

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF
the *Divorce Act*, R.S. 1985, c. 3(2nd Supp);

BETWEEN:

LENORA E. BRACE

Applicant

- and -

PAUL SMITH

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter came before me as an application to confirm a Provisional Order made on February 2, 2005 by The Honourable Justice F.B. William Kelly in the Supreme Court of Nova Scotia. The Provisional Order deals with various aspects of child support for the parties' son, James Robert Philip Dena Smith, who is now 16 years old and resides with his mother in Nova Scotia.

[2] The evidence before me from Mr. Smith consists of two affidavits, one of which was filed after I requested clarification of some evidence from his counsel.

[3] The parties were divorced in 2001, at which time a Corollary Relief Judgment issued. The terms of that Judgment were varied by a Consent Order in 2003.

[4] Mr. Smith agrees with much of the Provisional Order, although he seeks some changes to it. For ease of reference, I will go through each provision of the Provisional Order.

[5] 1. Clause 1 of the Provisional Order states that child support payable by Mr. Smith shall be increased effective June 1, 2004 and the arrears shall be calculated from that time in accordance with the Northwest Territories Child Support Tables.

[6] Mr. Smith's 2004 Notice of Assessment filed as part of his affidavit indicates that his total income in 2004 was \$72,845.00. Of that, \$4726.30 is identified as reimbursement of travel expenses as per the 2004 T4 slip provided.

[7] Deducting the reimbursement results in Mr. Smith's 2004 income being \$68,118.70. Child support based on that income is \$591.00 under the *Child Support Guidelines* applicable in the Northwest Territories. Mr. Smith had been paying \$508.00 per month. He has provided evidence that he increased that to \$587.00 per month and has recently paid Ms. Brace the arrears back to June 1, 2004. Because of the discrepancy between what should have been paid (\$591.00) and what was paid (\$587.00), there is a small amount, \$40.00, still owing on the arrears.

[8] The evidence is that Mr. Smith had an increase in pay in April 2005, which resulted in an annual income calculation of \$78,496.08. The monthly payment under the *Guidelines* based on that annual income is \$672.00. Mr. Smith indicates that he had miscalculated the monthly payment as \$545.00; he has provided evidence that he made up the shortfall for the months of April, May and June.

[9] Mr. Smith indicates that his income will change during the month of July 2005 because effective mid-month he is being transferred to Newfoundland in his employment with the Department of National Defence ("DND"). He will no longer receive the northern allowance starting July 22 and effective July 8, his monthly income will be \$4675.00 plus \$699.00 in DVA pension, which works out to \$64,488.00 per year.

[10] In submissions, counsel for Mr. Smith proposed that he pay the amount of \$591.00 for the month of July. I so order. I order further that from August 1, 2005, Mr. Smith pay the amount of \$502.00 per month based on the *Guidelines* figure for the province of Newfoundland for income of \$64,488.00. Depending on Mr. Smith's total income for 2005, some adjustment for arrears may yet result from the recalculation as per the paragraph below dealing with Clause 4 of the Provisional Order.

[11] Accordingly, Clause 1 of the Provisional Order is varied to provide that child support payable for the period June 1, 2004 to March 31, 2005 is \$591.00 per month; from April 1 to June 30, 2005, it is \$672.00 per month; for July 2005 it is \$591.00; and effective August 1, 2005, it is \$502.00 per month, being the amount payable in the province of Newfoundland for one child based on annual income of \$64,488.00. Any arrears owing from after June 1, 2004 to date are to be paid by August 31, 2005.

[12] 2. Clause 2 of the Provisional Order provides that Paul Smith shall provide his Statement of Financial Information to enable the Yellowknife Court to assess.

[13] Mr. Smith has now provided his Statement of Financial Information in his supplementary affidavit. It does not, however, affect the amount of the child support payments.

[14] 3. The Provisional Order states in clause 3 that Mr. Smith shall confirm in writing to Ms. Brace within one month any increase in his pay or pension.

[15] Mr. Smith requests that the one month be extended to 60 days from the date any change in income takes effect. He explains in his affidavit that DND takes significant time to process increases and often grants them retroactively. Mr. Smith is also out of the country on tours of duty from time to time. Accordingly, in my view the 60 days is reasonable and I confirm clause 3 of the Provisional Order with the variation as requested.

[16] 4. Clause 4 of the Provisional Order provides: Paragraph four of the 2003 Consent Order shall be amended to read that Paul Smith shall increase child maintenance payments within one month of receipt of any increase of his employment or pension income based on the Guidelines for the Province or Territory in which he resides.

[17] Mr. Smith submits that child support payments should be based on his yearly income as his monthly income can vary a great deal because of the way DND pays allowances. Using the yearly amount would, he submits, create more certainty for both parties. I agree that basing the payments on annual income makes sense in the circumstances. It would avoid the need to make monthly adjustments. Accordingly, I

vary clause 4 to reflect what the Alberta Court of Appeal said in *D.B.S. v. S.R.G.*, [2005] A.J. No. 2, 2005 ABCA 2 should be included in child support orders. Clause 4 will read:

Paragraph four of the 2003 Consent Order is amended to provide that the child support payable by Mr. Smith is subject to adjustment and shall be recalculated annually based on his then current income and the federal *Child Support Guidelines* for his province or territory of residence. For that purpose, Mr. Smith shall provide to Ms. Brace a copy of his Income Tax Return and Notice of Assessment and any other information required by s. 25 of the *Guidelines* by June 1 of each year. Any recalculation of ongoing support is to be effective on July 1 of each year.

Should the parties be unable, by July 1 in each year, to agree on the amount of support payable, both retroactively and for the ensuing year, or the date or dates on which payments are to be made, either may apply to a court of competent jurisdiction to resolve the issue.

[18] 5. Clause 5 of the Provisional Order provides: The total registration fee for hockey for Joshua, regardless of whether house team or rep team, shall be divided equally between the parties. Paul Smith shall pay to Lenora Brace the amount of \$195.00 the hockey registration for the 2004/2005 year.

[19] Mr. Smith does not take issue with the parties each paying half the hockey registration fee. Clause 5 of the Provisional Order is confirmed with the addition, for certainty, of the following sentence at the end of it: Paul Smith shall pay his half of the yearly hockey fee within 60 days of receipt of notification as to the amount.

[20] 6. and 7. Clauses 6 and 7 of the Provisional Order are as follows:

6. The insurance provision in the previous court order shall be varied to read “each shall name the other as Trustee until Josh has completed post secondary education”. A copy of the most current policy in the name of each party is to be provided to the other party within one month of the final order being issued.

7. Paul Smith shall provide confirmation from his insurance carrier to confirm that the amount of coverage remains at \$300,000.00 or more and the current status of beneficiary and Trustee be provided to Lenora Brace. Paul Smith shall forward confirmation of insurance coverage to Lenora Brace on an annual basis on or before the 1st day of July each year. The terms of the policy cannot be changed without consent of both parents until Josh finishes his post-secondary education.

[1] The Corollary Relief Judgment provided that both parties would maintain their existing life insurance policies in place naming their child as beneficiary for so long as he is a child of the marriage. The Judgment also specified that both agree that they shall name each other on their policies of insurance as Trustee of the son during his minority in accordance with an Agreement and Minutes of Settlement they had entered into. It is not clear why the latter provision was specified as an agreement rather than a court order, but I understand it to be part of the Judgment that the parties were to name each other as Trustee.

[2] In the Consent Order of 2003, a provision identical in substance to the above was included but apparently later deleted as it was already dealt with in the Corollary Relief Judgment (this appears from the documents forwarded to this Court from the Supreme Court of Nova Scotia).

[3] It is clear from all the material that both parties originally understood and agreed that each would have insurance coverage of \$300,000.00 for purposes of the above clauses. Mr. Smith indicates in his affidavit that he has learned that his coverage is only \$280,000.00. He has not provided a copy of his policy, but only a very recent document which appears to be an application form. However, he does not object to increasing the amount applicable to his son to \$300,000.00 and maintaining it at that amount until Joshua has completed his post-secondary education.

[4] Mr. Smith does, however, take the position that Joshua should not require a trustee after the age of eighteen. He says that Joshua is mature and capable and points out that Ms. Brace apparently agrees with that view as she seeks to have child support paid directly to Joshua when he is away at school and not living with her. Mr. Smith also points to issues communicating with Ms. Brace over the years. In fairness, any issues in that regard are probably two-sided as Ms. Brace also testified at the hearing in Nova Scotia about problems communicating with Mr. Smith. Also, once the policy

is in place with the Trustee named, there should not have to be a great deal of communication about it.

[5] Although it does appear that Joshua is considered mature and capable by both his parents, there is quite a difference between having responsibility for a monthly payment of \$500.00 to \$600.00 and having to deal with a lump sum payment of \$300,000.00. In my view, absent an agreement between the parties, it is preferable to maintain a trustee in place. The order made is quite clear as to what each of the parties must do and any past communication difficulties should not make compliance with the trustee provisions a problem. Accordingly, I confirm clause 6 of the provisional order without variation. Clause 7 will be varied to state that Paul Smith shall, by August 31, 2005, provide to Ms. Brace confirmation from his insurance carrier to confirm that the amount of coverage remains at \$300,000.00 or more and that Joshua is the named beneficiary and Lenora Brace the named Trustee. The remaining two sentences in clause 7 will remain as they now are.

[6] 8. Clause 8 of the Provisional Order states: If Josh is in residence, child support shall be paid to Josh directly.

[7] Mr. Smith does not take issue with this provision. It is confirmed.

[8] 9. Clause 9 of the Provisional Order states: Lenora Brace shall provide one months notice to Paul Smith of any period of time Josh attends University or has summer employment or otherwise resides independently of Lenora Brace for any period in excess of three weeks.

[9] Mr. Smith does not take issue with this provision. It is confirmed.

[10] 10. Clause 10 of the Provisional Order simply states that it is a provisional order.

[11] 11. Clause 11 of the Provisional Order provides that Mr. Smith shall immediately pay costs of \$53.00 to Lenora Brace for the cost of this application. Mr. Smith submits that since he has agreed to much of what Ms. Brace wanted, he should not have to pay the costs. I note, however, that it was only after being served with the Notice of Hearing to confirm the Provisional Order that Mr. Smith paid the arrears of child support and that he has still not settled the life insurance issue as per the

agreement made on divorce. It seems that this application was necessary to get these matters resolved and therefore I confirm the costs order.

[12] In the result, the Provisional Order is confirmed with some variations as set out above. Pursuant to s. 19(12) of the *Divorce Act*, I direct that upon counsel for Mr. Smith taking out the formal order, the clerk of the court will send a copy of the order along with a copy of this Memorandum and the two affidavits filed by Mr. Smith to the Nova Scotia Supreme Court.

Dated this 12 day of July 2005.

V.A. Schuler,
J.S.C.

Heard at Yellowknife, NT
June 30, 2005

Counsel for the Respondent, Paul Smith: Terri Nguyen

No one appeared for the Applicant Lenora E. Brace

S001-CV2005000130

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