

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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

BETWEEN:

PAULA FARRELL

Applicant

- and -

BRIAN KING

Respondent

MEMORANDUM OF JUDGMENT

- [1] This is an application by Mr. King for various orders relating to his child support obligations. It came before me in regular Chambers on January 26, 2007.
- [2] This matter has a lengthy history, some of which is set out in a Memorandum of Judgment issued by me on November 22, 2005. On that date, I confirmed with some variation a Provisional Order (Amended) made in the Supreme Court of Newfoundland and Labrador, the province where Ms. Farrell is resident and where various court proceedings arising from the parties' divorce have taken place over a number of years. I will refer to the order I made as the Confirmed Order. At that time the annual income of Mr. King, who is resident in the Northwest Territories, was held to be \$63,000.00 for purposes of child support calculations.

- [3] One of the variations I ordered was the inclusion of a clause that provided that the parties exchange copies of their income tax returns by no later than July 1 in each year for purposes of adjustments to the amount of child support payable by Mr. King.
- [4] As set out in Reasons for Judgment by The Honourable Mr. Justice Garrett A. Handrigan in *Farrell v. King* 2006 NLTD 163, the Confirmed Order subsequently became “ensnarled in a procedural maze”. I need not go into the details of the maze. It will suffice to say that in October 2006, an application by Ms. Farrell to “reinstate” the Confirmed Order came before Handrigan J., who found that two orders made at Mr. King’s request in this Court in April and September 2006, and which purported to vary the Confirmed Order, were made without jurisdiction, or, alternatively, were provisional orders only for which confirmation had not been sought. Ultimately, Handrigan J. found that those orders were unenforceable and did not affect the Confirmed Order. It has not been suggested on this application that the decision of Handrigan J. was incorrect.
- [5] In his decision, Handrigan J. also declared that the Confirmed Order is in full force and effect and that all arrears due under it are payable forthwith.
- [6] In November 2006, Mr. King filed an application in this Court requesting a provisional order under sections 18 to 20 of the *Divorce Act*, R.S.C. 1985, as amended. The order he now seeks would in part incorporate the variations which were made to the Confirmed Order by the orders of April and September 2006, which were found by Handrigan J. to be unenforceable. The variations reduced Mr. King’s child support payments while he attended a training course and was receiving employment insurance payments. Mr. King asks that his child support obligation be reduced for a period of time from April to October 2006 while he was receiving those benefits and that the arrears that have accumulated under the Confirmed Order be adjusted accordingly.
- [7] Mr. King also asks that his child support payments be revised to reflect his current annual income, which is \$62,000.00, that payment on the arrears as adjusted be set at \$200.00 per month and that some or all of the arrears be paid into Registered Education Savings Plans for the benefit of the two children of the marriage. He asks for a similar order relating to extraordinary expenses. He

also seeks an order compelling Ms. Farrell to provide him with her 2005 income tax return and notice of assessment and asks that until she does, his obligation to pay extraordinary expenses be suspended.

[8] Ms. Farrell was served with notice of Mr. King's application. She has sent to this Court two "Responses" which are not in proper form for filing. Although they purport to be sworn or affirmed statements, there is no indication that the person taking the oath or affirmation falls within the category of persons authorized to do so outside the Northwest Territories pursuant to s. 67 of the *Evidence Act*, R.S.N.W.T. 1988, c. E-8. For that reason, and because I regard these proceedings as a continuation of proceedings which she brought in the Newfoundland Court, I do not consider her to have accepted the jurisdiction of this Court.

[9] Section 18(2)(b) of the *Divorce Act* says that before making a provisional order varying a support order, the Court has to be satisfied that in the circumstances of the case, the issues can be adequately determined by proceeding under the provisional order sections of the *Act*. I have concluded that most of the issues raised by Mr. King cannot be adequately determined by that procedure for the following reasons:

1. The history of the proceedings between the parties is a long and apparently difficult one and the orders now sought are unlikely to be final in any sense. It makes sense that the Newfoundland Court continue to deal with the issues between the parties as it has since their separation in 1994;

2. There is already an order in place that the parties exchange income tax information. If Ms. Farrell is not complying with that order, any proceedings to compel her to do so or sanction her for not doing so should be taken in Newfoundland, not in the Northwest Territories. Such proceedings would not, in my view, fall within the definition of "a variation order in respect of a support order" in s. 18(2) of the *Divorce Act*;

3. One of the purposes of the exchange of income tax information is that the parties attempt to agree on any adjustments to child support. If the parties are unable to agree, mediation, as suggested by Mr. King, may help. This Court does not have a mediation facility or service, whereas it appears from Mr. King's affidavit that there may be one available through the Court in Newfoundland;

4. Part of the relief sought by Mr. King is that arrears of child support and future extraordinary expenses be paid into a Registered Education Savings Plan he says he has opened for the benefit of the children. In one of his affidavits he refers to an order made by the Court in Newfoundland that required the parties to make payments into such a plan. He says he cannot now locate that order. He also says that Ms. Farrell has not been complying with the order. For this Court to make a variation order under s. 18(2) relating to the Savings Plan it must know what order the applicant seeks to vary, so nothing can be done without Mr. King placing that order before the Court;

5. It is clear to me from reviewing the materials on the Northwest Territories court file that there are, and have been in the past, issues of credibility. Mr. King himself alludes to this in his affidavit filed November 24, 2006, when he says in paragraph 38, "I am very concerned that Justice Handrigan has been given a skewed perspective of the ongoing problems between me and Ms. Farrell". The provisional order process in the *Divorce Act* is not meant to deal with cases in which there are credibility issues, since there is no opportunity for cross-examination of witnesses and no opportunity for one judge to hear and assess both sides;

6. Considering the number of issues raised by Mr. King, even if *viva voce* evidence is not required to resolve them, it is preferable that one judge "hear" both sides and resolve the issues rather than two judges doing so on a provisional/confirmation basis.

- [10] In summary, the lengthy history of this matter, the fact that the Court in Newfoundland and Labrador has dealt with it over a number of years, the many variation applications and the disputes about factual matters all make it inappropriate to deal with the majority of the issues raised by Mr. King by way of a provisional proceeding in this Court. It is preferable that one Judge hear both sides, whether in a *viva voce* hearing or by way of affidavits, and make interim or final orders as need be. Although this may make matters more complicated from Mr. King's point of view, it should in the long run save time and be more efficient. The Supreme Court of Newfoundland and Labrador clearly has jurisdiction as the Court that made the original child support order.
- [11] Mr. King asks that the orders that were made in April and September 2006, and that Handrigan J. declared unenforceable, be made again as provisional orders, subject to confirmation by the Court in Newfoundland and Labrador. In my view, however, it is preferable to wait until Mr. King's total taxable income for 2006 is known and then determine what he should have paid for that year. The *Child Support Guidelines* base support payments on annual income which is determined using total sources of income for income tax purposes (s. 16 of the *Guidelines*). This is one of the reasons parties exchange tax returns, to apprise themselves of any changes in income. The exchange of income tax returns should shed light on the income of both parties and therefore help to resolve the issues about what proportion of extraordinary expenses each should be paying. All of these issues should be dealt with in the Court in Newfoundland, for the reasons set out above.
- [12] In the circumstances, the only issues I will deal with by way of a provisional order are issues that are straightforward and unlikely to be contentious. Mr. King has pointed out that in May 2006 the table amounts under the *Guidelines* changed so that he should be paying an increased amount. He says that although he has been paying the increased amount, the Maintenance Enforcement Office is applying the increase to his arrears instead of his continuing payments. Accordingly, based on his stated current annual income of \$62,000.00 (which is very close to his annual income at the time of the Confirmed Order), Mr. King should be paying child support of \$937.00 per month. He should be paying that amount at least since November 1, 2006. A decision whether he should be paying the increased amount for a time period earlier than that will have to wait

until his annual income for 2006 is known and any issues arising out of that are dealt with.

[13] Mr. King also seeks an order that would allow him to make payments on arrears in the amount of \$200.00 monthly so as to avoid garnishment of his wages. In light of what has happened with the orders he obtained from this Court in April and September 2006, I think that request is reasonable on a temporary basis, to allow Mr. King time to bring the other issues forward in the Court in Newfoundland and Labrador.

[14] Mr. King asked that I incorporate the new monthly child support payment in an interim order under s. 19(9) of the *Divorce Act*, pending the making of an order under s. 19(7). The power to make an interim order under s. 19(9) applies where a court which is asked to confirm a provisional order “remits” a matter for further evidence to the court that made the provisional order pending the making of a confirmation order. There is no similar power given to the court that makes the provisional order, so I conclude that I do not have jurisdiction to do so.

[15] I therefore order on a provisional basis, subject to confirmation by the Supreme Court of Newfoundland and Labrador:

1. The Amended Confirmation of Provisional Order (Amended) dated November 17, 2005 and filed in this Court on April 18, 2006 is hereby varied to provide that, based on annual income of \$62,000.00, Mr. King will pay child support in the amount of \$937.00 per month effective November 1, 2006;

2. Mr. King will make payments on arrears of child support in the minimum amount of \$200.00 per month until August 31, 2007, after which date the minimum amount will no longer apply unless so ordered by the Supreme Court of Newfoundland and Labrador.

[16] I will review the provisional order when it is submitted for filing. After it has been filed, the Clerk will transmit it and the other materials to the appropriate authority pursuant to s. 18(3) of the *Divorce Act*.

Dated this 21st day of February 2007.

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

Heard at Yellowknife, NT
January 26, 2007

Counsel for Mr. King: Margo Nightingale
No one appeared for Ms. Farrell

S-0001-CV-2005 000067

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