IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Sewell* v. *Grant*, 2005 YKSC 39

Date: 20050623
Docket No.: S.C. No.: 01-D3398
Registry: Whitehorse

Between:

RACHAEL ANNE SEWELL

Petitioner

And

MICHEAL RYAN GRANT

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Christina Sutherland	Counsel For the Petitioner
No one appearing	For the Respondent
Lenore M. Morris	Counsel For the Director of Maintenance Enforcement

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the respondent father to confirm a provisional order from the Ontario Superior Court of Justice, which reduced both child support and arrears. The petitioner mother opposes the application, but not entirely. She agrees that there should be a reduction in the amount of ongoing child support, but contests the extent of that reduction. She also contests any reduction in the amount of the arrears.

[2] The divorce judgment and corollary relief order were made by this Court in August 2002. The corollary relief order imputed an income to the father of $75,000 per year and awarded child support of $621 per month, pursuant to the *Federal Child Support*

Guidelines, SOR/97-175 (the "*Guidelines*"). The father was also ordered to pay arrears of child support of $6,831.

[3] The father commenced his variation application in Ontario in May 2004. The application was supported by a "Change Information Form", which included certain sworn statements by him as to the alleged change in circumstances required by s. 17 of the *Divorce Act*, R.S. 1985, c. 3 (2nd Supp.).

[4] In responding to this confirmation application, the mother primarily relies on three affidavits: the third and most recent was filed specifically in response to the father's application; the first two were filed in 2002, prior to the corollary relief order.

[5] Pursuant to s. 19 of the *Divorce Act*, I can either remit the matter back to the Ontario Superior Court of Justice for the purpose of taking further evidence, confirm the provisional order with or without variation or refuse confirmation.

ISSUES

[6] The issues in this application are:

1. Ongoing Child Support

(a) Has there been a change in circumstances since the making of the corollary relief order to justify a variation in the amount of the ongoing child support?

(b) If so, what is the appropriate amount of ongoing child support?

2. Arrears

(a) Has there been a change in circumstances since the making of the corollary relief order to justify a reduction in the arrears of child support?

(b) If so, what should the reduction be and from when should it be effective?

(c) If there are arrears outstanding, at what rate should they be repaid?

POSITIONS OF THE PARTIES

Father's Position

[7] The father says the parties separated in August 1995 and continued to share parenting duties for the child, born October 23, 1991, for the ensuing six years. The parties signed a separation agreement in 1995 specifying joint custody of the child. The mother had the primary residence, but the parties agreed to equal shared time with the child. On that basis they also agreed that no child support would be payable.

[8] Following the mother's move with the child to the Yukon in 2002, the divorce proceedings were commenced in this Court. The father claims he did not have the means to litigate in the Yukon. The divorce order and corollary relief order were made, therefore, without his participation in the proceedings.

[9] On this application, the father says he has never earned $75,000 per year. He claims that his earnings have ranged between $35,000 and $41,000 annually over the years 2001 to 2004. He submitted a financial statement in support of his application in Ontario, which includes copies of earning statements from his employer, his 2001 and 2003 tax return summaries, and a portion of his 2002 tax return. In 2003, he reported a net income of $33,179.86. He anticipated the same amount of income in 2004 when he made his variation application in May of that year. Therefore, based upon the *Guidelines* table, he sought a reduction in monthly child support from $621 to $290. Further, he calculated that the amount of arrears as of April 1, 2004, should be reduced (after accounting for payments made) from $19,251 to $2,826.

Mother's Position

[10] The mother gave written notice to the father on October 5, 2001, that she intended to vary the child support arrangements under the separation agreement. She did not receive a response to that notice.

[11] The mother initially sought financial disclosure from the father through service of the petition for divorce and the provision of a blank financial statement in November 2001. This was not responded to by the father.

[12] The mother's counsel wrote to the father on January 21, 2002, asking for financial information. The father did not respond and the mother obtained an order from this Court on March 15, 2002 requiring the father to provide, within 30 days of the date of the order, the financial information specified in s. 21 of the *Guidelines*. The father did not respond to that order.

[13] On March 25, 2002, the mother's counsel wrote to the father informing him that if he failed to comply with the terms of the order for disclosure of financial information, the mother would be applying to the court to have his income imputed at the amount of $75,000 per annum for the purposes of an application for child support and arrears of child support. There were a number of telephone conversations between the parties after that letter, and even some e-mail exchanges, but the mother did not receive the requested financial statement or any other financial information.

[14] After the corollary relief order was made on August 16, 2002, the mother registered it with Yukon Maintenance Enforcement, which in turn arranged for registration of the order with the Ontario enforcement agency. That resulted in garnishment of the father's wages during the late summer of 2003. The father contacted

the mother to discuss a reduction in the amount of the child support. As a result, the mother's counsel e-mailed the father on November 26, 2003, setting out a detailed list of the financial information required. The father replied by providing the first page of his 2001 notice of assessment, two recent earnings statements and a letter from the Ontario Support Orders office. However, he failed to produce the income and tax information requested by the mother's counsel for 2002 and 2003. This was confirmed by e-mail from the mother's counsel to the father dated December 22, 2003. The father again failed to provide the requested information.

[15] According to the mother, the amount of arrears with Yukon Maintenance Enforcement as of February 4, 2005, is $5,464.80.

[16] The mother says the father never made any voluntary payments of child support and did not take any action to vary the corollary relief order until May 2004, when he applied for variation in Ontario.

[17] The mother also claims that she could have pursued the father for child support commencing in early 1995, when the child came to live with her on a full-time basis, contrary to the intention of the parties under the separation agreement. By accepting October 1, 2001 as the date arrears should commence, as specified in the corollary relief order, she submits that she has saved the father thousands of dollars in additional child support arrears. The mother further claims that the period between 1995 and 2003, when the father was not paying child support, was very difficult for her financially.

[18] The financial information provided by the father is challenged by the mother. In particular, she notes that in his 2003 tax return summary the father claims to have experienced a loss relating to rental income of $14,539.82. This arises from the father's

"Statement of Real Estate Rentals", where he claims a total of $31,534.67 in expenses, which presumably relates to the rental suite in his home. Included within those expenses is an amount for "maintenance and repairs" of $20,610.63. The mother suggests that this must be a capital cost for renovations to the suite, as it is far in excess of what one would consider as reasonable for maintenance and repairs for a rental property in a single year. Although the father deducted 50% of those expenses as his personal portion, he still claimed a net expense of $18,039.82. After crediting the rental income of $3,500 he received in 2003, he declared a net loss of $14,539.82.

[19] Both the mother and the counsel for Yukon Maintenance Enforcement submit this purported loss is unsupportable and in effect should be added back into the father's total income for 2003. Accordingly, the mother submits that the father's gross income for 2003 should be $51,219, which, rounded down, is the sum of his employment income ($44,783.73), his rental income ($3,500) and his RRSP income ($2,935.95).

[20] As for the father's financial statement for 2004, the mother argues that it is also inappropriate for the father to have claimed deductions for his "Rr plan" of $216.66 (which she presumes to be an RRSP contribution), his "Credit Union loan" of $325 (as no particulars for the loan were supplied and it is therefore presumed to be for a personal expense) and the "family support plan deductions" of $882.38. She also questions why the father claims a negative amount of $1,211.65 under "rent". Finally, she takes issue with the car loan expense of $277 monthly, saying that child support and arrears should take priority over car payments.

LAW

Change of Circumstances

[21] There is a debate in this country as to whether courts retain any discretion in making a variation of child support once it is determined that there has been a change in circumstances. That debate centres on the use of the word "may" in s. 17(1) of the *Divorce Act*. That section and the other relevant statutory provisions are set out below. I have emphasized the key words in each:

- Section 17(1) of the *Divorce Act*:

  > "A court of competent jurisdiction ***may*** make an order varying, rescinding or suspending, prospectively or retroactively,
  >
  > (a) a support order …"

- Section 17(4) of the *Divorce Act*:

  > "Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that ***a change of circumstances as provided for in the*** applicable ***guidelines*** has occurred since the making of the child support order or the last variation order made in respect of that order."

- Section 14(a) of the *Federal Child Support Guidelines*:

  > "14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes ***a change of circumstances*** that gives rise to the making of a variation order in respect of a child support order:
  >
  > (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, ***any change in circumstances*** that would result in a different child support order or any provision thereof;"

- Section 17(6.1) of the *Divorce Act*:

> "A court making a variation order in respect of a child support order ***shall do so in accordance with the*** applicable ***guidelines***."

[22] A change in circumstances has been held to mean a change that, if it was known by the court at the time that the previous child support order was made, would likely have resulted in a different order. On the other hand, if the information relied on as constituting a change was known at the time the previous child support order was made, it cannot be relied on as the basis for variation.[1]

Discretion

[23] As for the matter of discretion, the British Columbia Court of Appeal in *Wang* v. *Wang* (1998), 58 B.C.L.R. (3d) 159, held, at para. 36, that if Parliament had intended the *Guidelines* to be mandatory on all applications to vary, it would have said so explicitly in s. 17(1). That approach has also been taken by the Courts of Appeal of New Brunswick and Alberta.[2]

[24] In contrast, the Courts of Appeal of Ontario, Saskatchewan and Nova Scotia have each determined that "may" in s. 17(1) really means "must" and consequently there is no residual discretion to not vary according to the *Guidelines* table once there has been a change in circumstances.[3] These cases say that the enactment of the *Guidelines* created a "right to variation" once the applicant has satisfied the court that they fall within one of the pre-conditions of ss. 14(a) or (c) of the *Guidelines*.

[25] A good starting point for understanding this debate is the *obiter dicta* (non-binding portion of his opinion) of Laskin J.A. in *Bates* v. *Bates* (2000), 49 O.R. (3d) 1 at para. 24:

> "Those who argue in favour of giving the court an overriding discretion to refuse to apply the Guidelines focus on the word "may" in s. 17(1) of the Act. … But the word "may" has to be read in its context. Thus, the Interpretation Act, R.S.C. 1985, c. I-21 states that "may" is to be construed as permissive unless

> the contrary intention appears in the legislation. … In some contexts the word "may" confers a discretionary power on the court. In other contexts "may" simply gives the court the power or authority to do something; and if the exercise of that power depends on a condition being satisfied, "may" has been interpreted to mean "must" once the condition is met. …" (citation omitted)

[26] Laskin J.A. continued, at pp. 11 and 12, that this latter interpretation best reflects the purposes of the *Guidelines*, which promote uniformity, fairness, objectivity and efficiency in child support orders. The specific objectives of the *Guidelines* are set out in s. 1. They are:

> "(a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances."

Laskin J.A. explained, at para. 24, how each objective would be undermined by expanding rather than curtailing judicial discretion:

> "Assuming the Guidelines reflect what Parliament considers "fair" support, adopting an interpretation of s. 17 of the *Divorce Act* that gives judges an open-ended discretion to refuse to apply the Guidelines does not promote fair support. Expanding the scope of judicial discretion to permit judges to refuse to apply the only objective standard of child support available, the Guidelines, will increase, not reduce, conflict and tension between spouses. Permitting judges to ignore the Guidelines will make the resolution of family disputes less efficient, not more efficient. And giving judges broad discretion to refuse to vary previous child support orders to comply with the Guidelines regime will not ensure that spouses and children in similar circumstances are treated

> consistently, because their treatment will differ depending on the wholly arbitrary factor of when separation or divorce took place."

[27] Finally, Laskin J.A. also noted that the *Guidelines* themselves set out the limited circumstances when judicial discretion may be exercised in deviating from the table amounts, citing ss. 17(6.2) and (6.4) of the *Divorce Act*. I would add ss. 10 and 14(b) of the *Guidelines* as further exceptions where the court can deviate from the table amount.

[28] *Bates* was followed in *Wright* v. *Zaver* (2002), O.R. (3d) 26 (O.C.A.). That case further detailed the nature of the debate on this issue of discretion. The Ontario Court of Appeal confirmed that the *Guidelines* create a "right to a variation" of pre-existing child support orders and that there is no residual discretion ***not*** to vary once one of the pre-conditions in ss. 14(a) or (c) have been satisfied. Simmons J.A. at para. 52 expressly adopted the views of Laskin J.A. in *Bates* and concluded that "… "may" as it appears in s. 17(1) of the *Divorce Act* … means "must", once the pre-condition requisite to variation is met. …" In so deciding, the court reversed its earlier decision in *Sherman* v. *Sherman* (1999), 44 O.R. (3d) 411, which had adopted portions of the reasoning in *Wang*, cited above.

[29] Simmons J.A. in *Wright*, at para. 62, described the three categories of orders contemplated in s. 14 of the *Guidelines*:

> "Section 14(a) applies exclusively to applications to vary post-Guidelines orders where the amount of child support in the existing order was determined based on Guidelines table amounts. Section 14(b) applies exclusively to applications to vary post-Guidelines orders where the amount of child support in the existing order was not determined based on Guidelines table amounts. Section 14(c) applies exclusively to applications to vary pre-Guidelines orders."

[30] Simmons J.A. acknowledged, at para. 63, that s. 14(b) of the *Guidelines* is the only pre-condition to variation which requires the exercise of any discretion. She noted that s. 14(b) retains the language of s. 17(4) of the *Divorce Act*, as it existed prior to the *Guidelines* coming into force, and therefore preserves the pre-existing judicially interpreted test of “material change in circumstances”: see *Willick* v. *Willick*[1]. However, she continued, at para. 64:

> “Rather than signalling a legislative intent that there be an undefined residual discretion not to vary, in my view, s. 14(b) of the Federal Guidelines limits judicial discretion not to vary to a single category of orders, and defines the scope of that discretion.”

[31] Having reviewed the differing lines of authority discussed in *Wright*, I am persuaded that there is no residual discretion *not* to vary where an applicant establishes one of the pre-conditions in either s. 14(a) or 14(c) of the *Guidelines*. I agree with the statutory interpretation argument that “may” in s. 17(1) means “must” in those circumstances. I also agree with Laskin J.A. in *Bates*, cited above, that this conclusion is most likely to meet the objectives of the *Guidelines* in ss. 1(a) to 1(d).

[32] There is, however, continuing discretion where an applicant falls within the pre-condition in s. 14(b) - where it is sought to vary a post-*Guidelines* order which was not made in accordance with the table. In that case, “any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support” must be considered. The pre-guidelines case law may still be helpful here. For example, *Willick* v. *Willick*[1], held that the change in circumstances had to be “material” in the sense that there had been a change in the relationship between the needs of the children and the means of the parents. If so, the court must re-assess the needs of the

children in light of the change, taking into account the standard set by the means of the parents.

[33] There are also a limited number of additional circumstances in the *Divorce Act* and the *Guidelines* where the court may exercise discretion in departing from the table amount:

a. Section 17(6.2) of the *Divorce Act* - where special provisions have otherwise been made for the child and where the application of the *Guidelines* would be inequitable;
b. Section 17(6.4) of the *Divorce Act* - where consensual arrangements have been made for child support which are considered to be "reasonable";
c. Section 4(b)(ii) of the *Guidelines* – where a spouse has an income over $150,000; and
d. Section 10 of the *Guidelines* - where a spouse or a child would suffer "undue hardship" unless the amount of child support is varied from the amount indicated by the table.

[34] Further, there are provisions which invite the court's discretion, but with respect to terms and conditions and not the quantum determined by the table:

1. Section 17(3) of the *Divorce Act* - the court may include in a variation order any provision that could have been included in the original order. That would seem to make s. 15.1(4) of the *Act* applicable to variations of arrears. Section 15.1(4) allows the court to impose timelines, terms, conditions or restrictions in connection with the child support order, "as

it thinks fit and just". However, given that s. 15.1(3) and s. 17(6.1) both require the court to order child support "in accordance with" the *Guidelines*, I take it that s. 17(3) must refer to matters other than quantum.

2. Section 7 of the *Guidelines* - where there has to be an accounting for special or extra-ordinary expenses;
3. Section 11 of the *Guidelines* - whether payments are made periodically, in a lump sum, or in some combination of both; and
4. Section 12 of the *Guidelines* - where the court may order the amounts payable be paid or secured in a manner specified.

Principles Applicable to Arrears

[35] The above principles and provisions apply to applications to vary ongoing child support. The next question is whether they also apply to applications to vary child support arrears. Here, it is helpful to note the decision of the British Columbia Court of Appeal in *Shankland* v. *Harper* (1999), 60 B.C.L.R. (3d) 242, where Huddart J.A., speaking for a panel of four, said at paras. 19 and 20:

> "Nothing in the Act or the Guidelines deals specifically with arrears under a **child support** order or suggests a distinction between a **retroactive** and a prospective **variation** order insofar as the application of the Guidelines is concerned. …
>
> …
>
> The conclusion is inescapable that Parliament intended all **variation** orders, **retroactive** or prospective, to be in accordance with the Guidelines. …" (emphasis already added)

[36] In *Earle* v. *Earle*, [1999] B.C.J. No. 383, Martinson J. of the British Columbia Supreme Court thoroughly canvassed her view of the basic principles relating to the

reduction or cancellation of child support arrears. She noted initially that the cancellation or reduction of child support arrears "is a form of variation" (para. 21). Martinson J. further held that not only must there be a change in circumstances, but that the change must be "material", that is, "significant and long lasting" (para. 19). Following the earlier Alberta Court of Appeal decision in *Haisman* v. *Haisman* (1994), 157 A.R. 47, *Earle* also held that arrears will only be varied if the person is unable to pay now and will be unable to pay in the future (para. 26). *Earle* was applied by Veale J. of this Court in *Ford* v. *Hombert,* 2004 YKSC 21.

[37] *Earle*, which followed *Wang*, cited above, is a case which is premised on the overriding discretion of the court in deciding whether or not to vary child support arrears. The following language used by Martinson J. makes this abundantly clear (I have added emphasis to certain key words and phrases):

- "A change to the guideline amount is ***not automatic***" (para. 46).
- "A judge does not have to change an order granted before the Guidelines came into force, to conform with the Guidelines just because a parent asks. Instead, an order will only be changed where the arrangements the parents or a previous court made are seen as ***unreasonable*** when compared with the arrangements that would result from the application of the Guidelines after taking into account all the relevant factors" (para. 20).
- "The courts are generally reluctant to reduce or to cancel arrears … arrears will not be reduced or cancelled unless it is ***grossly unfair*** not to do so. …" (at para. 23).

- “There has to be ***a material change*** of circumstances, a change that is ***significant and long lasting***” (at para. 46).
- “Because cancellation or reduction of arrears is a form of variation, there is ***a substantial onus (a heavy duty)*** on the person asking for a reduction or a cancellation of arrears. …” (at para. 22).

[38] Under the *Guidelines*, where an applicant for variation of child support arrears meets the pre-condition in either s. 14(a) or 14(c), following the logic of *Bates* and *Wright*, cited above, he or she has a right to a variation of the arrears in accordance with the table. Further, since s. 17(1) of the *Divorce Act* specifically authorizes variation, rescission or suspension of child support “retroactively”, then the revised amount based on the table should also be applied retroactively. See also *Shankland*, cited above.

[39] It is difficult to reconcile the concept of having a “right” to variation with the prospect of having that right undermined by the exercise of discretion. In the following examples, I have set out when *Earle* suggests the court should exercise discretion and my response in each case:

1. *Whenever the court may feel the applicant has not met the “substantial onus” or “heavy duty” referred to in Earle*. There is nothing in the *Act* or the *Guidelines* which purports to create a different standard of proof for an applicant seeking variation of ongoing child support as compared with an applicant seeking a variation of arrears.
2. *Where an applicant fails to establish a “material” change of circumstances or a change that is “significant and long lasting”.* All that ss. 14(a) and (c) require is a “change in circumstances”. Indeed, s. 14(a) says that “*any*

change in circumstances that would result in a different child support order" is sufficient. Thus, any change in the payor's income which would result in a different amount payable under the table, and thus a different child support order, is sufficient. Admittedly, as *Earle* clearly states at paras. 27 – 30, the applicant must provide reliable, accurate and complete information and the change in circumstances must be real and legitimate. Further, if the applicant is earning less money than he or she is capable of, then income may be imputed to the applicant under s. 19 of the *Guidelines.* However, subject to those qualifications, if the applicant's income is proven to be less than what was previously assumed or imputed, the quantum of child support is reduced retroactively to reflect that change.

3. *Where an applicant fails to establish that it would be "grossly unfair" not to reduce or cancel the arrears, or that the previous child support order was "unreasonable" compared with what it would be currently under the Guidelines*. These circumstances are similar to the "substantial onus" problem. The legislation simply does not require more from an applicant seeking to vary arrears than from one seeking to vary only ongoing child support.

4. *Where an applicant fails to establish that he cannot pay the arrears both currently and in the future.* The *Guidelines* only require the applicant to show a change in circumstances, which in the case of s. 14(a) would be a change in present income. There is no requirement that the applicant establish future inability to pay.

[40] Of course, there may be cases where a party specifically asks the court to exercise its discretion under one of the legislative provisions I enumerated above. For example, a party could argue, either as part of their application or in response to the other's application, that the undue hardship provisions under s. 10 of the *Guidelines* should apply. However, those legislative circumstances where the court retains discretion do not correspond with those set out in *Earle*. Therefore, to the extent that *Earle* assumes the court has discretion:

(a) in deciding on the sufficiency of the change in circumstances;

(b) to disallow a variation notwithstanding a change in circumstances; and

(c) to disallow a variation if the applicant fails to prove they will be unable to pay the arrears in the future,

I respectfully feel compelled to conclude that it is no longer good law.

APPLICATION OF LAW TO FACTS

Ongoing Child Support

[41] The first question is whether there has been a change in circumstances. I accept that the father's actual income is less than his previously imputed income. However, I agree with the mother's position regarding the father's apparent under-reporting of income for 2003. The total rental expense claim of $31,534.67 is unsupportable. Therefore, I would disallow the net loss of $14,539.82 for rental income. As suggested by the mother, I would then add his employment income ($44,783.73) to his rental income ($3,500) and his RRSP income ($2,935.95), to result in a total of $51,219 as income for 2003.

[42] Further, as the father himself said that he expects to earn “the same income” in 2004 as he did in 2003, I impute income of $51,219 to the father for the year 2004. In doing so I rely on ss. 19(1)(d), (f) and (g) of the *Guidelines*. Here, I refer respectively to the father’s apparent diversion of rental income, or at least an apparent undercharging for market rent; the father’s failure to provide income information when under a legal obligation to do so; and the father’s unreasonable deduction of expenses from income.

[43] The father failed to provide a complete tax return for 2002. He has also failed to provide copies of his notices of assessment and reassessment issued to him for each of the three most recent taxation years. As the applicant for a variation of a child support order, he has a legal obligation under s. 21(1) of the *Guidelines* to provide this information. He was also previously ordered by this Court (March 15, 2002) to provide the same type of information, which he failed to do.

[44] The reduction in the father’s income, from $75,000 to $51,219, constitutes a change in circumstances under s. 14(a) of the *Guidelines*. Had the court known that this was the father’s income when the mother applied for the corollary relief order, a different order would have been made. Consequently, as requested by the mother’s counsel, I would reduce the father’s ongoing child support obligations from $621 per month to $440 per month, in accordance with the *Guidelines*. That should commence as of June 1, 2004, since that was the first date child support was due after the father applied to vary the corollary relief order in the Ontario Superior Court of Justice.

[45] I note that in the relief sought by the mother in her chambers brief she agreed to vary the corollary relief order by replacing the father’s imputed annual income of $75,000

with amount of $51,219. That order, in turn, was premised on the determination that the respondent's child support obligations should have commenced October 1, 2001.

Arrears

[46] Given that I have found that there has been a change in circumstances to justify a reduction in ongoing child support, I feel compelled to conclude that the same change in circumstances justifies a reduction in the arrears of child support. Again, I conclude that if this Court had known that the father's income was $51,219, and not $75,000, when the mother applied for the corollary relief order, a different order would have been made. Thus, the father gets past the first step of the analysis by having established the pre-condition of his application under s. 14(a) of the *Guidelines*.

[47] Neither party has specifically argued that I should exercise my discretion under any of the enumerated provisions in the *Divorce Act* or the *Guidelines* to depart from the amount of child support suggested by the table. Of course, the mother's counsel was quite properly operating under the assumption that the principles for varying child support arrears set out in the *Earle* decision continued to be applicable in this jurisdiction. On that basis, she argued against any reduction in arrears, notwithstanding the change in circumstances.

[48] The mother did not challenge the financial information provided by the father for the years 2001 and 2002. The actual income earned by the father in each of those years is less than the previously imputed income of $75,000, and therefore constitutes a change in circumstances under s. 14(a) of the *Guidelines*. From what I was able to discern, the father did not claim the same "rental income" loss as a deduction in each of those years as he did in the challenged year of 2003. His reported gross income for

2001 was $39,601.70. As that was unchallenged by the mother, I am prepared to retroactively accept that as the actual income of the father for that year. Having no discretion here not to vary, according to the *Federal Child Support Guidelines* table that results in an amount of $341 monthly. As for 2002, the father's reported gross income was $41,086. On the same basis, according to the *Federal Child Support Guidelines* table, that would result in a monthly payment of $353.

[49] Thus, the arrears in para. 9 of the corollary relief order, for the period from October 1, 2001, to and including August 1, 2002, should be recalculated as follows:

2001 – 3 months X $341 =	$1,023
2002 – 8 months X $353 =	$2,824
TOTAL	$3,847

[50] The father's child support arrears accrued under the corollary relief order from September 1, 2002 (the date ongoing child support was to commence) to and including April 1, 2004 (the date referred to in the father's application), being a period of 20 months. For the 2002 portion of that period (4 months), the father should have paid $353/month or (4 x $353) $1,412. For the 2003 portion of that period (12 months), the father should have paid $440/month, based on his imputed income of $51,219, or (12 x $440) $5,280. For the 2004 portion (4 months), the father should have paid (4 x $440) $1,760. Therefore, the total arrears accrued for that 20 month period should be ($1,412 + $5,280 + $1,760) $8,452.

[51] If the retroactively varied arrears of $3,847 are added to the arrears accrued under the Corollary Relief Order, $8,452, then the total should be $12,229 as of April 1,

2004. Subtracting from that the $7,100 which the father has remitted (albeit through garnishment), would result in a balance owing of $5,199.

CONCLUSIONS

[52] It is not necessary to remit this matter back to the Ontario Superior Court of Justice for the taking of further evidence. I have sufficient evidence to confirm the provisional order with variation, as follows:

1. Ongoing Child Support

(a) The new information about the father's income constitutes a change in circumstances since the making of the corollary relief order to justify a variation in the amount of the ongoing child support.

(b) Child support should be reduced from $621 monthly to $440 monthly, effective as of June 1, 2004. The provisional order should be varied accordingly.

2. Arrears

(a) The new financial information also constitutes a change of circumstances since the making of the corollary relief order to justify a reduction in the arrears of child support.

(b) The arrears in para. 9 of the corollary relief order should be reduced from $6,831 to $3,847. The child support arrears accruing from October 1, 2001, to and including April 1, 2004, is $5,199.

(c) In addition to the ongoing child support payments of $440 per month, and after crediting the father with any overpayments in the interim, he shall repay the arrears at the rate of $160 per month.

[53] To be clear, the terms of the provisional order are varied and amended by underlining as follows:

"THE COURT ORDERS THAT:

> 1. The terms of the order made between these parties by the Honourable Mr. Justice R.E. Hudson on Friday, the 16th of August 2002 in the Supreme Court of the Yukon Territory Court File S.C. No. 01-D3398 be and the same are hereby varied by deleting paragraphs 8 and 9 thereof and inserting in their place the following:
>
> > "8. Commencing June 1, 2004, the respondent shall pay child support to the applicant for the support of the child Courtney Alexis Grant born October 23, 1991 in the amount of $440 per month in accordance with the Federal Child Support Guidelines based on his imputed total annual income of $51,219.
> >
> > 9. Child support arrears accrued pursuant to the Order of the Honourable Mr. Justice R.E. Hudson dated Friday, August 16, 2002 in the Supreme Court of the Yukon Territory Court, File S.C. No. 01-D3398 be and the same are fixed in the amount of $5,199 to and including April 1, 2004, and are to be paid at the rate of $160 per month commencing May 1, 2004 until paid in full."
>
> 2. The Family Responsibility Office shall adjust their records accordingly for Case Number 0654901, File, Number 13635-02."

COSTS

[54] I note that s. 24(d) of the *Guidelines* states that where a party fails to comply with an order compelling them to produce financial information, such as was ordered by this Court on March 15, 2002, the Court may award costs in favour of the other party "up to an amount that fully compensates [that party] for all costs incurred in the proceedings."

[55] While this confirmation hearing was not an application under the *Guidelines* in response to the father's failure to comply with the order of March 15, 2005, I nevertheless wish to express my disapproval of the father's contemptuous conduct in failing to obey an order of this Court. I have great difficulty accepting the father's apparent and scanty explanation that he did not have the means to litigate in the Yukon.

He could have done so at relatively minimal expense by representing himself and filing appropriate materials. He could have been connected to the Court proceedings by teleconference. It is clear to me that the father was only prompted to make his variation application when garnishment of his wages began in Ontario. In these circumstances, I feel it is appropriate to apply the principle in s. 24(d) of the *Guidelines* and award the mother costs in an amount that fully compensate her for all costs incurred by her in these proceedings. The Yukon *Divorce Rules, 1986*, state that the *Rules of the Supreme Court of the Yukon Territory* apply to proceedings under the *Divorce Act*, where the *Divorce Rules* are silent. Pursuant to Rule 57 of the *Rules of Court,* I award the mother special costs for her response to this application.

POST-SCRIPT

[56] I regret that I was not aware of the divergence in the case law on variation of child support orders at the time of the confirmation hearing. I only learned of the debate upon further considering the mother's submission that I should exercise my discretion by declining to reduce the child support arrears, notwithstanding the change in circumstances. Accordingly, I allowed counsel for the mother and counsel for Yukon Maintenance Enforcement a period of 30 days to bring this matter back to Court for continuation of the confirmation hearing or to provide further submissions on the issue of discretion. Both counsel declined to take up my offer.

GOWER J.

Endnotes

[1] *Willick* v. *Willick*, [1994] 3 S.C.R. 670

[2] *Parent* v. *Pelletier* (1999), 219 N.B.R. (2d) 102 (C.A.)
Laird v. *Laird* 2000 ABCA 9

[3] *Bates* v. *Bates* (2000), 49 O.R. (3d) 1 (C.A.)
Wright v. *Zaver* (2002), 59 O.R. (3d) 26 (C.A.)
Dergousoff v. *Schille* (*Dergousoff*) (1999), 177 Sask. R. 64 (C.A.)
MacKay v. *Bucher* 2001 NSCA 120