Date: 2000 01 07
Docket: 6101-03151

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SUSAN MacNEIL

Petitioner

-and-

VINCENT MacNEIL

Respondent

REASONS FOR JUDGMENT

[1] At the commencement of this chambers application, counsel for the Petitioner requested that I strike out or disregard a number of paragraphs in the Respondent's affidavits. I ruled on the application at the time and struck out some of the items referred to and indicated that I would disregard others. I will not repeat that ruling in these Reasons for Judgment.

[2] It may, however, be useful to refer to some of the difficulties arising from the affidavits filed in this case. I would first remind counsel of the provisions of Rule 373:`

> 373. (1) Subject to subrule (3), a deponent may state in an affidavit only what the deponent would be permitted to state in evidence as a witness in court.
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> (2) In an action or proceeding to which a corporation is a party, any affidavit required by these rules to be made by a corporate party may be made by an officer, servant or agent of the corporation who has knowledge of the facts to be

deposed to and the officer, servant or agent shall state in the affidavit that he or she has that knowledge.

(3) An affidavit may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

[3] In this case, counsel included in the Respondent's second affidavit a reference to things said by the Petitioner in anger and with foul language about what she thinks a judge will or will not do. It is difficult to imagine what possible relevance this information could have and it was struck out.

[4] The rules that apply to affidavits also apply to exhibits. Attached as an exhibit to one of the Respondent's affidavits is a "To Whom it May Concern" letter prepared by a representative of his employer. The Respondent does not state in his affidavit that he believes the information in the letter. It is not clear whether the author of the letter knew that it would be submitted to the Court, although I infer from the date that he may have known. While the intent in obtaining and presenting the letter was presumably to provide the Court with factual information about the Respondent's bonus from employment, the letter itself contains an opinion, in crude terms, about anyone who might think differently than the author of the letter. In this case, the Petitioner asks that the Court draw the conclusion that the Respondent will likely continue to receive the bonus that he has received in the past. The letter in question, instead of simply stating when and on what conditions the bonus is paid and why it might not continue to be paid, expresses the opinion that it would be "stupid and short sighted" to assume that it will continue to be paid. That opinion is irrelevant. It is also improper for a witness or anyone else providing information to the Court to express his opinion of what the Court may or may not do, which is essentially what the author was doing in his letter. Counsel should not be putting before the Court material containing opinion and comment of this nature.

[5] The Petitioner's affidavit material is not without fault either. Her second affidavit introduces irrelevant material such as the Respondent's past involvement with another woman. Although this was an interim application dealing mainly with financial matters, both the Petitioner's and the Respondent's affidavits go into much irrelevant detail about the history of the marriage and problems the parties

have had with each other. Both parties' affidavits contain argument when they should contain only fact.

[6] On the whole, the affidavit material in this case contains the same faults that were referred to by Master Patterson in *Crofton v. Sturko*, [1998] B.C.J. No. 38 (S.C. Master's Chambers), when he said, "Lengthy affidavits containing opinions, wishes, belief, innuendo and inference, are wholly inappropriate". I agree completely with that statement.

[7] Unfortunately, affidavits with these faults are all too frequently filed. This is a general problem which, from my observation, is not restricted to this case or to counsel in this case. Such material simply obscures the real issues before the Court and leads the parties to engage in mud-slinging and counter-mud-slinging, all of which is of no help to the Court. It reflects badly on the parties themselves and on counsel, who should be advising the parties as to what is and is not appropriate and relevant. Should one party include inappropriate material in an affidavit, or material which is, in the words of Rule 375, "scandalous, irrelevant or otherwise oppressive", counsel should apply to strike out that material, not encourage or permit the client to respond in kind.

[8] Having said that, I have taken into consideration on this application only the material which is factual and relevant. As this is an interim application based on affidavit evidence without cross-examination, I have attempted to determine what the uncontested facts are.

[9] The issues on which I reserved after hearing argument are custody and access, child support and the Respondent's hardship application.

Custody

[10] The parties have three children, ages 13, 11 and 10. When the parties separated in July 1998, the children remained with the Petitioner in Yellowknife while the Respondent sought employment outside the Northwest Territories because the mine he worked at in Yellowknife was on strike. He returned twice to visit with the children.

[11] The Respondent returned to work in Yellowknife at the conclusion of the strike in June 1999. From that time until November 1999 he had regular access to the children, some of which was exercised at the Petitioner's home. This access

appears to have consisted of approximately seven overnight visits a month while the Petitioner worked night shift at the hospital, approximately seven additional after school or evening visits a month while the Petitioner worked day shift and an additional overnight period each weekend.

[12] In November, the Respondent moved into an apartment across the street from the children's school. Since then, it appears that the children have spent somewhat more time with him. In particular, the eleven year old son has spent more nights sleeping at the Respondent's home, apparently at his own wish. The Respondent provided a list of his contacts with the children from November 1 to December 8, 1999. His information is that during the month of November, he had at least one child with him overnight for 24 nights and from December 1 to 8 for 7 nights.

[13] The Petitioner says that she is content that access continue the way it was before the Respondent moved to his new location. She suggests that the Respondent living so close by is a novelty for the children and that this novelty may soon wear off. She also suggests that the Respondent has attempted to set up a shared custody regime in response to her application for child support, which was filed in October 1999.

[14] The Respondent takes the position that the Petitioner is attempting to limit his access to the children so that it will not affect the amount of child support she can obtain. He says that the fact that the children are with him so much shows that they want to be with him.

[15] The Respondent submits that what is now in effect is a shared custody regime as contemplated by s. 9 of the *Child Support Guidelines* under the *Divorce Act*. Alternatively, he asks that I order that there be a shared custody arrangement.

[16] Section 9 reads as follows:

> 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
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> (a) the amounts set out in the applicable tables for each of the spouses;
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> (b) the increased costs of shared custody arrangements; and
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> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[17] The first thing to note about s. 9 is that it speaks of a spouse exercising a right of access for not less than 40 per cent of the time *over the course of a year*. This suggests to me that the arrangement which the Court is asked to consider should be one which has been in place for a significant period of time. That length of time need not necessarily be a full year but it should be sufficient to allow the Court to determine what is likely to happen over the course of a year. Alternatively, the arrangement may be one that the parties agree will govern.

[18] This is reinforced by the reference in s. 9(b) to the increased costs of shared custody arrangements. Where a parent is exercising access or physical custody for not less than 40 per cent of the time over the course of a year, it is to be expected that he or she will incur increased costs associated with caring for the children for that amount of time.

[19] In this case, in the five months preceding November, the access exercised by the Respondent amounts to approximately 30 per cent of the time. The access he says he has exercised since November 1, taking into account the increased time the middle child has spent with him, exceeds 40 per cent of the time even when one looks at only the overnight access and not also hours spent during the day or evening short of overnight. So I need not decide whether the latter hours should be considered.

[20] A couple of other points should be noted. The Respondent's initial affidavit was sworn November 22, 1999 in response to the Petitioner's first affidavit in support of her application for interim joint custody, sole day to day care and child support. In his November 22 affidavit, the Respondent stated that "the established routine has enabled me to see my children on a daily basis as well as care for them approximately fifty per cent of the time". He also stated that the eleven year old son had been staying with him almost every night since the first of November, while the other two children were going back and forth between the Petitioner's home and his own. He did not provide a list of dates when the children were with him overnight.

[21] In her affidavit in reply, sworn December 7, 1999, the Petitioner stated that it had not been the children's routine to see the Respondent on a daily basis and that once the novelty of staying with him had worn off, the eleven year old was spending only about three nights a week there. Although it is not completely clear, the Petitioner's affidavit seems to say that the children had gone back to spending overnights with the Respondent mainly when the Petitioner was on night shift.

[22] The Respondent then filed yet another affidavit, sworn December 12, 1999, in which he listed each overnight and other time the children had spent with him since November 1. This affidavit was filed on December 13, 1999 for the chambers application scheduled to be argued on December 15. Counsel for the Petitioner stated that she had had no time to review the affidavit with her client and objected to the detailed list being considered. Counsel for the Respondent argued that the information simply expanded on what the Respondent had said in his first affidavit and was important because it was up to date.

[23] This points up another common problem in chambers practice, the late filing of affidavits. When counsel obtain a special chambers date, as they did in this case, it should be understood that all the evidence has been filed and that counsel can file their chambers briefs knowing what facts or alleged facts they have to deal with. There may be situations where something new and significant occurs late in the day and counsel feels the court should be aware of it. But that should be the exception and not the rule. In most cases, there should be no more than the affidavit or affidavits that were filed when the application was commenced, the respondent's affidavit material responding to that, and then perhaps limited reply affidavit material from the applicant.

[24] The Respondent's second affidavit gives rise to two concerns. The first is that the detailed information, at least up until November 22, could have been contained in his first affidavit. That way the Petitioner could have responded in detail. As it is, I am left not knowing whether the Petitioner agrees with what the Respondent says about how much time the children have spent with him since the beginning of November or whether her version of the facts is different.

[25] The second concern is critical to the very issue I have to decide. The Respondent asks me to accept as an established regime a situation which appears to be in a developing stage. He asks that I not rely on what was happening for the five months after he returned to Yellowknife and what the Petitioner says was the established routine and is likely to remain the established routine because of her work schedule, but instead that I rely on what has happened from November 1, when he moved his residence closer to the children, to December 8, a period of just over five weeks. Not only is that a very short period of time from which to draw conclusions about what might happen over the course of a year, it is also of uncertain weight because much of the time the Respondent is counting seems to be dependant on the wishes of an eleven year old child. I do not suggest that

those wishes should be disregarded, but they may or may not change and five weeks is simply too short a period on which to base any judgment about that.

[26] In my view, this case is very much like *Hus v. Hus*, [1998] S.J. No. 803 (Q.B.). There, the parties separated in 1994. After that, the children spent two overnights with their father in each eight day rotation. Between March and August 1998, they spent somewhat more than 40 per cent of their time with him. This decreased substantially in September 1998. When the matter came before Wright J. in November 1998, he had this to say about s. 9:

> The onus is on the parent wishing to invoke the operation of s.9 to demonstrate to the court's satisfaction that a shared custody arrangement as contemplated by s.9 is in fact in place, and has been, or will be in place over the course of a year. While it is not necessary that there be in all circumstances a written agreement or court order to this effect before the onus can be discharged, the court should, in my opinion, exercise caution before imposing a s.9 child support regime on what may be a short term informal custody arrangement.
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> In this case, the respondent is prematurely relying on s.9. A track record has not yet been established. Whether or not he will continue to have access to or physical custody of the children for more than 40 percent of the time over the course of a year is unclear. Accordingly, I am bound to determine child support having regard only to the respondent's income and the applicable table.

[27] The problem in this case is that a track record has not yet been established. It is simply too early to tell whether the circumstances relied on by the Respondent are "in spirit and in reality a case of shared custody" as envisaged by s. 9 [(*Dennett v. Dennett* (1998), 61 Alta. L.R. (3d) 245 (Q.B.)]. So it does not matter whether I take into account the details of the time the Respondent says the children have spent with him since the beginning of November; it is too short a time to enable me to determine whether s. 9 applies. This fact distinguishes this case from the majority of the cases cited by counsel.

[28] In coming to this conclusion I have not taken into account the suggestion that the Respondent has contrived a s. 9 arrangement so as not to have to pay child support, nor the suggestion that the Petitioner has denied access or wants to deny access so that he will have to pay child support. It was not necessary for me to

make conclusions about the parties' motives, nor could I have done when all I have before me is affidavit material which is largely contradictory on the issues of intent, motive and bona fides and which raises issues of credibility.

[29] Having decided that it is too early to tell whether a s. 9 shared custody regime is in place, the next question is whether I should order a shared custody arrangement. As I understand the Respondent's position, he seeks an order that he have the access which he says has been in place. Again, however, that is somewhat uncertain because some of the access he has been exercising seems to have resulted because of the wishes of one of the children. It remains to be seen whether that will last and whether it will be to the child's benefit that he have what seems to be a rather unsettled schedule.

[30] Custody and access are governed by the best interests of the children. On an interim basis, unless there is some good reason to change it, the children's situation should remain as stable and certain as possible.

[31] Both parties are content that an order for joint custody issue. This suggests to me that they are acknowledging that they can work together for the sake of the children. That being the case, they should also be able to work together to arrange a schedule that will allow both of them involvement with the children in a way that will benefit the children. The purpose of all this should not be to avoid or to get child support. The purpose should be to do what is best for the children.

[32] Accordingly, I make the following interim orders. The parties will have joint custody of the children. The Petitioner will have day to day care of them except during the following times, when the Respondent is to have the care of them: those nights when the Petitioner is on night shift; those evenings (meaning over the evening meal time) when the Petitioner is working; such times on weekends and otherwise as may be agreed to by the parties. If the parties cannot work out the precise times when the children will be with each of them and require direction from me in that regard, counsel may arrange to have that issue brought on before me.

Child Support

[33] Having found that s. 9 does not apply, I turn now to the issue of child support, which gives rise to two further issues: calculation of the Respondent's income and his hardship application.

[34] The Respondent is employed as a miner. His gross income in 1997 was $123,588.01, of which $109,752.41 was employment income. In 1998 his gross income was $73,995.27. The decrease in income appears to be explained by the fact that he was on strike as of May 1998 and then obtained employment from July 29 to September 19, September 25 to October 20 and October 27 to December 19 at less than what he made at his earlier employment.

[35] In 1999, from January 25 to May 25, the Respondent earned $26,566.80. He expects his total 1999 income to be $90,000.00.

[36] Since June 1999, when the strike ended, the Respondent has been back with his regular employer at Con Mine. He earns $22.45 per hour. His most recent pay information, dated December 10, 1999, indicates year to date pay of $53,131.90. This includes a bonus which appears to have been included in the Additional Pay Totals column on the pay slips presented. The year to date total represents approximately six months' work. By simply doubling that, a figure of approximately $106,000.00 is obtained for twelve months' work, although this would also double the bonus, which is likely not appropriate. In my view the bonus should be taken into account, however, as it forms part of his income from employment and there is no indication that it is to be discontinued in the near future.

[37] In her first affidavit, the Petitioner stated that to the best of her information and belief, the Respondent earns between $90,000.00 and $100,000.00 per year, including bonus and benefits. Her counsel submits, however, that a figure of between $108,000.00 and $112,000.00 is more appropriate based on the Respondent's pay slips. I was not told how those two figures were calculated. Counsel for the Respondent submitted that I should use the Respondent's expected 1999 income of $90,000.00 as his income for child support purposes.

[38] Section 2(3) of the *Child Support Guidelines* says that where any amount is determined on the basis of specified information, the most current information must be used. The most current information about the Respondent's employment

income is not what he earned in 1999, when he was not continuously employed with the same employer, but what he can now earn at Con Mine. Having regard to the affidavit material and the pay slips, I find that to be, for purposes of this interim application, $100,000.00.

[39] The *Guidelines* amount for three children based on income of $100,000.00 is $1734.00 per month.

[40] The Respondent asks, however, that a different amount be ordered on the basis of undue hardship. He invokes s. 10 of the *Guidelines*, subparagraphs (1) to (4) of which provide as follows:

> 10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.
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> (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
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> (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
> (b) the spouse has unusually high expenses in relation to exercising access to a child;
> (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
> (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
> (i) under the age of majority, or
> (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and
> (e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

> (3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.
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> (4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

[41] Specifically, the Respondent argues that payment of the *Guidelines* amount will cause him to suffer undue hardship because of the circumstances in subparagraphs (2)(a) and (b).

[42] The question of debt is somewhat complicated because the parties do not agree on the amount of the debt and there are some contradictions in the evidence.

[43] It seems to be accepted by both parties that for at least the first year after separation, the Respondent made payments on the debt in lieu of child support. The Petitioner supported the children on her salary of $43,897.00 in 1998 and $69,952.37 (estimated) in 1999. There is disagreement between the parties as to whether the Respondent contributed any money to the family other than what was paid on the debt.

[44] In her first affidavit, the Petitioner stated that the matrimonial debt totalled about $46,000.00 at the time of separation. In her second affidavit she stated that at the time of separation there was $57,000.00 owing on a consolidated loan, a Visa debt of approximately $8700.00 and a Canadian Tire debt of $2300.00 along with a mortgage since paid in full.

[45] It appears from her affidavit material that the Petitioner accepts that the current state of the matrimonial debt is the following: a personal loan of $46,283.03 (which I understand to be the consolidated loan referred to above), a Revenue Canada debt of $9626.11 and the Canadian Tire debt of $2338.11. The Petitioner has sworn that she is prepared to arrange a bank loan for $29,000.00 to be paid against the debt provided that her name is removed from the personal loan. The other debts are in the Respondent’s name alone.

[46] The Respondent says that the matrimonial debt is currently the following: personal loan of $46,283.03, Revenue Canada debt of $11,500.00, Canadian Tire debt of $2338.11, Visa debt of $8677.47, Revenue Canada/Home Buyers Plan debt of $15,877.00. This is a total of $84,675.61.

[47] Some of this requires comment. Funds in the Respondent's Home Buyers Plan were used to make a down payment on a trailer in 1993. The Respondent is required to repay those funds into the Plan in an annual amount of $1323.00 or include that amount in income. In her submissions, counsel for the Petitioner indicated that the Petitioner is prepared to make payments of $50.00 per month toward repayment of that debt. However, she questioned whether it can truly be characterized as a matrimonial debt since it is not owing to a third party and the money goes back into the Respondent's Plan.

[48] For purposes of this application, I will accept it as a matrimonial debt because it is an amount which the parties had the benefit of and must now repay, failing which there will be financial consequences.

[49] The Petitioner disputes the $11,500.00 Revenue Canada debt, arguing that the extra $2000.00 which the Respondent says is owing represents penalties for late payment incurred because the Respondent chose not to file his income tax return. On this basis, the extra $2000.00 does not appear to fall within s. 10(2)(a) because it was not a debt reasonably incurred to support the family prior to the separation or to earn a living.

[50] The Visa debt is another area of dispute. The Respondent says that $8677.47 was owing to Visa at the date of separation. He says that after leaving Yellowknife, he paid his living expenses by Visa while using his income to pay down the matrimonial debt, including the Visa debt. By December 1998, the amount owing to Visa was $10,274.68.

[51] The Petitioner says that by December 1998, the Respondent had paid all of the Visa debt which existed at the separation. The figures presented by the Respondent indicate that he may not have done so. I am not able to resolve the dispute on the material provided.

[52] If I take the total amount of debt alleged by the Respondent, which is $84,675.61, less the approximately $2000.00 in penalties levied by Revenue Canada and subtract the amount which the Petitioner is prepared to pay ($29,000.00 plus half

of the Home Buyers Plan amount over time which is $7938.50, for a total of $36,938.50), that leaves the Respondent with debt of $45,737.11. I will simply note here that I was not asked to rule on this application whether the Petitioner bears any responsibility for repayment of any of that portion of the debt.

[53] While the Petitioner's proposed payment of $29,000.00 may not reduce the debt in exactly the way the Respondent would like to see it reduced, because it would pay down only the personal loan in order to meet the conditions of both the Petitioner and the bank, it should be taken into account in assessing the level of debt, as I have done.

[54] In order to come within s. 10, the Respondent must show that his level of debt is unusually high and that it would cause him to suffer undue hardship should he also have to pay the *Guidelines* amount of child support. It has been said that undue hardship is a tough threshold to meet. Hardship is not sufficient; it must be hardship which is excessive, extreme, improper, unreasonable or unjustified: *Van Gool v. Van Gool*, [1998] B.C.J. No. 3513 (C.A.).

[55] First, I note that after the contributions proposed by the Petitioner, the Respondent's remaining debt load is approximately half his annual income. That does not appear to be an unusually high level of debt.

[56] Second, taking into account the Respondent's substantial income and the fact that he may be in a position, through overtime and benefits, to earn even more, I find that the Respondent has not met the threshold of undue hardship. He has not shown that payment of the amount required under the *Child Support Guidelines* would cause him excessive or unreasonable hardship.

[57] It is clear from the material before me that the Respondent has paid a large amount of money on the various debts, something in excess of $35,000.00 over the period from August of 1998 to November of 1999, according to his affidavits. He is in a better position now that his employment has stabilized. Some rearrangement or different management of the Respondent's debt load may be required, especially in light of the Revenue Canada debt which he is being pressed to pay. However, child support takes priority over all other debts. While the Respondent may suffer some hardship, it has not been shown that it would be undue. Accordingly, I need not go on to compare the standard of living in the parties' households under s. 10(3).

[58] The second basis upon which the Respondent alleged undue hardship is under s. 10(2)(b) - unusually high expenses in relation to exercising access to a child. The Respondent submitted that he has incurred increased expenses so as to maintain a suitable residence for the children and that his household expenses are significantly higher because of the amount of time they spend with him.

[59] The Respondent relied on *Baranyi v. Longe,* [1998] O.J. No. 606 (Ont. Gen. Div.). In that case, the father's accommodation expense was found to be disproportionately high compared to his income and his claim of undue hardship was allowed on that basis.

[60] In this case, the Respondent rents a one bedroom apartment. A large storage room is used as a second bedroom when the children are with him. He hopes to obtain a two bedroom apartment. The information about the Respondent's rent is contained in a paragraph in his affidavit which I ruled would be disregarded because it was filed late. There is no information before me about any other household expenses which pertain specifically to the children, except that the Respondent purchased some beds.

[61] Many, if not most, parents who have overnight access to a child will incur some expenses as a result, whether for an extra bed or a bedroom or other items the child uses and does not bring with him or her. To qualify under s. 10, these expenses must be unusually high. There is no basis upon which I can find that renting a one or even a two bedroom apartment in a standard apartment building and buying some furnishings amounts to an unusually high expense on an annual salary of $100,000.00.

[62] For the foregoing reasons, the Respondent's hardship application is dismissed.

[63] In all the circumstances, and considering that, although the Respondent has not made child support payments pursuant to the *Guidelines*, he has made substantial payments on the debts, the interim child support payments in the amount of $1734.00 per month will commence January 1, 2000 and be payable on the first day of every month thereafter until further order.

[64] Counsel may arrange to speak to costs if they wish by contacting the Courtroom Services Supervisor within 30 days of the date this judgment issues.

V.A. Schuler J.S.C.

Dated at Yellowknife, NT
this 7th day of January, 2000

Counsel for the Petitioner: Elaine Keenan Bengts
Counsel for the Respondent: Jill A. Murray