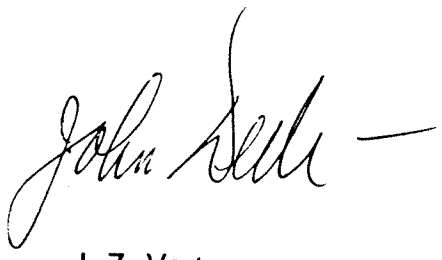
Counsel submitted that I can issue a "final order". Upon further review of this issue I have concluded that I can only issue a "provisional" order. This is due to the combined effect of s.18(2) and s.17.1 of the *Divorce Act*. These sections came into effect in 1993. The result is fully explained by T.W. Hainsworth in his Divorce Act Manual (1997), at page 18–2:

> Formerly, if the respondent in an application to vary support was ordinarily resident in another province, the applicant could proceed in two different ways. The applicant could apply to the local court on an *ex parte* basis. In such case, the court could make a provisional order which would be sent to the court in the province in which the respondent resided for confirmation or refusal. Alternatively, the applicant could proceed on notice to the foreign respondent. In such case, the court could not make a provisional order. It was required to hear the variation application and pronounce a final variation order: *Mahar v Mahar* (1987), 10 R.F.L. (3d) 276, 83 N.B.R. (2d) 373 (Q.B.); *Winram v Cassidy* (1991), 37 R.F.L. (3d) 230, 76 Man. R. (2d) 288 (C.A.).
>
> As a result of the amendments to s.18(2) and s.17.1, however, where the respondent in an application to vary support is resident in another province, unless he or she accepts the jurisdiction or both parties agree to proceed under s.17.1, an order made should be provisional only: *Martell v Height* (1993), 45 R.F.L. (3d) 344, 111 Sask. R. 279 (Q.B.).

In this case the respondent was served substitutionally. There is no evidence that she has accepted the jurisdiction of this court. Therefore, this will be a "provisional" order only.

I direct the Clerk of the Court to forward a copy of this Memorandum, together with the other documents stipulated by s.18(3) of the *Divorce Act*, and in accordance with Rule 29(2) of the N.W.T. Divorce Rules, to the Deputy Minister of Justice for the Northwest Territories as the representative of the Attorney General. The Act stipulates the steps the Attorney General must then take. Counsel for the applicant is, of course, responsible for preparing and filing the formal provisional order.

Dated this 26th day of March, 1997.



J. Z. Vertes
J.S.C.

To: Catherine Stark,
Counsel for the Applicant

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Memorandum of Judgment of the Honourable Justice J. Z. Vertes