Date: 2004 08 03
Docket: S-1-CV2001000249

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CYNTHIA ANN CAMPBELL

Respondent

- and -

WILLIAM DAVID CHAPPLE

Applicant

MEMORANDUM OF JUDGMENT

[1] This is an application by William David Chapple to vary the terms of a child support order made pursuant to the *Divorce Act* (Canada). It is made *ex parte* since the respondent, Cynthia Ann Campbell, resides in Manitoba and has not appeared in this jurisdiction in response to this application.

[2] The parties are the parents of one child, a daughter named Choloe, born on May 31, 1984. She is now 20 years old, thus being over the age of majority. In Manitoba, where she resides, the age of majority is 18: *Age of Majority Act*, R.S.M. 1987, c.A-7.

[3] The parties were divorced in 1987. The *Decree Nisi* provided that the respondent (who was the Petitioner in the divorce action) have custody and the applicant (who was the Respondent then) pay child support. The child support order was varied in 1990. Subsequently, in 1999, a further variation order was made in Manitoba at the behest of Ms. Campbell. That order was a provisional one since Mr. Chapple resided in this jurisdiction. Subsequently, that provisional order was confirmed, with variation, by Justice Schuler of this court in 2002: *Campbell* v. *Chapple*, 2002 NWTSC 75. The result of that confirmation was that Mr. Chapple is required to pay child support of $711.00 per month. There was a retroactive component to the variation resulting in arrears of approximately $10,000.00. This is being paid in additional monthly instalments of $125.00.

[4] The applicant filed this motion to vary on June 8, 2004. He seeks an order discontinuing child support and eliminating arrears.

[5] When this matter first came on for hearing, a jurisdictional concern arose. Is this a provisional hearing or can this court issue a final order? I therefore directed that the application be set over and that counsel for the territorial Attorney-General be requested to appear and make representations on the issue. I thought this advisable for two reasons: (a) the applicant is acting for himself without the benefit of legal counsel; and, (b) under the *Divorce Act*, it is the Attorney-General in each jurisdiction who has the responsibility of transmitting documents with respect to provisional and confirmation hearings of variation applications. In response, counsel for the Attorney-General filed a book of authorities and appeared to make representations. They were helpful and I am grateful for this assistance.

[6] The first issue, therefore, is whether this court can issue a final order, or merely a provisional one pending confirmation in Manitoba. The applicant argued that I can make a final order since, in effect, the respondent has attorned to this jurisdiction when she brought the previous proceedings, confirmed in this court, to vary child support.

[7] I have concluded that I can only issue a provisional order which will have no legal effect unless and until it is confirmed.

[8] The *Divorce Act*, in s.18, is quite explicit in stating that, unless both parties accept the jurisdiction of the court, any variation order is provisional only. Counsel for the Attorney-General brought to my attention a series of cases, primarily from Alberta, that held that there was still a discretion to grant a final order if the interests of fairness and justice made it appropriate to do so: see, for example, *Gartner* v. *Gartner*, [1993] A.J. No. 613 (Q.B.); *Muzechka* v. *Muzechka*, [2002] A.J. No. 1313 (Q.B.). She also referred me to numerous cases that held that no such discretion exists (particularly so after s.18 was amended in 1993): see, for example, *Martell* v. *Height*, [1993] S.J. No. 198 (Q.B.); *Bailey* v. *Bailey*, [1997] N.B.J. No. 124 (C.A.); *D.H.B.* v. *A.A.B.*, [2002] Y.J. No. 70 (S.C.). With due respect to the contrary view, I agree with this second line of cases. In my opinion, provided that the issues can be determined by proceeding in two jurisdictions in two separate hearings (as provided by s. 18(2)(b) of the Act), the only order that a court can issue, in the absence of the respondent, is a provisional one.

[9] The fact that there was a previous variation proceeding that was confirmed in this jurisdiction, pursuant to the procedure set out in s.18 of the *Divorce Act*, makes no difference in this analysis. Each variation application is a separate proceeding and, in the absence of attornment to the jurisdiction, it must proceed as a provisional hearing if the parties live in different jurisdictions.

[10] The next issue is whether Choloe is still a "child of the marriage" for support purposes. The *Divorce Act* provides a definition in s.2(1):

> "child of marriage" means 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] Choloe is over the age of majority. So the questions are whether she is still under the "charge" of her parents, i.e., do the parents have a financial and moral burden for her care and control; and, is she "unable" to withdraw from their charge, i.e., can she not withdraw from the support provided by her parents?

[12] Choloe is in full-time attendance at university, living in Winnipeg, and supporting herself through student loans and employment. She gets no support from her mother notwithstanding the fact that the applicant continues to pay support payments to her mother. Her mother resides in Portage la Prairie. The evidence before me is that, at least since she turned 19, in May of 2003, Choloe has received no support from anyone. All of this information is, technically, hearsay but it is nevertheless reliable. It comes from a communication sent by the daughter to her father and it is appended to the applicant's affidavit.

[13] The fact that Choloe is not living with either parent or that she is able to get by on her own is not necessarily determinative. But it does raise serious questions.

[14] First, who is the recipient of the support? If Choloe is not living with or dependant upon her mother, and her mother is not supporting her in any way, then the payments being made cannot realistically be regarded as support for Choloe.

[15] Second, is Choloe unable to withdraw from the "charge" of her parents? While financial support would be desirable and helpful, she has been able to support herself. Therefore, on an objective basis, she is no longer dependent on her parents' support.

[16] On the same point, as a general rule, the party claiming support for a child over the age of majority has the burden of establishing entitlement, i.e., that the child is unable to withdraw from parental charge. Can a parent who is not supporting the child satisfy that burden? The premise underlying this entitlement is that one parent, who is still assisting the child even though that child may not be living at home, requires the continuation of support from the other parent. That premise is undermined if the child is completely independent and self-sufficient, as appears from the evidence here.

[17] In a previous case I commented that, generally, a child over the age of majority who is in full-time attendance at an education institution will be treated as a dependent entitled to support. This applies even if the child is not living with the parent who is claiming support. There has been a general acceptance of education pursuits as "cause" for inability to withdraw from the parents' charge: *Fair* v. *Jones*, [1999] N.W.T.J. No. 17 (at para. 18). But this presupposes that the applicant parent, or the payee, has assumed and continues to assume a degree of responsibility for the care and support of the child. And each case is fact-specific.

[18] I think that each child should be given as much encouragement, morally, physically and financially, as possible to continue her or his education. The applicant offered, in the hearing before me, to pay directly to Choloe a monthly sum of $400.00 to assist her. He does not need a court order to do that. I encourage him to do so. I am sure his daughter will thank him. And, of course, under the *Divorce Act*, a child cannot apply for support, only a parent can. If Choloe could apply, then there may be reason to make an order along the lines volunteered by the applicant. But, in strictly legal terms, I have concluded that Choloe is no longer a "child of the marriage" within the meaning of the *Divorce Act*.

[19] This change in status is, in my opinion, a change to entitlement and therefore the precondition for a support order is no longer present. This is obviously a change of circumstance (as required by s.17(4) of the Act) justifying a variation.

[20] The next question is at what date to fix the variation? The available evidence points to Choloe's 19th birthday as the date from which she has been independent. Therefore any variation should be made retroactive to May 31, 2003.

[21] Finally, should anything be done about the arrears? There has been little evidence provided to me respecting the arrears. What I have been told is that they arose because of the retroactive aspect of the previous variation order. I cannot do anything about that. This is not an appeal of that order and it must be presumed that the order was correct at the time. However, the retroactive effect of my order will mean that the applicant should be credited with the payments made since May 31, 2003. That credit can be applied to reduce the outstanding arrears.

[22] In the result, the application for variation is granted as follows:

1. The applicant's child support obligations are ended effective as of May 31, 2003.

2. All payments made by the applicant since May 31, 2003, shall be credited to any accumulated arrears of support.

3. The applicant's obligation to continue support payments is limited to the amount being paid on arrears ($125.00 per month).

[23] This order is provisional only and has no legal effect until it has been confirmed by the Court of Queen's Bench of Manitoba. I ask counsel for the Attorney General to prepare and file a formal Order (a copy of which is to be provided to the applicant once it is filed) and then to transmit the necessary materials to the appropriate office in Manitoba in accordance with the requirements of s.18(3) of the *Divorce Act*.

J.Z. Vertes
J.S.C.

Dated this 3rd day of August 2004.

TO: Mr. William Chapple
118 Arden Avenue
Yellowknife, NT X1A 2L9

AND TO: Ms. Karan Shaner
Counsel for the Attorney
General of the Northwest Territories

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