*Waugh* v. *Waugh*, 2002 NWTSC 65

Date: 2002 09 30
Docket: S-0001-CV 2002000196

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DIANA WAUGH

Applicant

- and -

JAMES TREVOR WAUGH

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application for confirmation of a provisional order varying the child support payable pursuant to a Corollary Relief Order. The *Divorce Act*, s.19(12), requires that written reasons be provided if the confirming court does anything other than merely confirm the provisional order.

[2] The parties were divorced in 1992. They are the parents of three children but two are self-supporting. The third is now 16 years old. The child lives with the applicant and attends high school. The Corollary Relief Order provided for child support of $167.00 per month payable by the respondent. This Order, of course, predates the enactment of the *Federal Child Support Guidelines.*

[3] The applicant now lives in Yukon. When her application for variation came on for hearing in the Yukon Supreme Court, the only evidence as to the respondent's income was hearsay evidence that it was between $50,000 and $60,000 per year. The applicant sought to bring the support payable within the Guidelines regime. The presiding judge imputed income to the respondent of $50,000 per year and varied the Corollary Relief Order to the appropriate Guidelines amount, that being $443.00 per month.

[4] It appears, however, that what was not addressed was the fact that the original Order was made on consent. It was pursuant to an agreement between the parties (although the applicant stated in her affidavit that she agreed reluctantly just so the

matter could be settled). The weight of recent authority is to the effect that, while a court has no residual discretion to refuse to bring an earlier support order within the Guidelines, there is still a specific discretion contained in s.17(6.2) of the *Divorce Act*. That provides that, in making a variation order, a court may award a different amount than the stipulated Guidelines amount if (a) there are special provisions in an order, judgment or a written agreement which directly or indirectly benefit a child, and (b) the application of the Guidelines would result in an amount of child support that is inequitable.

[5] I recognize that there is some debate in the jurisprudence as to the meaning and scope of the term "special provisions". Some judges have interpreted this to mean some provision that is out of the ordinary and replaces the need for ongoing support for the child. Others have not interpreted it so restrictively but instead have held that the "special provisions" need not be out of the ordinary or unusual so long as the provisions replace the need for support in accordance with the Guidelines. For an example of this difference of opinion one need only refer to the separate reasons for judgment delivered by Sharpe J.A. and Simmons J.A. in *Wright* v. *Zaver* (2002), 59 O.R.(3d) 26 (Ont.C.A.).

[6] When this matter came on for hearing before me, I had the benefit of direct evidence from the respondent. Considering all of the circumstances, I am satisfied that I should exercise my discretion pursuant to s.17(6.2) of the Act and refuse to bring the order within the Guidelines regime.

[7] This is not the case to decide if an agreement and subsequent consent order amount to "special provisions" within the meaning of the Act. I am satisfied that at least arguably they can. My primary concern, however, is that it would be "inequitable" to bring this support order within the Guidelines. I use "inequitable" to include the interests of all parties, including the child.

[8] The respondent is unemployed. He was laid off in March of this year. He is ineligible to receive employment insurance benefits since his last period of employment was not long enough to qualify him for benefits. All this was supported by documentation. He had been employed steadily for 12 years but then had a few months of unemployment before obtaining his last job. His earnings, from October 2001 to March 2002, were under $5,000. He is living off some retirement funds that

he cashed in. He has, however, maintained the support payments of $167.00 per month. He said he "budgeted" for this.

[9] The respondent's usual occupation is that of a truck driver and heavy equipment operator. He has had medical problems related to this work and his doctor advised him to go into some other occupation. He is therefore planning to take some retraining programmes. To prepare for this, he has been spending his time fixing up his residence so that he could sell it and from the proceeds help support himself during this retraining period. All of this I find reasonable.

[10] So, if I bring the order within the Guidelines, there would be no support payments since the respondent has no income. He would fall below the threshold of the Guidelines. The lack of any support would be prejudicial to the applicant and the child. If I simply confirm the provisional order, that would be unfair to the respondent since he could not be able to make those higher payments. Hence, for all three interests at stake, bringing the order within the Guidelines would be inequitable. At least, if I refuse variation, the Corollary Relief Order will remain in force and the monthly support obligation of $167.00 will continue. That seems the most equitable for all concerned. But I will direct that the respondent inform the applicant immediately when he obtains new employment and provide her with details as to his income. The applicant, of course, will be free to bring a new variation application at that time.

[11] Therefore, I refuse confirmation of the provisional order of the Yukon Supreme Court dated January 28, 2002. I direct the Clerk of the Court to forward copies of this Memorandum of Judgment and the transcript of the hearing before me to the Yukon Supreme Court.

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

Dated at Yellowknife, NT this
30th day of September 2002

To: Mr. James Waugh

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Yellowknife, NT X1A 3B8

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THE HONOURABLE JUSTICE J.Z. VERTES