

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CYNTHIA ANN CAMPBELL

Respondent

- and -

WILLIAM DAVID CHAPPLE

Applicant

MEMORANDUM OF JUDGMENT

[1] This is another application to vary child support. It is the fourth such application since the parties were divorced in 1987.

[2] The applicant, William David Chapple, represents himself. This application is made *ex parte* since the respondent, Cynthia Ann Campbell, resides in Manitoba and, although served with notice of this application, has not attorned to the jurisdiction of this court. Therefore, pursuant to s.18 of the *Divorce Act*, any order I make is provisional only and must be confirmed in Manitoba.

[3] The history of these proceedings can be gleaned from a review of the previous provisional proceedings in this court (reported at [2004] N.W.T.J. No. 42) and the confirmation proceedings in Manitoba (reported at [2005] M.J. No. 323). It will suffice for the present to merely outline what is the current support regime (as established by the confirmation order of 2005):

1. The parties' daughter, Choloe, is still regarded as a "child of the marriage" since she is in full-time attendance at university. The applicant is required to pay \$480.00 per month as ongoing support.

2. The child support payable for Choloe will cease on June 1, 2006, unless there is proof that Choloe will be continuing her post-secondary education after receipt of her first degree.

3. The applicant is also required to pay \$125.00 per month on account of accumulated arrears of support.

4. The total monthly obligation of \$605.00 is paid by the applicant to the Maintenance Enforcement authorities who in turn disburse \$480.00 directly to Choloe and \$125.00 directly to the respondent.

[4] The present application to vary seeks relief of three items:

(a) an order for the recovery of \$1,039.00 representing an overpayment by the applicant;

(b) an order directing that child support obligations cease after Choloe has received her first degree; and,

(c) an order directing that the monthly payments on arrears be set at \$250.00 once the child support payments for Choloe cease.

[5] When this matter came on in regular chambers, I indicated to the applicant that, in my opinion, items (b) and (c) were premature.

[6] The order directing ongoing support for Choloe is quite specific in declaring that those payments will cease as of June 1, 2006. If Choloe continues her education, and there is documentation to that effect, then the monthly support obligation will continue. At that time, and if that happens, it may be appropriate for the applicant to apply for a variation since Choloe's financial circumstances may be different.

[7] With respect to item (c), that too is something that will have to be assessed if and when the child support obligation for Choloe ends. The 2005 confirmation order contemplates that by stipulating that the respondent may apply to vary the provision respecting payment on arrears when the obligation to Choloe ends. But until such a variation the applicant's obligation remains at \$125.00 per month until the arrears are satisfied.

[8] Section 17 of the *Divorce Act* gives broad powers to a court to vary a support order both prospectively and retrospectively. This includes the power to reduce or cancel arrears or give directions regarding payment. But the necessary precondition for variation is a change of circumstances. With respect to items (b) and (c) noted above, there is nothing to demonstrate at this time a change of circumstances.

[9] The relief requested in item (a) is different. The evidence demonstrates that the 2005 confirmation order, because it directed a retroactive variation, resulted in, what is labelled in the records of the Maintenance Enforcement office as, an “overpayment” of \$1,039.00. The Maintenance Enforcement officials have said that those funds were disbursed to the respondent and cannot be recovered. But there is approximately \$8,000.00 still owing on arrears. There is also apparently over \$5000.00 held in trust by the Maintenance Enforcement officials waiting to be disbursed on account of arrears. The applicant advises me that these amounts will not be dealt with in the absence of a court order.

[10] The fact that these amounts have accumulated on the Maintenance Enforcement records is, in my opinion, a change in the financial circumstances of the applicant. Thus the precondition to variation is met.

[11] The question of whether a court can order a repayment by one party of an overpayment of support by the other party is not without some controversy. Many cases have simply assumed that this power was within the authority of the court. In *Sherman v. Roy*, [2003] N.W.T.J. No. 87 (S.C.), Schuler J. of this court described such orders as a “recent phenomenon”, one that is a matter of discretion (at para. 23). In *Gartley v. Thibert*, [2002] O.J. No. 3313 (S.C.J.), Aston J. of the Ontario Family Court questioned the court’s authority to order a repayment since the court’s jurisdiction on matters of child support, in a divorce context, are defined within the statutory provisions contained in the *Divorce Act*. He noted that no precedent case has thoroughly examined the source or scope of this power.

[12] Notwithstanding this question, there is certainly ample authority for a court to vary, rescind or suspend arrears, including the power to order necessary adjustments or to order set-offs: *Sherman v. Roy* (*supra*); *Masotti v. Masotti* (2002) 32 R.F.L. (5th) 379 (Ont. S.C.J.); *Adams v. Adams* (2001), 15 R.F.L. (5th) 237 (Alta. Q.B.); *Janes v. Janes* (2002), 30 R.F.L. (5th) 127 (Nfld. & Lab. S.C.). In this case any direction

regarding the overpayment will affect arrears, not ongoing support. Therefore there is little prejudice to Choloe's ongoing need. Also, in my opinion, there is no reason why these amounts cannot be applied to the outstanding arrears since simply leaving them "on the books" does nothing to assist the parties in this case, including Choloe. Finally, the 2005 confirmation order contemplates that funds held in trust are to be credited to any amounts owing pursuant to that order.

[13] It is unfortunate that this issue must be dealt with in this bifurcated process whereby a provisional order is issued and then transmitted to Manitoba for confirmation. But I see no jurisdictional basis whereby I can simply issue directions as to how past payments are to be handled. The only recourse is through the variation procedures of the *Divorce Act*.

[14] Therefore, an order will issue directing that the "overpayment" of \$1,039.00, and all funds presently held in trust, be applied to reduce any outstanding arrears.

[15] This order is provisional only and has no legal effect until it has been confirmed by the Court of Queen's Bench of Manitoba. The clerk is hereby directed to forward the necessary materials to the territorial Department of Justice for transmission to Manitoba.

J.Z. Vertes
J.S.C.

Dated this 9th day of May 2006.

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

S-0001-CV-2001000249

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