

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GREGORY CHARLES HUNTER

Applicant

- and -

MARCIA JEAN HUNTER

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a confirmation hearing of a provisional child support variation order. The original support order was made as part of the corollary relief ordered in conjunction with the parties' divorce in 1997. Thus this is a proceeding under sections 18 and 19 of the *Divorce Act* (Canada).

[2] There are two children, ages 14 and 17, affected by the support order. The 1997 order required the applicant to pay support of \$250.00 per month per child payable on the 15th day of each month. On January 8, 2001, a provisional order was issued by the Superior Court of Justice of Ontario as follows:

- (a) eliminating the applicant's child support obligations effective as of December 1, 1999;
- (b) rescinding arrears as of December 1, 1999;
- (c) staying enforcement proceedings retroactively to December 1, 1999; and
- (d) ordering the respondent to repay to the applicant the sum of \$5,917.01 representing the total of three garnishments effected in December 2000.

[3] On this hearing the respondent has filed a notice of motion seeking a variation as well, except that her proposed variation would maintain the support obligations for a further two months or at least until today. The two-month period would use up what is now a credit of \$946.15 held by the Maintenance Enforcement Office (“M.E.O.”). I have decided not to entertain this motion as a separate application since I think it is unnecessary. It in effect seeks a variation of the provisional order. That is one of the things I am empowered to do in any event by s.19(7) of the Act. There is therefore no need to consider a separate application (which itself would only result in a provisional order).

[4] For the reasons that follow I will confirm the provisional order but with variation.

[5] I have had the benefit of far more detailed information than was available to the judge in Ontario. Primarily I had the benefit of reviewing a detailed M.E.O. statement recording all receipts and disbursements relating to the child support obligations.

[6] The variation was made because the applicant has been unable to work since mid-November 1999. He is currently receiving a C.P.P. disability pension of either \$919.34 or \$827.41 per month (the evidence is unclear which). He has been receiving this, in effect, since March 2000 (although the actual payments did not start until December). Meanwhile, the children have also been receiving a C.P.P. benefit because of their father’s disability. This amounts now to \$356.84 per month (paid directly to the respondent who in turn reports the payments to the M.E.O.).

[7] The disability benefits received by the children have been credited on an ongoing basis to the applicant’s child support obligations on the account maintained by the M.E.O. This is an error. There is authoritative case law to the effect that such benefits belong to the children and do not reduce the support payable by the non-custodial parent: see *Vickers v. Vickers* (2001), 201 D.L.R. (4th) 65 (N.S.C.A.), at paras. 4-17. Thus the applicant, insofar as accumulating arrears are concerned, has received the benefit of having those payments credited to his account.

[8] It seems to me, however, that the reason for the specific provisions in the provisional order was an assumption that the applicant could not and cannot pay support. With respect, I do not think this conclusion is completely warranted.

[9] The applicant’s annual income, even on the basis of his disability pension, does not put him below the threshold of paying child support under the Guidelines. The table amount for two children payable by a non-custodial parent living in Ontario would be

\$147.00 per month (if the income is \$919.34 per month) or \$117.00 per month (if the income is \$827.41 per month). While the applicant's income is extremely low it is not so low that it would automatically or necessarily result in no support. Admittedly there was a period of months when the applicant was on welfare but I do not think that in itself justifies the broad sweep of the provisional order wiping out all obligations and requiring the respondent, who has the ongoing child care responsibility, to repay a significant amount.

[10] A review of the M.E.O. account reveals the following pertinent information:

1. The arrears stood at \$1,000.00 as of December 1, 1999.
2. The accumulated support obligations from December 15, 1999, to September 15, 2001, amount to a further \$11,000.00 (\$500.00 per month for 22 months).
3. Credited to the total obligation of \$12,000.00 were the following payments:
 - (a) the children's C.P.P. disability payments which to date total \$6,675.56;
 - (b) two payments made directly by the applicant to the respondent (in January and April 2000) totalling \$2,000.00;
 - (c) a payment of \$200.00 received on November 1, 2000 (the notation is simply "Family Support Plan" so I assume it is from Ontario); and,
 - (d) three payments (each identified as "Family Responsibility Office") received on March 7, 2001 (\$424.05), March 20, 2001 (\$424.05), and January 11, 2001 (\$3,222.49), for a total of \$4,070.59.

[11] When I add up the total of the payments (\$12,946.15) and deduct that from the total of the obligations (\$12,000.00) I come up with the same figure as the M.E.O. report: a credit of \$946.15. This is not actual cash but only a paper credit resulting from the inclusion of the disability pension payments.

[12] I am unable to discern a correspondence between the total amount garnisheed (\$5,917.01 as noted in the provisional order) and the miscellaneous amounts paid to the respondent. I also do not see why the applicant should now be able to claim that payments he voluntarily made should not have been made. It seems to me that the applicant has received significant credits (where they were not due) and to now expect reimbursement would be inequitable.

[13] I have concluded that the fairest disposition would be to confirm but vary the provisional order as follows:

- (a) the applicant's child support obligations are terminated as of November 16, 2001;
- (b) all enforcement proceedings are hereby terminated; and
- (c) any credit held by the Maintenance Enforcement Office is to be applied in satisfaction of the remaining support obligations.

[14] To be perfectly clear, this order contemplates that there are no arrears, that the current situation is simply that of a credit standing in the account, and there is no obligation on the respondent to repay any amount. I recognize that this disposition is not strictly in accordance with the Guidelines. Nevertheless I am confident that if one went through the effort and intricacies of a household standard of living comparison test one would come to the conclusion that the applicant would suffer undue hardship from any ongoing obligations (an opinion shared by respondent's counsel). Furthermore, the C.P.P. payments made directly to the children exceed what the respondent would be required to pay in any event.

[15] I direct respondent's counsel to prepare a formal Order and then copies of the Order, these reasons, and the evidence filed by the respondent along with a transcript of the hearing before me, shall be transmitted by the Clerk to the authorities in Ontario in accordance with s.19(12) of the Act.

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

Dated at Yellowknife, NT, this
27th day of September 2001

To: Jill A. Murray,
Counsel for the Respondent

S-1-CV 2001 000212

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