Date: 2003 12 12
Docket: S0001-CV-2003000271

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CATHY RENATE SHERMAN

Petitioner

- and -

MICHAEL BENJAMEN ROY

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter originally came before me on September 19, 2003 in regular Chambers. It is an application by Michael Benjamen Roy for a provisional order for the following:

(i) A finding that the eldest child of the parties, Lianne Marie Roy, born March 27, 1984, ceased being a child of the marriage for the purposes of child support as of August 1, 2002;

(ii) A finding that the Respondent's annual income for the purposes of calculating child support pursuant to the Federal Child Support Guidelines is $39,001.00 annually;

(iii) A variation of Respondent's child support obligations pursuant to the Consent Final Order issued by the Queen's Bench (Family Division) Winnipeg Centre on June 2, 1998, such that the Respondent's child support obligations are retroactively varied to require to him to pay child support for the child of the marriage, Benjamen Arthur Roy, born October 31, 1987, in the amount of $348.00 a month on the 1st day of each month, commencing August 1, 2002, and for each month thereafter.

(iv) An order that, as the result of the retroactive variation, the Respondent shall receive a credit for child support overpayments made to date, to be deducted from his future payments at the rate of $174.00 a month.

[2] On September 19, 2003, the matter was adjourned to October 3 so that counsel for Mr. Roy could submit material substantiating her client's claim that his health has affected his ability to earn income. Extensions of time were subsequently sought and granted and the material was filed on November 17, 2003.

Background

[3] The parties were divorced in 1989 in Alberta. On June 2, 1998, a Consent Final Order was made in the Court of Queen's Bench in Manitoba. That order determined that Mr. Roy's annual income for child support purposes was $44,319.00 and provided that child support was payable by him for the two children of the marriage in the amount of $643.30 per month.

[4] Ms. Sherman, the recipient of the child support, now resides in Nova Scotia. She has not consented to this matter being heard in the Northwest Territories. Therefore, any order I may make can be provisional only.

[5] Two affidavits sworn by Mr. Roy have been filed. They indicate that Mr. Roy obtained a position as a labourer and groundskeeper with the Canadian Coastguard in 1992. He has worked for the Coastguard since then, eventually moving to an operator's position which he maintains at present.

[6] Mr. Roy asserts that there have been two material changes in circumstances since the Consent Final Order issued. The first change asserted is that the eldest child, Lianne, has ceased to be a child of the marriage within the meaning of the *Divorce Act* (Canada). The second is that his income has decreased due to his health problems.

The eldest child

[7] The eldest child, Lianne, was born on March 27, 1984 and for some time has resided in Winnipeg, Manitoba. Pursuant to the definitions in s. 2(1) of the *Divorce Act* and s. 1 of Manitoba's *Age of Majority Act*, C.C.S.M. c. A7, she would have reached the age of majority (18) in March 2002.

[8] Mr. Roy deposes that when Ms. Sherman and their youngest child moved to Nova Scotia in July 2002, Lianne remained in Winnipeg, obtained accommodation with roommates and since then has worked at various jobs. Mr. Roy indicates that he did sent

her money on a regular basis to help her out. Since March of 2003, however, he says Lianne has not been in touch with him as much as she used to be and it is not known for certain whether she has joined her mother in Nova Scotia and whether she is employed.

[9] Mr. Roy also deposes that once Lianne started living on her own, he began to pay only half the monthly payment of $643.30 required under the Consent Final Order. He has not provided any explanation as to why he did not apply earlier for a reduction in child support based on Lianne having attained the age of majority. It appears from the Maintenance Enforcement Program document submitted with the affidavit material that the Program has continued to calculate his obligation for support based on the figure for the two children.

[10] Section 2(1) of the *Divorce Act* defines "child of the marriage" as a child of two spouses or former spouses who, at the material time, (a) is under the age of majority and who has not withdrawn from their charge, or (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

[11] Lianne is over the age of majority and there is no evidence and no reason to think that she is unable to withdraw from the charge of her parents or obtain the necessaries of life. Accordingly, I find that she is no longer a child of the marriage since August 1, 2002, by which time she had reached the age of majority and was living independently.

Mr. Roy's income

[12] Mr. Roy's affidavits and the income tax information annexed as exhibits indicate that his total income in the year 2000 was $48,599.00, all from employment. His total income in the year 2001 was $45,545.00, again from employment. In the year 2002, his income decreased to a total of $39,001.00, consisting of $30,664.00 from employment and $8337.00 from employment insurance benefits.

[13] Mr. Roy deposes that his ability to work has been affected by his chronic depression, which requires him to take medication and attend counselling. He asserts that due to the consequences of the treatment and the condition, he found it too difficult to continue with his full-time position with the Coastguard and so in the year 2001, he switched to a seasonal operator's position, resulting in the decreased salary and receipt of employment insurance benefits.

[14] In support of these assertions, the affidavit of a legal secretary in the office of Mr. Roy's counsel has been filed. That affidavit deposes that certain letters were received in the office and it attaches them as exhibits. The letters, one from a doctor and one from

an addictions counsellor, are not sworn documents. Nor does the secretary who swore the affidavit depose that she believes the contents of the letters to be true. The affidavit does not, therefore, comply with Rule 373(3).

[15] The practice of submitting information by way of a letter attached to an affidavit sworn by someone who has no knowledge of the contents of the letter is not uncommon but it is also not the proper way to place evidence before the Court. Although such an affidavit proves that the letters were received, it does not prove the contents of the letters.

[16] Despite that, I have reviewed and taken into account the letters. They confirm that Mr. Roy has been and is being treated and counselled for depression and addiction issues.

[17] The letters do not, however, provide any information as to whether or how the depression and addiction issues affect Mr. Roy's ability to work. Mr. Roy himself does not say that he is unable to work full-time, just that he found it "too difficult", although he gives no details as to why that is.

[18] Counsel relies on the case of *Chan v. Chan*, [1998] B.C.J. No. 2420 (S.C.). In that case, however, there was evidence that a psychiatrist had provided an opinion that the party in question was in danger of burnout. Thus, there was a link between the opinion and the party's decision to cut back on his hours of work.

[19] In this case, there is no evidence that any medical or mental health professional recommended that Mr. Roy cease to work full-time. The onus is, of course, on Mr. Roy to satisfy the Court that his choice to give up his full-time position and work seasonally only was a reasonable one. The material from the doctor and the addictions counsellor is insufficient for me to determine whether it was a reasonable choice. I accept that depression is a circumstance which can be beyond the control of the individual who suffers from it, but the problem is that there is no evidence to support Mr. Roy's assertion that his depression or the treatment of it has detrimentally affected his ability to work. I note as well that the letters provided indicate that Mr. Roy has had treatment for depression since 1994, yet he was also able to work full-time for several years since then.

[20] In light of the above, Mr. Roy's income for child support purposes should be based on what he can earn in a full-time position, that being $48,599.00. The monthly child support payable for one child at that level of income under the *Child Support Guidelines* applicable to a payor resident in the Northwest Territories is $426.00. I therefore order that he pay child support in that amount, commencing August 1, 2002.

[21] Based on payments of $426.00 per month commencing August 2002, Mr. Roy would owe $6390.00 up to and including November 2003. According to the Maintenance Enforcement Program report, however, he has paid $8081.53, resulting in an overpayment of $1691.53.

[22] *Should there be a credit in the amount of $1691.53 to be deducted from future child support payments?*

[23] It appears that the Court can order repayment of an overpayment of support. In the *Divorce Act Manual* (T.W. Hainsworth, Canada Law Book Inc. 2003), the ordering of such repayment is called a "recent phenomenon". Whether and how to order repayment is a matter of discretion: *Masotti v. Masotti*, [2002] O.J. No. 4133 (S.C.).

[24] There are a number of factors to consider in determining whether there should be repayment. In this case, Mr. Roy says that he began to reduce the child support payments by half when Lianne started living independently. He says that he offered the half payments to Ms. Sherman. He does not say what her reaction was. However, in light of the fact that he made several payments in the halved amount, I think it is fair to assume that she would have known that his intention was to pay for the younger child only.

[25] On the other hand, Maintenance Enforcement continued to show as owing the full amount of the payments ordered under the Consent Final Order and Mr. Roy does not appear to have sought an order before this to have Lianne declared no longer a child of the marriage.

[26] The problem with making deductions from future support payments is that doing so will lessen the amount available for the remaining child's support. Although it appears from Mr. Roy's affidavits that Ms. Sherman is employed, there is no evidence as to her income or the circumstances of the youngest child, who is now 16 years old, having been born October 31, 1987. It is reasonable to assume in light of his age that the expenses incurred to maintain him are significant. However, Ms. Sherman also had the benefit of the extra support when Lianne was no longer living with her.

[27] Balancing all these factors, I have decided to grant a credit for overpayment in the amount of $1600.00, to be applied first against arrears, if any, owing after recalculation of Mr. Roy's obligations pursuant to the terms of this order and after that, any balance remaining of the credit shall be applied in the amount of $160.00 per month against ongoing child support payments until the credit is exhausted.

[28] The aforesaid orders made by me are provisional only and subject to confirmation by the Court in Nova Scotia.

[29] Counsel is directed to take out the formal order and once that is done, the clerk is directed to proceed in accordance with s. 18(3) of the *Divorce Act*.

[30] I thank counsel for her very complete written submissions in this matter.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
12th day of December 2003

Counsel for Michael Benjamen Roy: Michelle Staszuk

No one appearing for Cathy Renate Sherman

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