

*Bosgra v. Squires*, 2001 NWTSC 58

Date: 2001 07 31  
Docket: CV 07765

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOANN M. BOSGRA

Applicant

- and -

FRED L. SQUIRES

Respondent

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Confirmation hearing pursuant to s.19 of the *Divorce Act* following the issue of a Provisional Order by the Court of Queen's Bench of Alberta. Provisional Order confirmed, with variation.

Heard at Yellowknife, NT: July 17, 2001

Reasons filed: July 31, 2001

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Respondent: BettyLou McIlmoyle

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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- and -

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REASONS FOR JUDGMENT

[1] The parties to this litigation were divorced by Order of this Court in 1992. The Applicant mother was granted custody of Dylan, then two years old. In a Corollary Relief Order issued at the time of the divorce, the Respondent father was ordered to pay to the Applicant child support for Dylan in the amount of \$300.00 per month. Dylan now lives in Alberta with his mother (the Applicant) and her new husband.

[2] The *Federal Child Support Guidelines* came into force in 1997.

[3] In March 1998 the Applicant mother went to the Alberta Court seeking an increase in the child support payments in accordance with the *Federal Child Support Guidelines*. The Alberta Court granted a Provisional Order, pursuant to s.18 of the *Divorce Act*. In that Provisional Order the Court:

- a) determined that the Respondent father had a guideline income of \$70,000.00, and that the Applicant mother had a guideline income of \$7,300.00;
- b) ordered the Respondent to pay basic child support of \$606.00 per month, commencing March 1, 1998;

- c) ordered the Respondent to pay an additional amount (\$227.50 per month) of child support as his share of s.7 special and extraordinary expenses, commencing March 1, 1998.

[4] The Provisional Order, by law, has no legal effect until it is confirmed in a proceeding in this Court.

[5] The Provisional Order and supporting documentation were transmitted to this Court, through the appropriate government officials in Alberta and Northwest Territories in May 1998. The confirmation hearing in this Court was scheduled for July 24, 1998, and notice was given to the Respondent who continues to reside in this jurisdiction.

[6] For reasons and circumstances described by my colleague Justice Vertes in his Memorandum issued March 5, 2001, there was no real progress in the holding of the confirmation hearing in this Court until February 2001.

[7] Pursuant to s.18(5) of the *Divorce Act*, Justice Vertes remitted the matter back to the Alberta Court for further evidence from the Applicant, specifically:

- a) the Applicant's current financial statement;
- b) all the information necessary to effectively make a comparison of household standards of living, as per the test set out in Schedule II of the *Federal Child Support Guidelines*;
- c) a detailed breakdown of child care, extracurricular and any other special expenses claimed as per s.7 of the Guidelines.

[8] Justice Vertes also ordered the Respondent father to file with this Court further and better particulars of his financial circumstances, and to do so no later than April 20, 2001.

[9] In the interim, i.e., pending this Court's adjudication on the confirmation hearing or further Order of the Court, Justice Vertes ordered the Respondent to pay child support in the amount of \$447.35 per month, commencing February 1, 2001.

[10] Both parties have been slow to comply with Justice Vertes' Order (and have not yet fully complied, as will be discussed later in these Reasons); however, the confirmation hearing took place before me on July 17, 2001.

[11] In addition to the original documentation enclosed with the Provisional Order received from the Alberta Court (i.e., the evidence put forward on behalf of the Applicant at the March 1998 hearing in Alberta) this Court has now received the following evidence of the Applicant from the Alberta Court:

- a) the Applicant's affidavit sworn May 3, 2001,
- b) the Applicant's affidavit sworn May 30, 2001,
- c) the Applicant's affidavit sworn June 15, 2001.

[12] For the Respondent's part he filed an affidavit containing sparse information on February 8, 2001. In this affidavit he states, *inter alia*, "I have remarried and have five other children which I am now supporting." On February 21, 2001 he filed a sworn Financial Statement showing "the particulars of my income and expenses". This document indicates a monthly income of \$3,052.56 (primarily workers' compensation benefits of \$2,607.50), monthly expenses of \$3,841.16, mortgage and other debts, and a monthly deficit of \$1,004.00. These two documents were before Justice Vertes on February 23, 2001, and, as mentioned above, Justice Vertes ordered further and better particulars of the Respondent's financial circumstances, to be filed no later than April 20, 2001.

[13] On April 19, 2001 the Respondent filed an affidavit, consisting essentially of his attached income tax returns (unsigned) for 1998, 1999 and 2000. In the final paragraph, the Respondent states "This affidavit is made to comply with the Order of Justice J.Z. Vertes."

[14] When this matter was called in Chambers on May 14, 2001, Justice Vertes' order had not yet been complied with so the matter was adjourned to June 1, 2001. On June 1, 2001, the Chambers judge had before her the affidavit of the Applicant sworn May 31, 2001. In that affidavit the Applicant states, *inter alia*, "I will not be providing my husband's Financial Statement until the Respondent provides his wife's." The Chambers judge, in further adjourning the matter, ordered:

...

2. The Respondent shall file his spouse's financial information in affidavit form by June 6, 2001.

...

5. The Applicant shall file a further affidavit providing her spouse's financial information to assess an undue hardship application by June 22, 2001.

[15] On June 4, 2001 the Respondent filed an affidavit, consisting essentially of the attached income tax returns (unsigned) of his wife Kelly Hansen for 1998, 1999 and 2000. In that affidavit he states:

5. That my wife, in 1990, was granted sole custody with no support ordered for the oldest two children in our family. I have been "dad" to these kids since Michael was two years old and Zachery was one year old. The applicant's allegations that we have lots of money and assets is incorrect. We are struggling financially."

and also:

6. This affidavit is made to comply with the Order of Justice V.A. Schuler made on June 1, 2001...

[16] And, finally, the Applicant's most recent affidavit in this prolonged proceeding, sworn on June 15, 2001, contains, *inter alia*, the following statements:

...

2. ...Maintenance Enforcement says that this Order [referring to the order of Justice Vertes] is not a proper Order, and will not explain to me why. . .

...

4. My spouse refuses to provide his financial information. He has been supporting Dylan since the age of 2. It is my opinion that the Respondent should be happy that someone is providing Dylan with everything that he requires for his extracurricular activities as \$300.00 doesn't even come close to being sufficient on his activities, never mind the essentials such as food, clothing, school, etc.

...

7. I have decided that I no longer wish to pursue any part of this as it seems to be a huge waste of time, money and energy and the Judge has already awarded me \$447.35 which I am not receiving anyway. If a Judge granting me an Order is not sufficient, what good is yet another going to do to help me with Dylan's expenses. Further, we are having a hard enough time keeping up with the cost

of Dylan's expenses without having to worry about paying another huge lawyer bill and getting no further ahead.

[17] Given the history of this tortured proceeding to date, one can readily understand the Applicant's frustration.

[18] At this point I wish to deal briefly with one obvious aspect of that frustration — the Maintenance Enforcement records. The Respondent attaches to his June 4 affidavit a computer printout from the Northwest Territories Maintenance Enforcement Program. The Applicant attaches to her June 15 affidavit a computer printout from the Alberta Maintenance Enforcement Program. The two accounting statements are, not surprisingly, starkly different. (Two different accounting systems by two government agencies for the same child support obligation — is it any wonder that the parties become frustrated?) Both of these financial reports are in error, at least inasmuch as each report shows child support obligations accruing since February 1, 2001 at \$300.00 per month instead of the \$447.35 ordered by Justice Vertes. That Order, made by Justice Vertes pursuant to s.19(9) of the *Divorce Act*, has legal effect throughout Canada, pursuant to s.20(2) of the *Divorce Act*. I direct the Clerk of the Court to send a copy of these Reasons to the offices of the Maintenance Enforcement in both Yellowknife and Edmonton.

[19] I turn now to the precise matter before the Court, i.e., whether to confirm the Provisional Order, with or without variation, or to refuse confirmation.

[20] Respondent's counsel on the confirmation hearing urges the Court to refuse confirmation and, alternatively, seeks a reduction of the child support amount on the basis of an undue hardship application under s.10 of the Guidelines. Also, the Respondent contests the validity of the special and extraordinary expenses under s.7.

[21] It is an understatement to say that the evidence before the Court is unsatisfactory.

[22] The *Divorce Act* makes provision for a s.19 confirmation hearing primarily to allow the Respondent to put his evidence before the Court. Yet I find that this Respondent has not made full or frank disclosure of his financial circumstances.

[23] At the time of obtaining the Provisional Order in Alberta, the Applicant alleged that the Respondent was deriving income from two or more bars which he owned and operated in Yellowknife. In his sworn affidavit placed before this Court on February

8, 2001, the Respondent states, "I do not own or operate any businesses." Yet a review of the copies of tax returns which he filed with his affidavits of April 19 and June 4 discloses that he and his wife were joint owners of businesses in Yellowknife in 1998, 1999 and 2000 earning gross revenues upwards of \$500,000.00 annually. And his wife was operating yet another related business itself earning hundreds of thousands of dollars in gross revenues. His explanation for this discrepancy? — "I did not think I was named as part-owner of my wife's business until we had our income tax completed and that's when it was brought to my attention that I was registered as 50% owner." (para.2 of June 4 affidavit)

[24] This is an example of the concern I have with attaching any credibility to the Respondent's affidavit evidence.

[25] Of course one of the difficulties of the provisional order/confirmation proceeding regime mandated by s.18 and s.19 of the *Divorce Act* is that the evidence of the parties is not subject to cross-examination. The affidavit evidence before me in this proceeding, particularly that of the Respondent, cries out for cross-examination.

[26] In any event, the Court shall make the best of the material it does have, in the circumstances of the history of this proceeding, and with a view to providing a fair level of support for Dylan, given the available reliable evidence of the present financial means of his two parents. In this regard I have specifically considered, pursuant to s.19(8) of the *Divorce Act*, whether to remit the matter back to Alberta for yet more evidence, and have decided that it is not appropriate to do so, nor necessary, in the circumstances.

[27] I will deal firstly, then, with the Respondent's annual income for purposes of the Guidelines.

[28] In his Financial Statement filed February 21, 2001, as mentioned earlier, he self-reports monthly income of \$3,177.91 consisting primarily of Workers' Compensation benefits. He reports no income or benefits from his business endeavours. He does not provide information regarding his income and draw from, and capital in, the various business partnerships he has with his wife. I have considerable doubt about the accuracy of this income figure.

[29] His unsigned tax returns show total income as follows:

1998 -	\$12,081.17
1999 -	\$40,160.96
2000 -	\$99,990.65

[30] In his April 19 affidavit he asserts that \$33,446.82 of his 2000 income consists of a pension pay-out he received, at his request, from Workers' Compensation Board. and which is non-recurring. With some hesitancy, I am prepared to accept that assertion.

[31] For purposes of determining the Respondent's annual income for Guidelines purposes, I use the figure reported in his most recent tax return, i.e., \$99,990.65 less the non-recurring amount of \$33,446.82, or \$66,543.83. I do this, knowing that of that \$66,543.83, \$20,440.76 represents Workers' Compensation benefits (i.e., apart from the non-recurring amount of \$33,446.82) and the \$20,440.76 is not taxed and ought to be grossed up. However, I have no evidence on precisely how that ought to be done, and I am not prepared to speculate on that issue. So I find that the Respondent's income for purposes of this proceeding is \$66,543.00. Using this figure, the presumptive Guideline amount of child support for Dylan is \$579.00.

[32] Next, the annual income of the Applicant. At the time of the granting of the Provisional Order, her income was determined to be \$7,300.00, based on her 1998 affidavit evidence. Further evidence received in this Court indicates that she reported total income of \$16,248.18 on her 2000 income tax return. In her affidavits in May and June she states she is presently unemployed due to a lay-off, and is waiting on Employment Insurance benefits and a rehire. In the circumstances, I find the Applicant's income for purposes of this proceeding is \$16,248.00.

[33] I turn now to the special and extraordinary expenses for Dylan claimed by the Applicant under s.7 of the Guidelines. That section states:

7(1) In a child support order the court may, on either spouse's request, provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

(a) child care expenses incurred as a result of the custodial parent's employment,



illness, disability or education or training for employment;

- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually per illness or event, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[34] Evidence before the Alberta Court at the time of granting the Provisional Order in support of this claim was simply paragraph 9 of the Applicant's affidavit sworn January 7, 1998:

On an annual basis, I estimate that I incur the following expenses with regard to Dylan:

Hockey fees	\$ 200.00	
Hockey equipment	\$ 350.00	
Hockey school	\$ 125.00	
Soccer fees	\$ 50.00	
Soccer Equipment	\$ 75.00	
Roller Blades	\$ 100.00	
Roller Blade Equipment	\$ 50.00	
Bicycle	\$ 100.00	(\$200.00 every two years)
Trip to paternal grandparents	\$ 500.00	(\$1000.00 every two years to St. John's NFLD)
After school babysitting	\$1440.00	(\$120.00 per month)
Yearly Total	\$2990.00	
Average Monthly Total	\$ 250.00	

[35] The Alberta Court accepted this evidence and ordered the Respondent, in the Provisional Order, to pay his proportionate share of the \$250.00 monthly s.7 expenses, i.e., \$227.50. Of the \$250.00 monthly s.7 expenses, \$120.00 was accepted under category s.7(1)(a) child care expenses, and \$130.00 was accepted as falling within category s.7(1)(f) extraordinary expenses for extracurricular activities.

[36] Further evidence received by this Court as a result of the Order of Justice Vertes remitting the matter back to Alberta for that purpose contains some limited new information on the s.7 issue.

[37] The Applicant's May 3, 2001 affidavit contains the following:

5. Attached hereto as Exhibit "B" is a List of Expenses incurred by myself in order for our son to participate in extracurricular activities. The List of Expenses is estimated. I cannot say for certain what it will cost me each year as the cost of registration for each sport goes up, and the cost of the equipment required for these sports goes up. Dylan is growing so much year to year that he normally requires new equipment from the previous year no longer fits him properly. Dylan is now wearing mostly adult sizes for all his equipment.

#### Exhibit B

#### LIST OF EXPENSES - Extracurricular, Dylan Kyle Squires

KOHO Revolution Men's skates - 1999	\$ 369.99
Sherwood APD gloves - Men's 13 1/2 - 1999	\$ 94.99
Sherwood EX-5030 Shoulder pads (Men's small) - 1999	\$ 119.99
CCM Supra Pants (Men's small) - 1999	\$ 129.99
Itech Stainless Steel Cage - 1999	\$ 39.99
Itech Neck guard - 1999	\$ 16.99
Shin pads (needs new ones for next season) - cost in 1999	\$ 54.99
Elbow pads (needs new ones for next season) - cost in 1999	\$ 39.99
Jock plus (needs new one for next season) - cost in 1999	\$ 42.99
CCM helmet (needs new one for next season) - cost in 1998	\$ 89.99
Skates (needs new ones for next season) - cost in 2001	\$ 369.99
Hockey registration - cost goes up each year (last season)	\$ 275.00
Hockey kitchen deposit - per year	\$ 150.00
Speed skating per season	\$ 185.00
Rollerblades (needs new each season as he grows out of them)	
- cost in 2000	\$ 169.00

Golf membership per year	\$ 180.00
Golf clubs - cost in 2000	\$ 600.00
Soccer registration - per year	\$ 55.00
Shoes for Soccer - per year (approximately)	\$ 50.00
Shin pads - per year (approximately)	\$ 20.00
Basketball registration - per year	\$ 40.00
Shoes for Basketball - per year (approximately)	\$ 80.00
Miscellaneous expenses for sports events, usually every 3rd weekend - (gas, hotels, meals, etc.) - approximate amount per year	<u>\$ 2,000.00</u>
TOTAL per year	\$ 5,173.89

[38] And, in response to the Respondent's allegation that she was not incurring child care expenses, the Applicant stated, in her affidavit of May 30, 2001, after explaining that she was currently unemployed as a result of a layoff:

The Respondent stated in his Affidavit on February 8, 2001, that Dylan is left home alone. I try to keep my child care costs to a minimum. When I was working in Bentley, my job allowed me to let Dylan come there after school except a few days here and there.

[39] I take from this evidence that the Applicant is not, while unemployed, incurring child care expenses that fit within s.7(1)(a) of the Guidelines. I also take note of the fact that while Dylan was 7 years old at the time of the Provisional Order which reflected a \$120.00 monthly expense for child care, he is now 11 years of age.

[40] In exercising my discretion with respect to s.7 add-on expenses, I remind myself of the statutory criteria:

- a) the necessity of the expense in relation to the best interests of the child;
- b) the reasonableness of the expense having regard to the means of the spouses and those of the child, and
- c) the reasonableness of the expense having regard to the family's pattern of spending prior to the separation.

[41] The onus is on the Applicant to establish that the \$5,173.89 (or what portion of it) in estimated/projected annual expenses for Dylan's hockey, speedskating, rollerblading, golf, soccer and basketball activities is both necessary and reasonable, yet there is a paucity of evidence before the Court in that regard. The Applicant has not satisfied me that she has incurred actual expenses which are extraordinary in the

sense that they are unusual in the context of her family's means and circumstances, or in the context of an 11-year-old boy's usual activities.

[42] Accordingly, on the evidence presented, I would deny the claim for a sharing of extraordinary expenses under s.7 of the Guidelines.

[43] Finally, I must consider the Respondent's undue hardship application under s.10 of the Guidelines.

[44] In considering this application the Court is bound by the provisions of s.10 of the Guidelines:

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.

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

- (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 reasons 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.

(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.

[45] Respondent's counsel relies specifically on paragraphs 10(2)(b) and 10(2)(d) in the undue hardship application.

[46] With respect to paragraph 10(2)(b) (unusually high expenses in exercising access to Dylan), no evidence is proffered for this item. Instead, counsel simply asks that the Court take judicial notice of the high cost of airfare or other means of transportation between Yellowknife and the Province of Alberta.

[47] As noted in previous decisions of this Court, many parents, whether resident or non-resident in the Northwest Territories, incur significant expenses in exercising access to their children in another jurisdiction following a marriage breakdown. This is not an unusual or unexpected phenomenon in today's society and was obviously in the contemplation of the drafters of the Guidelines. For such expenses to come within the ambit of s.10(2)(b) these expenses must be more than just high. They must be unusually high.

[48] The Respondent's plea of undue hardship on account of unusually high access costs fails.

[49] Under paragraph 10(2)(d) (legal duty to support other children) the Respondent submits that to require him to pay the Guideline amount of child support for Dylan would cause an undue hardship to the five children within his existing family unit here in Yellowknife. Of these five children, the three youngest are his biological children, the oldest two are the children of his present wife from an earlier marriage.

[50] Once again, there is little evidence proffered in support of this submission. The Respondent must show that he has a "legal duty" and not just a moral obligation to support the two older children. Are they being supported by their own biological father and mother, and, if not, why not? The mere fact of the Respondent's voluntary assumption of support obligations for these two older children, commendable though it be, does not trigger s.10(2)(d).

[51] Also, when the Respondent entered into new obligations with respect to each of the five children within his new family unit, he did so presumably with eyes wide open and knowing of his legal obligation to Dylan. In the context of an undue hardship claim under s.10(2)(d), a bald, generalized statement of the overall expense of the new household is insufficient.

[52] The Respondent has failed to satisfy me that he or his new family will suffer undue hardship if he is required to pay the presumptive Guideline amount of child support for his son Dylan.

[53] Even if I had been convinced of undue hardship being so visited upon the Respondent or the five Yellowknife children, the Respondent must still satisfy the Court that his household has a lower standard of living than the Applicant's household. This he has failed to do, simply because of the lack of evidence on the point.

[54] Any household standard of living comparison, using the Schedule II formula or otherwise, must commence with a full disclosure of the actual income of each person in each household. The Respondent has not made such disclosure with respect to he and his present wife. The unsigned tax returns attached to his affidavits are simply inadequate and unsatisfactory for this purpose. The evidence does indicate that the Respondent and his wife are engaged in busy and prosperous business enterprises in Yellowknife, yet there is no disclosure of their actual salaries, benefits, partnership draws, capital, return on capital, etc., with respect to those enterprises.

[55] It is no answer for the Respondent to say that the Applicant has also failed to make full disclosure of her household income, in particular that of her new husband. It is the Respondent who pleads undue hardship; it is for him to provide the information within his possession and control in order to allow the Court to consider his application.

[56] For these reasons I deny the request to award a different amount of child support on the ground of undue hardship under s.10.

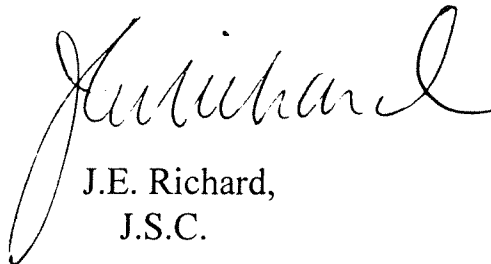
Conclusion:

[57] An order will issue pursuant to s.19(7) of the *Divorce Act* confirming the Provisional Order with the following variations:

- a) the Respondent is found to have a Guideline income of \$66,543.00;
- b) the Applicant is found to have a Guideline income of \$16,248.00;
- c) the Respondent shall pay to the Applicant for the support of Dylan Kyle Squires the sum of \$579.00 per month on the 1st day of each month commencing August 1, 2001;
- d) the Applicant's request for additional support on account of child care expenses and extraordinary expenses for extracurricular activities under s.7 is dismissed.

[58] Respondent's counsel will prepare the Order and file it with the Clerk of the Court.

[59] The Clerk shall send a copy of the Order and a copy of these Reasons to the Office of the Minister of Justice of the Northwest Territories and to the Court of Queen's Bench of Alberta.



J.E. Richard,  
J.S.C.

Dated at Yellowknife, NT  
this 31st day of July 2001

Counsel for the Respondent: BettyLou McIlmoyle

CV 07765

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