McBride v. *McBride*, 2001 NWTSC 59

Date: 2001 08 02
Docket: 6101-02404

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHERYL GAY McBRIDE

Petitioner

- and -

RANDOLPH WALTER McBRIDE

Respondent

- and -

ANTHONY GEORGE WATIER

Third Party

Application to vary child support in a Corollary Relief Order.

Heard at Yellowknife, NT, July 11, 2001

Reasons filed: August 2, 2001

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

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Counsel for the Third Party: Colin C.W. Chew

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REASONS FOR JUDGMENT

[1] This application raises a number of issues regarding the determination of appropriate child support obligations where there are a number of potential payors and a mix of custody arrangements.

[2] The petitioner, Cheryl Gay McBride (who now goes by the name of "Dies" so I will hereafter refer to her as Ms. Dies), was married to the respondent, Randolph Walter McBride, in 1989. They had one daughter, Shawna, born in 1990. Ms. Dies had another daughter, Alexandra, born in 1986. The third party, Anthony George Watier, is the biological father of Alexandra. [I refer to Mr. Watier as a "third party" simply for want of a better description for the time being of his role in these proceedings.] Ms. Dies and Mr. Watier were never married. For all intents and purposes, Mr. McBride fulfilled the role of "father" in Alexandra's life.

[3] Ms. Dies and Mr. McBride were divorced in 1994. By terms of a Corollary Relief Order the parties were awarded joint custody of both children with Ms. Dies maintaining their primary residence. Mr. McBride was ordered to pay child support of $250.00 per month per child. This was of course before the proclamation of the *Federal Child Support Guidelines* in 1997.

[4] The parents now have a shared custody arrangement with respect to Shawna. She spends half her time with Ms. Dies and half with Mr. McBride. A similar arrangement was in place for several years with respect to Alexandra as well. Last year, however, she and Mr. McBride had a falling out and she now lives on a full-time basis with Ms. Dies. The reasons for that falling out are not particularly relevant except that they are a combination, on the one hand, of Alexandra, who is now 15 years old, wanting to live a certain way while, on the other hand, Mr. McBride expects her to conform to his way of living. There was some dispute in the evidence as to whether what happened can best be described as Alexandra's rejection of Mr. McBride or Mr. McBride's withdrawal from the parental role. In my opinion, this dispute is about something more apparent than real. It is quite irrelevant, in fact, since no one questions the fact that Mr. McBride has been and continues to be a strong "father" figure in Alexandra's life.

[5] Mr. Watier, by contrast, has never played a role in Alexandra's life. Recently there has been some contact between them. He has never paid for her support nor has Ms. Dies ever claimed support from him.

[6] Ms. Dies has now applied to vary the child support terms of the Corollary Relief Order so as to bring them within the Guidelines. This should be fairly straightforward since the parties agree on the relevant income figures ($89,200.00 for Mr. McBride and $52,000.00 for Ms. Dies) and there is no dispute about the custody arrangements (shared custody of Shawna and sole custody of Alexandra by Ms. Dies). It is, however, anything but straightforward.

[7] Mr. McBride has filed an application seeking to add Mr. Watier as a party to these proceedings pursuant to Rule 58(3)(b) of the Supreme Court Rules. That Rule provides that the court may order that a person be added to an action where that person's presence before the court may be necessary so as to enable the court to adjudicate on and settle all questions involved in the action or to protect the rights or interests of any person having an interest in the action. Mr. McBride's motion is

premised on the argument that Mr. Watier, as Alexandra's natural father, has a legal duty to support her. Therefore the court cannot determine an appropriate support amount to be paid by Mr. McBride without also considering Mr. Watier's obligations. The Guidelines recognize this point because s.5 states that the amount of child support payable by a person who stands in the place of a parent (such as Mr. McBride in relation to Alexandra) is such amount as the court considers appropriate having regard to the Guidelines and to any other parent's legal duty to support the child.

[8] Section 5 of the Guidelines has been the subject of much discussion since it is one of the few aspects of the Guidelines where a discretion is preserved to deviate from the strict application of the Guideline table amounts. Much of that discussion has focussed on the practical problem of how to get the other parent before the court so as to be able to bring into consideration that parent's duty to support.

[9] This case is a good example of the legal and procedural conundrum often encountered in a section 5 application. The application to vary the Corollary Relief Order is made in the context of a divorce action under the federal *Divorce Act*. The parties to that action are the former spouses, Ms. Dies and Mr. McBride. Ms. Dies and Mr. Watier were never married. If she were to seek support directly from him, she would have to proceed under territorial legislation.

[10] Mr. Watier, for his part, appeared at the hearing before me. Quite commendably he stated that he is willing to pay child support (his annual income is $24,960.00). But, he is not prepared to replace Mr. McBride as the "father" to Alexandra and he feels that Mr. McBride should bear the bulk of any support obligation.

[11] Ms. Dies objects to including Mr. Watier in these proceedings. She does not want to start an action against him (even though, as has so often been noted, the right to support is a right of the child and the custodial parent should not simply ignore it). She says that adding Mr. Watier to these proceedings would result in undue delay and further expense. On the other hand, if Mr. Watier is added then she wants support from him. But how can one get support from a non-spouse in the context of a divorce action? In any event, Ms. Dies' counsel argued that even if Mr. Watier is added that would not necessarily, and should not, diminish Mr. McBride's obligation to pay the full amount of support required by the Guidelines in accordance with his income. There is nothing to say that Ms. Dies should not be able to receive support from both the natural father and the person who stands in the place of a father.

Change of Circumstances:

[12] Since this is a variation application, there is a threshold issue that must be addressed.

[13] Section 17(4) of the *Divorce Act* states that, before a court varies a child support order, the court must be satisfied that there has been a change of circumstances. Section 14 of the Guidelines sets out the factors that constitute a change of circumstances for the purposes of s.17(4) of the Act. Two of these are (i) any change in the condition, means, needs or other circumstances of either spouse or any child; and (ii) the coming into force of the Guidelines in the case of an order made before May 1, 1997.

[14] No one addressed this threshold issue at the hearing before me. Perhaps everyone simply assumed that because the Order in this case predated the Guidelines that was sufficient to trigger a variation. I may agree with that view but it is not one universally held (notwithstanding what appears to be the clear wording of s.14 of the Guidelines). I canvassed the opposing case law on this question in *MacLean* v. *Gerhardt*, 2000 CarswellNWT 53, at para.14.

[15] There is a controversy over whether a court has the discretion to refuse to harmonize a pre-Guidelines order with the Guidelines if one of the parents seeks to do so. Courts of appeal have expressed different views on this question. Several have held that a court maintains the discretion found in s.17 of the *Divorce Act* to vary or refuse to vary a support order: *Wang* v. *Wang* (1998), 39 R.F.L.(4th) 426 (B.C.C.A.); *Laird* v. *Laird* (2000), 182 DLR (4th) 357 (Alta.C.A.); *Lister* v. *Gould* (2000), 11 R.F.L.(5th) 167 (N.B.C.A.). Another court has rejected that position holding that the court has no discretion but must vary the previous order to comply with the Guidelines: *Dergousoff* v. *Dergousoff* (1999), 48 R.F.L.(4th) 1 (Sask.C.A.). The Ontario Court of Appeal first held that there was discretion to refuse to vary (*Sherman* v. *Sherman* (1999), 45 R.F.L.(4th) 424) but then later reversed itself and expressed the opinion that the earlier case had been wrongly decided (*Bates* v. *Bates* (2000), 5 R.F.L.(5th) 259). The court in *Bates* held that, if a party requests it, a court must bring a previous order within the Guidelines regime.

[16] So I will now state the obvious. While I may agree with the reasoning in *Dergousoff* and *Bates*, this is still very much an open question until the Court of Appeal of this jurisdiction pronounces on it. And, one should not assume what that decision will be since the Alberta Court of Appeal (a somewhat influential court for this jurisdiction) has already come down in favour of the view that favours maintaining a discretion. Counsel should therefore address this threshold issue in every such case.

[17] There is one case from this court, *Laraque* v. *Allooloo* (1999), 48 R.F.L.(4th) 381, in which my colleague Schuler J. made some comments regarding this issue (at para.6). She did not make a definitive decision on this point since she did not need to do so. I do not need to do so in the present case either.

[18] In this case, beside the fact that the current order predates the Guidelines, there has been a change in the condition and other circumstances of the parents and the children. One child alternates living between the two parents. The other child now lives exclusively with her mother. These arrangements are different from those existing either at the time of the Corollary Relief Order or even less than a year. Therefore, in my opinion, a change of circumstances has been established so as to meet the threshold test.

Support for Shawna:

[19] Shawna is the natural child of Ms. Dies and Mr. McBride. She spends half her time with her mother and half with her father. This engages s.9 of the Guidelines:

> 9. Where a spouse exercises a right of access to, or has physical custody of, a child 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
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[20] Counsel did not specifically address how to calculate the quantum. Ms. Dies' counsel suggested that the appropriate way to calculate support was simply to take

what Mr. McBride should pay according to the Guidelines tables for two children ($1,206.00) and deduct from that what Ms. Dies would pay for one child ($460.00). This results in a net child support obligation of $746.00 payable by Mr. McBride (for the two children).

[21] Offsetting the amounts payable by each parent is what is contemplated by s.9(a) of the Guidelines in cases of shared custody. It is in effect the application of a s.8 split custody formula. But s. 9 contains other factors that must be taken into account. There is also a discretion built into the section in recognition of the myriad of fact patterns that could arise. But, as noted in *Green* v. *Green*, [2000] 6 W.W.R. 130 (B.C.C.A.), it is incumbent on the parties to lead evidence as to the factors noted in subsections (b) and (c) above. Where there is no evidence, particularly evidence of any increased costs due to the shared custody arrangements, courts defer to the table amounts and apply an offsetting approach, particularly if the parents share the care of the child on a relatively equal basis: see *Middleton* v. *MacPherson* (1997), 29 R.F.L.(4th) 334 (Alta.Q.B.); *Soderberg* v. *Soderberg* (1999), 42 R.F.L.(4th) 403 (N.W.T.S.C.); and see *Slade* v. *Slade* (2001), 195 D.L.R.(4th) 108 (Nfld.C.A.).

[22] If Shawna were the only child under consideration, and since there is no evidence placed before me as to any increased costs of the shared custody arrangement or other circumstances, I would simply offset the respective table amounts for one child ($755.00 for Mr. McBride and $460.00 for Ms. Dies) and order support of $295.00 per month for her.

[23] Is it therefore appropriate to do, for sake of argument, what Ms. Dies' counsel suggested here? That is, take Mr. McBride's obligation for two children and deduct Ms. Dies' obligation for one child. I think not. The approach to calculating support for Shawna is discretionary and governed by s.9 of the Guidelines. The approach to calculating support for Alexandra is also discretionary but this one is governed by s.5 of the Guidelines. If, again for sake of argument, the situation with Alexandra was a simple one of sole custody of a natural child, there would be no discretion and the payor parent must pay the full table amount. So is it fair to apply the full table amount for two children and then apply a discretionary offset for one? This strikes me as a complicated question because of the very premises on which the Guidelines are based.

[24] One of the objectives of the Guidelines was to make the calculation of child support a more objective and easily calculable process so as to ensure consistent and

fair treatment of children. The table amounts in the Guidelines are based on studies of the average costs of raising children. Those amounts also recognize that expenditures on children vary with income. But among the premises underlying the Guidelines, based on economic research, is that, while spending on children increases as the number of children increases, the incremental costs associated with each additional child are lower as the family benefits from economies of scale: see MacDonald & Wilton, *Child Support Guidelines in Divorce Proceedings* (1997), at 21.

[25] The table amounts for two children ($1,205.00 in this case according to Mr. McBride's income) is calculated on the basis of both children being in the sole custody of one parent. That is not the case here. Yet it would not appear to be fair to simply take each child as an isolated unit. The table amount for one child ($755.00 in this case), if doubled, would be more than the table amount for two children. If one child were treated as being in sole custody (as with Alexandra for sake of argument) and one as being in shared custody (with an offset) the total amount would be $1,050.00 (significantly more than what is being claimed by Ms. Dies on this application).

[26] The problem here arises because the mixed custody arrangements call for the application of different formulas according to the Guidelines. This type of situation was addressed in *Wouters* v. *Wouters*, [2001] S.J. No. 232(Q.B.), where Wright J. reviewed a number of different approaches. In that case it was a family where one child was in the sole custody of one parent and two other children were in a shared custody arrangement. The one child in sole custody triggered the strict application of the Guidelines amount. Support for the other two children required the s.9 discretionary approach. Wright J. held that there must be a two-stage analysis (at paras.16-17):

> In my view, in situations where there is a hybrid of custody arrangements, a two-stage analysis should occur. The starting point is with respect to those children whose custody is not shared. They must be viewed independently as a separate and distinct entity from those children whose custody is shared since the discretion afforded by s.9 of the Guidelines does not extend to them. They are not part of the shared custody arrangement contemplated by s.9. It is s.3, which sets forth the presumptive rule, that is the operative section with respect to these children.

> It is only after the child support obligation arising pursuant to s.3 has been assessed that attention may be turned to the application of s.9 with respect to the support of the remaining children whose custody is shared. Here there is broad discretion, but only with respect to the support of those children who are the subject of the shared custody arrangement.

In the end result, Wright J. assessed support on the basis of the table amount for one child (the one in sole custody) and an offset of the respective table amounts for two children (the two in shared custody). This was more, as it turned out, than that being requested where (much like Ms. Dies' counsel did in this case) the table amount for three children was offset by the table amount for one child.

[27] I think there is much to commend the analysis by Wright J. in *Wouters*. The Guidelines, in an attempt to be definitive, set out separate provisions for specific types of custody arrangements. One cannot simply mix different arrangements into a melange and then apply one formula.

[28] In the case before me I have the advantage of at least saying that the approach under both s.9 and s.5 gives discretion to the court. So maybe I can put everything into some big pot and pull out a number that appears fair. Were it that easy. For one, I do not have detailed evidence as to financial circumstances, budgets, etc., all of which the Guidelines were meant to overcome. Even if it were available we run the risk of returning to a means-and-needs analysis with all of the attendant problems that were recognized in the pre-Guidelines era. For another, the two provisions, while being discretionary, require different factors to be taken into account. Hence I agree with Wright J. to the extent that separate and distinct analyses must be done.

[29] Therefore, with respect to Shawna, since she is in a shared custody arrangement, I will set child support at $295.00 per month.

Support for Alexandra:

[30] The issue of support for Alexandra requires consideration of two questions: (1) Should Mr. Watier be added as a party? And, (2) What is an appropriate amount of support payable by Mr. McBride?

[31] With respect to Mr. McBride's obligation to pay support for Alexandra generally, there is no dispute as to the governing law. Mr. McBride is a person who stands in the place of a parent. Thus he is liable to pay support. The Supreme Court of Canada, in *Chartier* v. *Chartier*, [1999] 1 S.C.R. 242 (S.C.C.), held that once that status is established it cannot be unilaterally changed by the adult nor do support obligations terminate upon a marriage breakdown.

[32] In the written brief filed by Mr. McBride's counsel, one of the items of relief sought was a termination of his support obligations for Alexandra. I think it is fair to say that this was not the position advanced at the hearing. Mr. McBride's counsel more or less conceded that he had an ongoing support obligation. The main argument advanced on behalf of Mr. McBride was that the amount of support he should pay should be reduced to reflect the changed relationship between him and Alexandra and to reflect the obligation of the biological father to support her. This was supplemented by a request that this court order Mr. Watier to contribute to Alexandra's support (either directly or by way of contribution to Mr. McBride).

1. Addition of Party:

[33] The application to add Mr. Watier as a party is based on the submission that he is a necessary party within the meaning of Rule 58(3)(b) of the Rules of Court. The use of the word "necessary" has been interpreted to mean that the issue in dispute cannot be effectively and completely resolved unless the new party is added: *Amoco Canada Petroleum Co.* v. *Alberta Southern Gas Co.* (1993), 10 Alta.L.R.(3d) 325 (Q.B.). The discretion to add a party has, however, been generously exercised so as to enable effective adjudication upon all matters in dispute without delay, inconvenience and expense: *Robson Bulldozing Ltd.* v. *Royal Bank of Canada* (1985), 62 B.C.L.R. 267 (S.C.).

[34] It would obviously be helpful to have Mr. Watier before the court. Section 5 of the Guidelines requires the court to consider any other parent's legal duty to pay support when determining the level of support payable by a person who stands in the place of a parent. It may have a bearing on that amount or it may not. But the court should not have to engage in guesswork or assumptions. The court is given a discretion, not a crystal ball.

[35] This point has been made in a number of cases. In *Janes* v. *Janes*, [1999] A.J. No.610 (Q.B.), Veit J. held that the court should not reduce the amount of support payable by a step-parent without knowing the biological parent's financial circumstances. She also held that it is up to the step-parent to bring the biological parent before the court and he can do that by using the rules of practice for joining parties. On why that should be done, Veit J. wrote, in answer to the question "is there an obligation to bring the biological parent before the court" (at paras.18-20):

> There is probably no single answer to this question. Although formulas have a surface attraction, formulas would prevent courts from assessing all of the factors that may affect a particular issue. The circumstances of multiple parenthood vary widely.
>
> For example, if a biological parent were voluntarily and regularly paying child support in an amount that was at least as much as that parent would currently be required to pay under the Guidelines, then it may not be necessary to bring that person before the court on a s.5 application by a subsequent step-parent. A court might then be justified in presuming that the existing level of additional support payments will continue.
>
> In this case, however, the court's obligation to Danielle's best interests requires that the biological father be brought before the court. Danielle's father has not been paying child support; this court's order did not require him to pay support once Danielle's mother married. For all the court knows, Danielle's father is dead or he could be physically or mentally incapacitated from financially supporting his daughter. The court should not reduce the amount of support that Danielle is potentially entitled to receive from her step-father on the basis that her biological father has an obligation to support her if, in fact, there were no prospect of support from that source.

[36] The benefits to be gained from joining all persons who may have support obligations was also noted by Professor J.G. McLeod in an annotation to *P.M.M.* v. *R.W.M.* (2001), 14 R.F.L. (5th) 351 (Alta.Q.B.). That case was a spousal support claim where the husband sought to add the person with whom the wife cohabited. The husband claimed that this other man also had an obligation to support the wife. The issue was decided on the rules relating to third party claims. Nash J. held that since a third party claim can only be issued so as to enforce a duty owed by the third party to the defendant, and since there was no such duty as between the two men, the claim could not stand. Professor McLeod noted that where there are multiple support obligations it would be preferable to address them all at once so that each person who may be liable to pay support will know how those obligations are to be apportioned. He wrote (at 352):

> A joinder request by a respondent/defendant in support proceedings invariably revolves around the allegation that another person also owes a support obligation to the applicant/plaintiff and the court should not determine the respondent's support obligation in isolation. It is better for everyone concerned if all interested persons are parties to a support proceeding, so that a court can determine who owes how much support to whom at one time. Each interested person is before the court and can assume responsibility for his or her case. A court does not have to make assumptions or draw inferences about the relationship between individuals or how one person's potential support obligation may affect another person's support obligation. More importantly, joining all potential payors to a support proceeding removes the possibility that one court may decide a husband's support obligation on the basis that a third person also has a duty to support the wife, and another court may decide later that the third person does not owe the wife support in support proceedings between them.

While these comments were made in the context of a spousal support action, I think they are equally applicable to a section 5 child support claim.

[37] The difficulty in most cases is how a joinder or addition of a party is to be done. There is no provision in the *Divorce Act* or the Guidelines for a payor to join others who may also have a support obligation. Some cases suggest using the rules of practice. The difficulty there is that ordinarily only the spouses are parties to a divorce action. Furthermore, pursuant to sections 15.1(1) and 17(1)(a) of the *Divorce Act*, only a "spouse" or a "former spouse" may apply for a determination of child support. This is because Parliament's power to legislate child support is ancillary to its power to legislate regarding divorce. Thus a court cannot make a final support order in the context of a divorce action unless the parties were once spouses: *Kalsi* v. *Kalsi* (1992), 41 R.F.L.(3d) 201 (Alta.C.A.). And, in most cases where this situation arises, the person who the payor spouse seeks to add was never a "spouse" as defined in the *Divorce Act*.

[38] Notwithstanding the obvious jurisdictional hurdle, many cases commonly refer to the ability to seek contribution. In both *Chartier* (*supra*) and *Theriault* v. *Theriault* (1994), 113 DLR (4th) 57 (Alta.C.A.), references were made to the ability of a payor to seek contribution. No one seems to have addressed how this is to be done however.

[39] The problem with a contribution claim (usually by way of third party notice) was outlined in the *P.M.M.* case noted above. It was also explained in *Stere* v. *Stere*

(1980), 116 D.L.R. (3d) 703 (Ont.H.C.J.). In that divorce case, the respondent spouse sought to issue a third party notice against the father of the child for whom support was sought. The third party claim was struck, not because the father did not have the obligation to pay support, but because there was no right to indemnity, contribution or other relief over as between the respondent spouse and the father.

[40] It also seems to me that merely invoking a right of contribution misses the point. As I understand it, and as explained in *P.M.M.* and *Stere*, contribution would not put more money into the hands of the custodial parent; it would simply compensate or reimburse the payor for his support payments. So contribution as between payors does not really assist the child. If, however, the biological parent were also before the court two things could happen. One, an order could be made requiring him to pay support directly. And, two, all the relevant circumstances would be known so as to determine the appropriate support payable by the step-parent. As also noted in *Chartier* and *Theriault*, there is nothing to prevent support being paid by both a biological parent and a step-parent.

[41] It would certainly not be in the best interests of a child to simply ignore the legal duty of a parent to pay support. It would also be potentially prejudicial to the payor since, as several cases have held, if no child support obligation by the natural parent has been established then the step-parent will be required to pay the full Guidelines amount. The rationale is that it would be contrary to the interests of the child to reduce the child support obligations of one without a legal obligation to pay support having been established for the other: see *Janes* (*supra*); *Clarke* v. *Clarke*, [1998] B.C.J. No. 2370 (S.C.).

[42] So, in my opinion, it would be just and convenient to add Mr. Watier as a party. Only then can this court equitably apportion the liability of he, as the natural parent, and Mr. McBride, as the step-parent, for the support of Alexandra and thus make a binding order in her favour against both.

[43] What jurisprudence there is on this question goes both ways. With respect to divorce proceedings, numerous cases have held that one cannot add someone in Mr. Watier's position. These cases are premised on the definitions in the *Divorce Act* which reflect an intent to confine corollary relief and variation proceedings to the two former "spouses": *Pierce* v. *Pierce*, [1994] B.C.J. No. 2375 (S.C.); *Singh* v. *Singh*, [1997] B.C.J. No. 1550 (S.C.); *Robinson* v. *Domin* (1998), 39 R.F.L. (4th) 92

(B.C.S.C.); *Nelson* v. *Nelson*, [1999] A.J. No. 242 (Q.B.). As some judges in these cases have said, the failure to provide, either under the Act or the Guidelines, for the joinder of others who may have a duty to provide child support may be a legislative oversight in the legislation or it may be deliberate federal policy.

[44] Numerous other cases have held that a natural father can be added as a party defendant so as to enable the court to apportion support and make binding orders: *Pye* v. *Pye*, [1995] B.C.J. No. 1315 (S.C.); *Clarke* (*supra*); *Janes* (*supra*); *Kolada* v. *Kolada*, [1999] A.J. No. 376 (Q.B.); *Foster* v. *Foster*, [2000] B.C.J. No. 1848 (S.C.); *Coulstring* v. *Lacroix*, [2001] O.J. No. 1826 (S.C.J.). All of these cases resorted to rules of procedure to add the party.

[45] The key difference between the two sets of decisions is that in those where the party was added there was usually the facility to join claims under provincial legislation with a divorce. In many provincial and territorial statutes there are broader procedural avanues for bringing an outsider into the action.

[46] In the Northwest Territories, one may bring a child support action under the *Children's Law Act* (proclaimed in force in 1997). That action may be brought whether or not the parents were legally married. The definition of "parent" includes a person who stands in the place of a parent: s.57. The Act provides that "a parent" has an obligation to provide support for his or her child: s.58. So, in this case, each of Ms. Dies, Mr. Watier, and Mr. McBride have an obligation to provide support for Alexandra. Any parent may bring a support application and a respondent may add anyone else who may have a support obligation. These two significant provisions are found in s.59 of the Act:

> 59(1) A court may, on application, order a parent to provide support for his or her child and determine the amount and duration of such support.
>
> (2) An application for an order under subsection (1) may be made by
>
> (a) another parent or a person who has lawful custody of the child or with whom the child lives;
>
> . . .

> (5) In an application under this section the respondent may add as a third party another person who may have an obligation to provide support for the child.

Also, the Child Support Guidelines enacted under this Act has a section (s.7) that duplicates s.5 of the *Federal Child Support Guidelines*.

[47] The provision found in s.59(5) above, providing for others to be added to the action, is not unusual. It is apparently found in several other jurisdictions. That, and rules of practice, have been relied on by the courts in many cases under provincial legislation to add parties who also may have a support obligation: *Pickup* v. *Pickup* (1985), 47 R.F.L. (2d) 188 (Man.Q.B.); *Baddeley* v. *Baddeley* (1989), 71 O.R. (2d) 318 (H.C.J.); *Kasper* v. *Mundy*, [1993] B.C.J. No. 1314 (S.C.); *Bell* v. *Mellows*, [1994] O.J. No. 1316 (Prov.Ct.); *Johnson* v. *Johnson*, [1998] O.J. No. 1120 (S.C.); *Mansfield* v. *Mansfield*, [1999] B.C.J. No. 3049 (S.C.). In these circumstances, any discussion of a party being "necessary" is irrelevant since they can be added as of right.

[48] The other notable factor is that claims or causes of action may be joined with a divorce proceeding pursuant to Rule 5(1) of the *Northwest Territories Divorce Rules*. This feature is also found in several other jurisdictions. Rule 5(1) lists four specific statutes for purposes of joinder. Among them is the *Domestic Relations Act*. That Act was repealed by the *Children's Law Act*. It seems to me that, since both the repealed and new statutes dealt with child support claims (among other things), and if I read the repeal and replacement provisions of s.36 of the *Interpretation Act* (N.W.T.) correctly, a claim under the *Children's Law Act* can still be joined with a divorce action.

[49] It would have been open for Mr. McBride to join a child support claim under the territorial legislation to the divorce proceeding and then add the natural father as a party respondent. He need not have claimed support payable to him but merely a determination of what child support was payable and by whom. Adding a new respondent to the divorce action would require leave (see Rule 6(2) of the Divorce Rules) or Mr. McBride could have simply started a separate action, naming Mr. Watier and Ms. Dies as the respondents, and then applied to have it tried at the same time as the divorce action. This is the method recommended by Professor McLeod in another annotation (*Primeau* v. *Primeau* (1986), 2 R.F.L. (3d) 114) as a way of forcing the court to deal with the various support obligations at the same time. He also doubted

that there would be a paramountcy problem since the actions would be directed at different payors.

[50] Could Mr. McBride commence a support action now under the *Children's Law Act* and join that with these proceedings? In my opinion he could. Section 17(1) of the *Divorce Act* says that a court may make an order varying a support order, on application by either former spouse, either prospectively or retroactively. Section 17(3) says that the court may include in a variation order any provision that could have been included in the order in respect of which variation is sought. Therefore the scope of relief available on a variation application is not limited by the original pleadings. Mr. McBride could commence an action now and seek to join it to, or have it tried at the same time as, Ms. Dies' variation application under the *Divorce Act*.

[51] So now we come to the real question arising from all this discussion. Should Mr. McBride commence a separate action now? Or, can this court take it upon itself to in effect do what might have been done if an action had actually been commenced?

[52] In this case, Mr. Watier is before the court voluntarily. He made submissions through counsel. Evidence was presented as to his income. What, I ask myself, would be the point of having a whole new proceeding started? That would certainly be more expensive and inconvenient for everyone concerned (including Ms. Dies). I remind myself that the object of our rules of procedure in civil matters is to secure the just, speedy and inexpensive determination of every proceeding (see Rule 3). I also remind myself of the proviso in Rule 58(1) of the Rules of Court that the court may "in every cause and matter deal with the matter in controversy so far as the rights and interests of the parties actually before it are affected". Finally, I remind myself that the welfare and support of a child are the concerns in this matter. In such a case, it "would be inappropriate for the court to put one of the parties to the trouble and expense of originating proceedings": as per Burnyeat J. in *Guiotto* v. *Guiotto*, [2001] B.C.J. No.1032 (S.C.).

[53] Accordingly, I will not require the parties to go through all the trouble of a separate proceeding. I will treat Mr. McBride's application to add Mr. Watier as a party as if he had applied for an order determining support under the *Children's Law Act*. I will therefore issue one order under that Act addressing Mr. Watier's support obligations. I will issue a separate order under the *Divorce Act* with respect to Ms. Dies' variation application and Mr. McBride's support obligations.

2. Calculation of Support:

[54] With respect to the support that should be paid by Mr. Watier, the assessment is fairly straightforward. He is the natural father. He has had, now has, and will continue to have, an obligation to support his child. The fact that he has had no involvement in his child's life, and very little contact until recently, makes no difference. The Supreme Court of Canada, in *Chartier* (*supra*), made clear that parents who have no contact with their children still have support obligations (at para.45):

> Even if a relationship has broken down after a separation or divorce, the obligation of a person who stands in the place of a parent to support a child remains the same. Natural parents, even if they lose contact with their children, must continue to pay child support.

[55] The fact that Ms. Dies married and that Mr. McBride stands in the place of a parent to Alexandra does not change Mr. Watier's obligations. The discretion afforded by s.7 of the territorial Guidelines (and s.5 of the federal Guidelines) applies only to the support payable by Mr. McBride. In the case of a natural parent the presumptive rule is that the Guidelines amount is what must be paid. There is no discretion in the absence of specified exceptions in the Guidelines (none of which apply here). So even where there is a person who stands in the place of a parent, and liable to pay support, that does not reduce the Guidelines amount that the natural parent is required to pay: see *Stoddard* v. *Atwood*, 2001 CarswellNS 147 (C.A.).

[56] Mr. Watier's annual income is $24,960.00. The Guidelines support amount, based on that income for one child, is $230.00 per month. I therefore order, pursuant to the *Children's Law Act*, that Mr. Watier pay child support for Alexandra of $230.00 per month, commencing the first day of August 2001, and continuing on the first day of each month thereafter so long as she remains a "child" within the meaning of s.57 of that Act.

[57] With respect to Mr. McBride's ongoing obligation, that is to be determined solely by reference to s.5 of the federal Guidelines:

> 5. Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the

> court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

[58] Having regard to the Guidelines, the table amounts that Mr. McBride would have to pay, based on his income, are $755.00 for one child and $1,205 for two children (I have already discussed the problem created by the mix of custody arrangements presented by this case).

[59] Section 5 refers to such amount as the court considers "appropriate". In *Francis* v. *Baker*, [1999] 3 S.C.R. 250, it was held that the word "inappropriate" (as used in s.4 of the Guidelines) means "unsuitable", not "inadequate". Thus it seems to me that the word "appropriate" in s.5 must mean "suitable", and what is "suitable" in this case must be considered in the context of the mixed custody arrangements for the two children as well as the fact that now an enforceable support obligation has been imposed on another person. This last fact is pertinent since, as I noted previously, many cases have held that where there is no determined enforceable support order against the natural parent then the appropriate, and indeed necessary, amount to be paid by the step-parent is the full table amount.

[60] Section 5 confers a broad discretion on a court in setting child support payable by a step-parent. Unfortunately the courts have not adopted a consistent approach on how to exercise that discretion. Much of the divergence of opinion centres on the question of whether the nature of the ongoing relationship between the child and the step-parent is a relevant consideration in setting the amount of support. This stems from the holding in *Chartier* that once the parent/child relationship has been established it creates an ongoing support obligation. The *Chartier* judgment, however, was considering the "liability" issue; it did not concern itself specifically with "quantum" issues. Hence the lack of consistency in the lower courts in attempting to actually quantify a step-parent's support obligation.

[61] One approach is illustrated by *MacArthur* v. *Demers* (1998), 116 D.L.R. (4th) 172 (Ont.S.C.J.), where Aston J. held that the quality of the relationship between a parent and the child is irrelevant. He wrote (at 182-183):

> Should courts exercise a broad, unstructured discretion in determining what is "appropriate" (i.e. fair) in circumstances in which three or more parents have an obligation to support a child? The factual circumstances presented to the courts will be wide-ranging but, in exercising its discretion,

courts will have to reflect the objectives of the Federal Child Support Guidelines which include consistency of applicable principles, objectivity and certainty.

Section 5 of the Guidelines only applies if the respondent is not the child's biological parent. The following step-by-step approach offers one way of structuring the exercise of judicial discretion under section 5:

1. Determine the guideline amount payable by the respondent. This will involve consideration of the table amount, any section 7 add-ons and any undue hardship adjustment.

2. Determine the "legal duty" of any other non-custodial parent to contribute to the support of the child. As noted above, this will be established by a pre-existing order or agreement or by a guideline calculation. The words in section 5 "any other parents" legal duty to support the child would include the custodial parent, but the guideline scheme assumes the custodial parent meets this duty by sharing his or her household standard of living with the child.

3. In considering whether it is "appropriate" to reduce the respondent's obligation under the Guidelines, once the non-custodial parent establishes that another non-custodial parent (or parents) has (have) a legal duty to support the child, the onus ought to shift to the custodial parent to demonstrate why the respondents obligation should not be reduced by that of other non-custodial parent(s).

The custodial parent might satisfy that onus, in whole or in part, by demonstrating that (a) the "legal duty" of the other non-custodial parent(s) is (are) unenforceable, or (b) such a reduction is inconsistent with the stated objective sin section 1 of the Guidelines.

There is no evidence before me to establish whether or not Mr. Broderick's child support obligation is enforceable. It should be assumed to be enforceable.

The first stated objective of the Federal Child Support Guidelines is "to establish a fair standard of support for children that ensures they continue to benefit from the financial means of both spouses after separation". The words "fair standard of support" open the door to evidence of the standard of living that ought to be afforded the child and budgets of "reasonable needs", as well as the income of the custodial parent. In short, the custodial parent could attempt to demonstrate an inability to maintain an appropriate standard of living for the child if the respondent's obligation under the Guidelines were to be reduced.

The other three stated objectives in section 1 of the Federal Child Support Guidelines favour a formulaic approach to child support that discourages evidentiary disputes over the cost of raising a child . . .

> I can find nothing in the stated objectives of the Federal Child Support Guidelines that would make the relationship between a parent and child a relevant consideration. On the contrary, if courts attempt to apportion child support responsibilities between non-custodial parents based upon the extent and nature of each parent's involvement with the child, that will encourage litigation and frustrate the objectives stated in section 1(b) and (c) of the Guidelines.

[62] Another approach is to look at the relationship of each parent to the child, and the degree of involvement by each of them in the child's life, so as to determine what is the appropriate amount payable by the step-parent. This approach was described in *Halliday* v. *Halliday* (1998), 164 Sask.R. 12 (Q.B.), at 15:

> Payne, J.D., Child Support Under the Federal Child Support Guidelines, 2nd Ed. September 1997, Quicklaw DB PDCS/1997 103, Part 9 sets out some of the considerations the court should address in making the determination whether a person stands in the place of a parent. They are the age of the child, the duration of the relationship, whether the person is a psychological parent, the provision of financial support, whether the application is for interim or final support, and whether there has been any intention to terminate the relationship. He then states:
>
> > In determining the respective support obligation as between natural or adoptive parents and a spouse who stands in the place of a parent, the court has an overriding discretion to determine what is the proper apportionment to be made of the obligation to support the child. Having regard to the degree of involvement of each of them in the life of the child, the court may conclude it is proper to impose a greater financial obligation on the spouse or former spouse than on the natural parent.

The court in *Halliday* also referred to the decision in *Morrison-Pelletier* v. *Pelletier* (1997), 143 DLR (4th) 766 (Ont.C.A.), a pre-Guidelines case, where the biological father had no involvement with the child and the stepfather had stood in the place of the father. The court found it appropriate to order the stepfather to pay 85% of what otherwise would have been the appropriate total support order.

[63] The relevance of the relationship between the step-parent and the child was also recognized in *Aamodt* v. *Aamodt*, [2000] B.C.J. No.1912 (S.C.), at para.41:

> In my view that section recognizes that, in considering the obligation of a person standing in place of a parent, a court may consider not only the obligations of another parent but also other circumstances as well. In Singh v. Singh, [1997] B.C.J. No.2195 (B.C.S.C.) at para.17, Master Powers (as he then was) described section 5 as follows:

> This does not mean that the court simply looks at the guideline amounts for the person who stands in the place of a parent and subtracts from that amount the obligation of the natural parent. In determining what is an appropriate amount the court should consider the guideline amount and also consider the condition, means, needs and circumstances of the parties and of the children. The court may also consider the relationship between the person who stands in the place of a parent and the children including the length of that relationship, whether it continues and the extent to which the children have come to rely on that person for support.

> While this statement was made before Chartier, I understand Chartier to confirm that the support obligation of a person standing in place of a parent is that required by the Divorce Act. That obligation is set out in section 5 of the Guidelines and is not necessarily the support obligation that would be required to be met by a natural parent.

See also *White* v. *Rushton*, [1998] B.C.J. No. 422 (S.C.).

[64] In my opinion, the nature of the ongoing relationship is a relevant factor when determining the quantum of support under s.5 of the Guidelines. It may not be a decisive factor (and usually it would not be) but it is a material factor to consider where, as here, there may be an estrangement between the child and the step-parent or where, after several years, the child may no longer wish to continue a relationship with someone who once was a step-parent in her life. This was recognized in *Dutrisac* v. *Ulm*, [2000] B.C.J. No.1078 (C.A.), where Esson J.A. wrote (at para.22) in reference to the *Chartier* judgment:

> In holding that a person who stands in the place of a parent cannot unilaterally terminate that status, the Supreme Court said nothing about the power of a court, under either the Divorce Act or provincial legislation, to grant a reduction of the amount of child support required to be paid by a stepparent. In my view, nothing in Chartier would preclude an order reducing the quantum of the obligation to zero if, in all the circumstances, that was found to be appropriate.

[65] The court in *Dutrisac* was simply recognizing a concern articulated in an earlier case, *Beatty* v. *Beatty* (1997), 33 B.C.L.R.(3d) 247 (C.A.), regarding the ongoing nature of a step-parent's obligations:

> The question of the extent to which someone who is not a parent either by blood or adoption should continue to be held responsible, perhaps for years, for children who may have no interest in him or her at all and whose natural parent may have acquired a new spouse, is a troubling one

> which appears to be arising more frequently and is deserving of more than cursory attention. It is not a question to be answered by the "blunt instrument" approach.

To date there has been no definitive answer to this question.

[66] In the present case, Ms. Dies' counsel argued that, even if some support obligation is imposed on Mr. Watier, Mr. McBride should still be required to pay the full amount required by the Guidelines. In part this submission is supported by the references in *Chartier* and *Theriault* to the obligations of parents to support a child being joint and several. Indeed, in *Chartier* (at para.42), there is the statement that the obligations of parents and step-parents should be assessed independently. Since they are independent obligations, and since the Guidelines do not create a hierarchy of obligations as between natural parents and stepparents, there is nothing to prevent the full amount of Guidelines support being paid by both Mr. Watier and Mr. McBride.

[67] I agree in principle that the full amount of support can be payable by both a natural parent and a step-parent. But I think that to justify such a result as appropriate there should be evidence as to needs and circumstances of the child so that such a total amount can be determined to be suitable. The presumptive rule that the Guidelines figures apply underpins the rationale of the entire Guidelines approach but, in the absence of evidence, it would be an abdication of discretion to simply order the full amount to be paid by both payors. The child is entitled to the benefit of the standard of living that would have been enjoyed if the marriage had not broken up, not the standard of living that might have been if a third person's income had been added to the family.

[68] There is nevertheless much in favour of imposing the full Guidelines amount as Mr. McBride's support obligation. Of all the people who are "parents" to Alexandra, he has the greatest means available to pay support. He is, for all practical purposes, the only "father" Alexandra has known. Also, Mr. McBride's support obligation is not potentially an extremely long one. Alexandra is now 15 and so in a few years he may no longer be liable for support (depending of course on what Alexandra does once she graduates from high school).

[69] On the other hand, there is a new dynamic to Mr. McBride's relationship with Alexandra (as there is to the relationship between Mr. Watier and Alexandra). One relationship has diminished in involvement while the other has increased, albeit only

slightly. The reasons for these changes are not as important as the fact that this is the present situation. Mr. McBride now plays a far lesser role in Alexandra's life.

[70] Ms. Dies' counsel provided a child support calculation as follows:

(a)	Guideline amount payable by Mr. McBride for two children:	$1,206.00
(b)	Less Guideline amount payable by Ms. Dies for one child:	460.00
(c)	Total child support payable:	$ 746.00

[71] I already went through what I considered to be the proper approach; that being an independent assessment for the support of Shawna since that is a shared custody arrangement to be assessed under s.9 of the Guidelines. If I were to do an independent assessment for Alexandra's support under s.5, logic would suggest that I again use the table amount for one child as per Mr. McBride's income, that being $755.00. But the potential problem here, also as I discussed above, is that the full Guideline amount for two children in sole custody is only $1,205.00 (not $755.00 x 2). So I think in fairness some different approach should be used, one that would be fair to Alexandra and to Mr. McBride. For want of any readily available alternative, I have decided to employ the following formula:

(a)	Guideline amount payable by Mr. McBride for two children:	$1,206.00
(b)	Divided by two:	603.00
(c)	Less amount payable by Mr. Watier:	230.00
(d)	Amount payable by Mr. McBride for Alexandra:	$ 373.00
(e)	Plus amount payable for Shawna:	295.00
(f)	Total support payable by Mr. McBride for the two children:	$ 668.00
(g)	Plus amount payable by Mr. Watier for Alexandra:	230.00
(h)	Total child support receivable by Ms. Dies:	$ 898.00

[72] As can be seen, the total amount that Ms. Dies will receive under this formula for the two children is $898.00, an amount that is more than what she was seeking on this variation (taking into account that she was not advancing her own claim against Mr. Watier). Also, the total amount payable by Mr. McBride for the two children ($668.00) is less than what was being claimed by Ms. Dies but more than what he was

paying under the Corollary Relief Order. Finally, Mr. Watier will now also be fulfilling his moral and legal obligation to support Alexandra.

[73] In my opinion, these amounts are appropriate and fair for all parties.

Conclusions:

[74] The Corollary Relief Order is hereby varied with respect to child support. The support payable by Mr. McBride will be $295.00 per month for Shawna and $373.00 per month for Alexandra.

[75] Ms. Dies also seeks an order that the variation should be retroactive to the commencement of these proceedings in January of this year. This request can be approached from two perspectives.

[76] On the one hand, it has become almost the norm to make a variation order retroactive to the date of the initial application: *Ennis* v. *Ennis*, [2000] A.J. No.75 (C.A.), at paras. 29-30. The reason for that is that until the payor receives notice of the intention to request an increase the payor should be entitled to rely on the current support order. Once the payor is served with a variation application, however, the payor knows that the payee intends to seek an increase. Thereafter, there is no unfairness to the payor in making the order retroactive.

[77] On the other hand, there is the view that a payor should not be required to pay support retroactively for a period during which the amount was fixed by an order or agreement: *Hauf* v. *Hauf* (1994), 95 Man.R.(2d) 83 (C.A.). The exceptions would be cases where the payor was at fault either by failing to recognize his obvious obligation or by trying to avoid it. There is no evidence of that in these proceedings as apparently Mr. McBride has been meeting his obligations under the Corollary Relief Order.

[78] While generally I endorse the first approach, as reflected in *Ennis*, there is a difference here. Where the amount sought is one that is readily ascertainable by direct application of the Guidelines it seems to me that there is no reason why the payor should not pay what is required from the date when that requirement came into existence (as reflected by the application to vary). But, here, the amount of child support payable by Mr. McBride is not readily ascertainable or definite for either

Shawna or Alexandra. Both require an analysis beyond merely looking at income figures. Both require the application of discretionary factors (pursuant to s.9 of the Guidelines for Shawna and pursuant to s.5 for Alexandra). While educated guesses could be made as to the outcomes, neither one could be said to have that quality of certainty that is one of the objectives of the Guidelines. For this reason I decline to make the variation retroactive to the extent sought by the petitioner.

[79] Mr. McBride's new support obligations will take effect commencing August 1, 2001, and will continue thereafter with respect to each child for so long as the particular child remains a "child" within the meaning of the *Divorce Act.*

[80] With respect to Mr. Watier, I have already outlined the terms of my order. His support payments are also to start August 1, 2001. I suggest counsel prepare and file a separate order to reflect this obligation; one that is made outside of the *Divorce Act* but within the purview of the *Children's Law Act*. Obviously, there should be a distinct order to reflect the variation of the Corollary Relief Order.

[81] Ms. Dies' counsel asked that she be able to speak to costs at a later date. If counsel cannot agree on the question of costs, then they may seek a special date from the clerk for an appearance before me in chambers. I assume that any issue as to costs will be between Ms. Dies and Mr. McBride so it may be that Mr. Watier will not need to appear on that argument.

[82] Finally, I want to simply say that my aim in this exercise, and the point of this all-too-lengthy dissertation on some of the more esoteric points of support law, is to avoid the type of lengthy and expensive proceedings that often occur on these questions,

proceedings that in the end often do not result in very much of a difference. Where the interests of children are concerned, I think one should prefer substance over form.

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

Dated at Yellowknife, NT,
this 2nd day of August 2001

Counsel for the Petitioner: Elaine Keenan-Bengts
Counsel for the Respondent: Sheila M. MacPherson
Counsel for the Third Party: Colin C.W. Chew

6101-02404

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN:

CHERYL GAY McBRIDE

Petitioner

- and -

RANDOLPH WALTER McBRIDE

Respondent

- and -

ANTHONY GEORGE WATIER

Third Party

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
