IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Brost* v. *Brost,* 2004 YKSC 57

Date: 20040820
Docket No.: S.C. No. 03-D3630
Registry: Whitehorse

Between:

KAREN LYNN BROST

Petitioner

And

ALAN WAYNE BROST

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
Debbie P. Hoffman — For the Petitioner
E. Joie Quarton — For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The petitioner mother applies for child support for her 17-year-old son, Nelson, who has been residing with her from time to time since the parties separated in January 2002. The respondent father has cross-applied for child support for both Nelson and his older brother, Mitchell, who just turned 19, for the time that both sons were residing with him.

[2] When the parties separated in January 2002, the mother moved out of the family home. They arranged that the father would remain in the family home, which was

essentially mortgage-free, with the two boys while they were attending high school in Whitehorse. They also arranged that the mother would not pay any child support for the two boys and that the family assets would be divided later. The parties disagree about a term of the “verbal agreement” between them giving rise to this arrangement. The father alleges that the mother agreed to forgo any claim against his pension upon the eventual division of the family assets. The mother denies that she waived her right to the pension, although she acknowledges that the father told her that she would not be getting his pension.

[3] The mother alleges that Nelson later came to reside with her from June to October 2002 and from May 2003 to May 2004. She says she asked the father to pay child support for Nelson during those periods. The father says the mother did not ask for child support for Nelson until or about May 2003, when she also reneged on her waiver of his pension, and that this was when the verbal agreement broke down.

[4] The mother argues that the arrangement of the sons living with their father in the family home constitutes a “special provision” under s. 15.1(5) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), which justifies a departure from the specified amounts under the *Federal Child Support Guidelines*. That would allow her to be credited for the value to the father in occupying the family home.

[5] The father argues that after the verbal agreement came to an end in May 2003, as he says, each party should have paid child support to the other for any period when either had one or both of the sons living with them. Accordingly, the father says that s. 8 of the *Child Support Guidelines* should apply. It provides that during times of split custody, one parent’s child support is set off against the other’s and the difference is due

from the parent paying the larger amount. The father's counsel was less clear on whether the child support due from the mother should be retroactive. That is, whether the mother should pay for any periods prior to the end of May 2003. However, at the hearing she argued for child support from the mother from January 2002 forward.

ISSUES

[6] There was a significant amount of conflicting affidavit material and extensive argument by counsel for both parties, leading to some confusion on my part over the precise issues to be adjudicated. There were also changes in the parties' positions as the hearing progressed. Accordingly, I invited counsel to provide the Court with an outline of the issues from their perspective. I have amended them slightly to avoid identifying the parties; they are as follows:

1. What is the effect of the verbal agreement?

2. Is the verbal agreement a "special provision" under s. 15.1(1) of the *Divorce Act*?

3. What are the terms of the verbal agreement?

4. Is there any retroactive child support payable by the father to the mother, or vice versa, considering the terms and the effect of the verbal agreement?

5. How is child support to be dealt with in the future?
   (a) For Nelson:
      (i) When he lives with the mother?
      (ii) When he lives with the father?
   (b) Do the terms of the verbal agreement reached between the parties remain in effect with respect to Nelson?

(c) For Mitchell:

(i) is there any child support payable for Mitchell after he turned 19 on July 15, 2004, or

(ii) should a party requesting child support make an application to Court to determine the issue depending on the circumstances at the time child support is requested?

EVIDENCE

[7] Any discussion of the issues must be informed by the circumstances under which the verbal agreement was made and the conduct of the parties going forward. The evidence is in conflict but there are some points of common ground. Given the central importance of the verbal agreement to the parties, I will take some time to go through the manner in which the parties described the agreement in their respective affidavits.

[8] The mother initially said she and the father made a verbal agreement that he would remain living in the family home with the two boys, while the mother took up residence in a home outside of Whitehorse. The parties decided it would be more convenient for the sons to remain living in Whitehorse while they attended school. They agreed that the mother would not pay child support for the sons while they remained living in the family home with the father. After the sons graduate, the parties intend to deal with the mother's interest in the family home, either by the father purchasing her interest or by splitting the sale proceeds. The mother says the agreement that she not pay child support was based on the fact that the father would have the benefit of living in the family home and that the mother would be helping her new common-law spouse pay the mortgage for her new home outside of Whitehorse.

[9] The father's response was that he did not recall any discussion about what would be best for the sons, but somewhat inconsistently does recall the mother saying that the

children would be “better off” with him at that time, as the mother did not have a place to live when she first moved out of the family home. Nor does the father recall any discussion about the mother not paying child support for the specific reason that she would be helping her new spouse pay his mortgage. However, the father did *not* deny that *part* of the reason for the decision that the mother would not pay child support was that he would have the benefit of living in the family home. The father also acknowledges that the parties agreed to divide the value of the family home after the children leave home. He says that the mother “volunteered” to leave his pension alone and that she “confirmed her continued agreement” to that many months after they separated.

[10] The mother implicitly denied that she volunteered not to claim a division of the pension, and responded that the father had told her she would not be getting his pension.

[11] The father responded in turn that he did not particularly want to continue living in the family home, but as the mother did not have a place to live at that time, he felt that the sons “would be better off staying with him in the family home, where they had lived for a number of years”. He recalls that the verbal agreement was that he would stay in the family home and “continue to provide a home and stability for the children”. He confirmed that part of the agreement was that the mother would not pay child support and would not seek a share of his pension when it came to dividing the family assets. He clarified that he did not insist on the mother not seeking a share of his pension, but rather this was something the mother “offered” to do. Again, he said that he felt “it would be good for Mitchell and Nelson” to continue living in the family home.

[12] The mother's last response was that she did not tell the father she would not claim a division of his pension and that the parties did not make any agreements as to the division of the family assets, except that she would not be receiving her share of the equity in the family home until the children finished high school. She once again confirmed the only agreement was that the children would live with the father in the family home until they graduate from high school and she would not pay child support because the father would not have to pay rent or a mortgage while he remained in the family home.

[13] In fact, the father did remain in the family home with the two sons for the first part of 2002, and no child support was paid by the mother nor was any claimed by the father over that initial period. Then the arrangement began to unravel. Once again, exactly how is in dispute.

[14] This is the mother's version of events:

- Nelson moved in with her and lived with her "most of the time from mid-June 2002 to mid-October 2002". Nelson returned to the family home (the "father's home") for a weekend during that period of time, but he was "kicked out" of the family home by the father in mid-August. She asked the respondent to pay child support for Nelson during that period. None was paid by either parent.
- In mid-October 2002, Nelson returned to reside with the father, where he remained until May 2003.

- In May 2003, Nelson returned to the mother's home until October 2003. Again, she asked the father to pay child support for Nelson for that period. None was paid by either parent.
- Nelson moved back with the father around the end of October 2003 and stayed about one month.
- He returned to live with the mother at the end of November 2003 and stayed until the end of May 2004. The father began paying child support for Nelson in December 2003.
- In June 2004, Nelson returned to the father's home, but there is no evidence where he has been residing since then.

[15] The father says he was the "sole support" for the sons until May 2003, aside from a "short period of time during the [Northwestel] strike", when he had to travel to British Columbia and Nelson stayed with the mother. Earlier, the father deposed that he had to work in British Columbia "for two months to cover for striking workers". However, in a later affidavit, the father, again somewhat inconsistently, said that "with the exception of June to October 2002 [approximately five months], I had been supporting both children with no assistance from the [mother] for almost a year and a half". At the very least, this corroborates the mother's evidence that Nelson lived with her over this period.

[16] The father also did not refute the evidence that Nelson lived with his mother from May 2003 until May 2004 (with the exception of the month of November 2003), although his counsel argued he had both sons from time to time from September to November 2003.

[17] Another inconsistency by the father is that he deposed the mother “volunteered” or “offered” to forgo a claim against his pension and that he did not “insist” on the point. However, when he says the mother reneged on their agreement regarding the pension, he told her that he would be seeking child support for Mitchell “as my agreement to no child support was **tied to** her not seeking a share of my pension” (emphasis added). First of all, that seems internally inconsistent. Initially, the father deposed in terms that the mother’s waiver of claim to the pension was gratuitously offered by her and not, apparently, essential to him. However, he then says that this same issue “was tied to” his agreement to forgo child support. It is also externally inconsistent in that the father says the mother reneged on her agreement respecting the pension in the spring of 2003, and yet he made no application for child support for Mitchell until the mother filed her current application, almost a year later. If the pension issue was as important to the father as he sometimes claimed in his affidavits, then one would have expected him to move much more quickly to obtain child support for Mitchell.

ANALYSIS

[18] I pause here to note that counsel for each party filed documents as exhibits in this hearing detailing their calculations as to the amount of child support that is payable by each party to the other, assuming the Court treats this as a split custody situation under s. 8 of the *Child Support Guidelines*. While that information is helpful, it does not fit squarely with evidence of the parties as to when Nelson lived with each of them. As well, the mother’s counsel in her Chambers Outline for this hearing stated that the mother was asking for child support for Nelson for the months from May to October 2002. However, that this is not what the mother deposed to. Where there is any significant

discrepancy between the affidavits and the additional material filed for the purposes of this hearing, I have used the information in the affidavits.

Issue 1: What is the effect of the verbal agreement?

[19] I assume from the way this issue was phrased by counsel that they did not intend to presume there was a binding verbal agreement. Rather, I take it that counsel are asking whether the agreement, such as it was, constitutes a valid oral contract?

[20] I am satisfied that the verbal agreement was a valid oral contract between the parties. There was an implicit offer and acceptance, as well as consideration. While there was some uncertainty as to one of the terms, that does not affect the validity of the remainder, as I shall discuss in more detail below.

[21] Counsel for the father argued that the verbal agreement was for the parties own benefit and not for the benefit of the children. While it is no doubt true that the agreement benefited the parties, as admitted by the mother's counsel, I do not accept the agreement was not also for the benefit of the two children. At a minimum, those benefits were that:

- the children were allowed to remain in Whitehorse, in the neighbourhood with which they were familiar;
- they were also allowed to remain in the family home, in which they have lived since 1987;
- there was more than sufficient space for the father and the two sons in the family home;

- it was not necessary for the boys to move from the family home to the mother's new home, which is approximately a 40-minute drive outside of Whitehorse; and
- as the family home was mortgage-free (with the exception of an $8,000.00 outstanding loan to the father from his employer, which will be paid out upon the sale of the home), the father had more disposable income to use for the benefit of the children.

Indeed, the father himself deposed that the sons were "better off" and had greater "stability" by residing with him in the family home.

[22] The effect of the verbal agreement that constitutes a "special provision" under s. 15.1(5) of the *Divorce Act*. I will discuss the law leading to this conclusion under Issue 2, immediately following. Accordingly, while the arrangement contemplated by the verbal agreement was in place, no child support was payable by the mother. This takes into account the value to the father of being able to stay in the family home essentially mortgage free, which value would be equivalent to the notion of "occupation rent" payable by the father to the mother. While the mother's counsel did not specifically claim occupation rent, she did argue fairly extensively that the equivalent value to the father, arising from the verbal agreement, must be accounted for in any determination of child support. I will discuss occupation rent again under Issue 4.

[23] I agree that this value must be accounted for the period from January to May 2002 inclusive, when the father was living with the sons in the family home as the parties originally intended. If there is a subsequent claim for occupation rent by the mother when the family assets are divided, I would expect the Court at that time would take note

of this aspect of my decision, in order to avoid the mother receiving a double benefit for that period.

[24] However, the arrangement changed significantly in June 2002, when Nelson began residing with his mother. I accept that the mother made a claim for child support for Nelson at that time. One would logically expect her to do so. She then had a comparatively modest income of approximately $41,000, while the father's income in that year was approximately $112,000.

[25] Further, the father does not specifically refute the allegation that the mother asked for child support. Rather, he simply says he does "not recall" her asking for child support. While I do not wish to be unduly critical of the father in this regard, his affidavits were replete with responses that he did not "recall" various allegations by the mother. This is problematic for the Court because a failure to recall something is not equivalent to a denial that what is alleged is true. That problem, in conjunction with the problem of the other inconsistencies in his evidence, leads me to prefer the evidence of the mother on this point.

[26] Even if I am in error in concluding the verbal agreement was a valid oral contract, I would be inclined to say the arrangement still constitutes a special provision. Section 15.1(5)(a) of the *Divorce Act* speaks of:

> … special provisions in an order, judgment or a written agreement … or that special provisions have otherwise been made for the benefit of a child …

The latter part of that paragraph makes it clear the agreement need not be in writing to be acceptable. I would also argue it goes even further and that provisions which have

"otherwise been made" could include an arrangement, perhaps even a unilateral one, which falls short of constituting a valid contract, but nevertheless is for the benefit of the child and therefore remains acceptable under s. 15.5(5).

Issue 2: Is the verbal agreement a "special provision" under s. 15.1(5) of the *Divorce Act*?

[27] Yes, for the reasons provided above and below.

[28] Surprisingly, given the centrality of the "special provisions" issue in this hearing, neither counsel provided the Court with any case law on point. Nor did counsel accept my invitation to provide further written submissions. The question is one that is far from settled and a number of trial and appellate courts have wrestled with the meaning of the phrase, as noted in *Anderson-Devine* v. *Anderson*, [2002] M.J. No. 484 (C.A.), by Monnin J.A., speaking for the Manitoba Court of Appeal at paragraph 17. Monnin J.A. went on to refer to the often-cited decision of *Wang* v. *Wang*, [1997] B.C.J. No. 1678 (B.C.S.C.), where Saunders J., as she then was, noted that there are two possible meanings. At paragraph 15 she said that the word "special" could mean "particular", one of the dictionary definitions of the word, in which case particular provisions in an agreement or previous court order made for the benefit of the children would presumably be acceptable as special provisions. Alternatively, the term could mean "out of the ordinary, not usual", another dictionary definition of the word.

[29] A three to two majority of the Ontario Court of Appeal in *Wright* v. *Zaver*, [2002] O.J. No. 1098 (C.A.), favoured the notion that "special provisions" must be out of the ordinary or unusual. However, Simmons J.A., writing for the minority, commented at paragraphs 89 to 91 that so long as the provisions replace, in whole or in part, the need

for child support in accordance with the *Child Support Guidelines* (in that case the *Ontario Guidelines*), then it would be restrictive to limit the application of the term to provisions that are out of the ordinary or unusual.

[30] Burnyeat J. of the British Columbia Supreme Court in *Wanstall* v. *Walker*, [1998] B.C.J. No. 1808 (B.C.S.C.), at paragraphs 25 and 26 adopted the test set out by Master Joyce in *Hall* v. *Hall*, [1997] B.C.J. No. 1191 (B.C.S.C.), that "a 'special provision' must be one which, in whole or in part, replaces the need for the ongoing support for the children".

[31] After an extensive review of these and other cases, Monnin J.A. in *Anderson-Divine*, cited above, concluded at paragraph 28:

> What I gather from this review of the jurisprudence is simply that the definitions of "special provisions" and "for the benefit of the children" are still in a state of flux and are defined to a certain degree by the circumstances of the individual cases.

[32] Bateman J.A. speaking for the Nova Scotia Court of Appeal in *MacKay* v. *Bucher*, [2001] N.S.J. No. 326 (C.A.), noted that it is also important to consider the use of the word "inequitable". In s. 15.1(5) the *Divorce Act*, the Court must not only be satisfied that special provisions for the benefit of the children have been made, but also that the application of the *Guidelines* would be "inequitable" given those special provisions. In considering similar language, Bateman J.A. said at paragraph 41:

> In my view, this section is so worded to avoid exposing a payor to duplicative amounts of child support, resulting in excessive awards.

Later at paragraph 50, he noted that "Upholding consensual agreements which benefit a child is in keeping with the child centered focus of the Guidelines." And finally, at paragraph 51:

> In assessing “inequitability” it is the payor’s current financial situation that is relevant, not the circumstances as they were at the time the “special provision” was made.

[33] This last point is particularly relevant to the case before me, as the mother’s current annual income is approximately $20,000, about half of what it was when the verbal agreement was made.

[34] Sigurdson J. of the British Columbia Supreme Court in *Finney* v. *Finney*, [1998] B.C.J. No. 1848 (B.C.S.C.), examined the parallel language under s. 17(6.2) of the *Federal Guidelines* and emphasized, at paragraph 28, that the determination of whether an agreement contains special provisions “will depend on the particular unique circumstances”.

[35] The approach by the Nova Scotia Court of Appeal in *MacKay* v. *Bucher*, which was referred to with approval by the minority in *Wright* v. *Zaver*, both cited above, seems consistent with the comments of the Supreme Court of Canada in *Francis* v. *Baker*, [1999] 3 S.C.R. 250, [1999] S.C.J. No. 52. There, Bastarache J., speaking for the Court, was referring to the principles of statutory interpretation and the objectives of the *Federal Child Support Guidelines*, in particular s. 4. At paragraph 38 he quoted the Minister of Justice who, when introducing the *Guidelines* bill to Parliament, said:

> … the objective of consistency always has to be balanced with the need to have sufficient flexibility to deal with individual circumstances.

Bastarache J. continued at paragraph 40:

> A proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of

> the actual “condition, means, needs and other circumstances of the children” on the other.

[36] Rather than focussing on whether a provision is sufficiently unusual or out of the ordinary, I prefer the alternative approach. First, is the particular provision for the benefit of the children? Second, does it replace in whole or in part the need for child support? Third, would it be inequitable in the individual circumstances of the case to apply the *Guidelines* when such a provision has been made?

[37] I repeat that I am satisfied that the effect of the verbal agreement is that it constituted a special provision which replaced the need for ongoing support for the children. They benefited directly by being able to live in the family home. They also benefited indirectly because the father was able to live with them in the family home mortgage free and without paying any occupation rent to the mother. That left the father with more disposable income for the benefit of the children. Particular examples of how the children benefited in that regard, such as allowances and gifts, are referred to in the affidavit material. Further, it would be inequitable to retroactively require the mother to pay child support under the *Guidelines* for the initial months of 2002 when the agreement was in effect. To do so would result in the father receiving a double benefit: rent free occupation plus child support. The inequity would be even greater given that the mother’s current income is about half of what it was when the agreement was made.

Issue 3: What are the terms of the verbal agreement?

[38] The short answer to this question is that the terms of the verbal agreement were, firstly, that the mother would not pay child support for her two sons while they lived with the father in the family home. Secondly, the parties agreed to delay the division of the

family assets, which might include a sale of the family home, until both sons graduate from high school and leave the family home.

[39] As for the alleged pension term, it should be severed. Despite having found the verbal agreement was a valid oral contract, severance is permissible if a term of the contract goes only to part of the consideration and is merely subsidiary to the main purpose of the contract.[1] In this case, the alleged pension term was merely subsidiary to the main purpose of the contract, which was that the mother would not pay child support if the father lived in the family home with both sons. Also, although subsequent conduct is not conclusive, the fact that the parties thought they had an agreement and acted upon it accordingly is to be considered in deciding whether the uncertain portion of the contract should be severed, without affecting the binding force of the balance of the contract.[2]

[40] In my view, the evidence shows that there was, at the very least, uncertainty about whether the pension term was part of the verbal agreement. Going further, and for reasons I have already discussed, I would be inclined to accept the mother's evidence that the pension was never part of the verbal agreement at all. It would be illogical to expect her to forgo a claim against the largest family asset beside the family home, with a value over $120,000.00, for no apparent reason other than her gratuitous good will. This would be especially strange when the mother was apparently aware of the issues surrounding family assets, as she had, about that time, obtained some literature on the point entitled "*Separating in the Yukon*".

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[1] Cheshire, Fifoot and Furstrom's *Law of Contract*, 13th ed., (Butterworths, 1996) at 435
[2] *Boult Enterprises Ltd.* v. *Bissett*, [1985] B.C.J. No. 1872 (B.C.C.A.) at paras. 18 – 20

[41] Alternatively, if the verbal agreement did not constitute a valid oral contract, I do not have to consider the problem of whether the alleged pension term could be severed from the remaining terms. It simply would not matter that there was no clarity on the pension issue. What would matter is that there was an arrangement put in place, and acted upon, regarding child support and the occupation of the family home.

Issue 4: Is there any retroactive child support payable by the father to the mother, or vice versa, considering the terms and the effect of the verbal agreement?

[42] I am satisfied that s. 15.1(4) of the *Divorce Act* gives me the authority to make retroactive orders. It allows the Court to "impose terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just".

[43] I find that retroactive child support is payable by each of the parties, but only after the verbal agreement unravelled in May 2002. In other words, any retroactive child support payable is not pursuant to the terms and the effect of the verbal agreement, but rather is a function of which parent had which of the children for which periods.

[44] For greater certainty:

- there is no child support payable by the mother to the father for the period January to May 2002.
- From June to October 2002 inclusive, I find that Nelson was residing principally with the mother and Mitchell was residing with the father. Accordingly, s. 8 of the *Child Support Guidelines* should apply. The father's income at that time was $112,000 and the mother's was $41,000. That results in child support payments under the *Guidelines* of $896 by the

father and $353 by the mother. That in turn results in a net payment from the father of $543 per month, for five months, totalling $2,715.

- From November 2002 to April 2003 inclusive, I find that both sons lived with the father in the family home. Accordingly, child support is retroactively payable by the mother to the father over that period. The mother's income was $41,000 for 2002 and $36,100 for 2003. Therefore, for two months she should have paid $581 for both children, and for four months she should have paid $519. That results in a total of $3,238.[3]

- From May to October 2003 inclusive, I find that Nelson was living with his mother. Again, this would give rise to a split custody situation. The father's income was then $104,800 and the mother's was $36,100. That results in *Guideline* amounts of $842 and $313, respectively. The net payment from the father was $529 per month, for six months, totalling $3,174.

- For the month of November 2003, I find that both sons again lived with the father and that there is retroactive child support payable by the mother for that month, totalling $519.

- From December 2003 to June 2004 inclusive, I find that Nelson was residing with the mother and there was a split custody situation. The father's income was $104,800 for 2003 and is projected to be $93,500 in 2004. The mother's income was $36,100 in 2003 and is projected to be $20,000 in 2004. That results in child support from the father of $842 for one month and $758 for six months, totalling $5,390. The mother should

[3] ($581 X 2) + ($519 X 4)

pay $313 for one month and $174 for six months, totalling $1,357. The net difference payable by the father is $4,033. However, the father is to be credited for payments made from December 2003 to May 2004 totalling $2,505 (I do not have any information about payments made after May 2004). That results in a balance payable by the father of $1,528.

Summary:

Child Support Payable

	By father	By mother
June to October 2002	$2,715	
November 2002 to April 2003		$3,238
May to October 2003	3,174	
November 2003		519
December 2003 to June 2004	1,528	
Totals	7,417	3,757
Net payable by father	**$3,660**	

[45] The mother's counsel emphasized that she was not making a claim for occupation rent, but nevertheless continued to argue that the value to the father in remaining in the matrimonial home should be accounted for over the entire period in issue. I even thought I heard the father's counsel submit that occupation rent *should* be accounted for if I consider retroactive child support. On the other hand, I also heard her say that occupation rent should only be dealt with when the family assets are divided. Even the mother's counsel acknowledged that she had not provided evidence on the issue of

occupation rent, beyond a reference to the fact that the monthly mortgage payment on the family home was approximately $1,000.00.

[46] The concept of occupation rent is an equitable approach used to achieve justice when one of two joint owners has exclusive possession of the family home, especially where the home is mortgage free.[4] Courts have allowed one-half of the amount the home could be rented for, less taxes, insurance and any expenses paid by the occupying spouse for the home, to be credited to the other owner who lives outside the family home.[5] However, evidence is required as to the probable rent which such a home could attract, as well as the appropriate expenses to be deducted before making such a credit. As well, the credit is usually given to the non-occupying spouse at the time the family assets are divided. That would be at trial or at the time of the final order.

[47] I agree with the father's counsel that it is not appropriate to decide this issue on these interim cross-applications for child support. However, as noted above, I am prepared to respect the verbal agreement for the initial period from January to May 2002 inclusive, by confirming that no child support is payable by the mother for that time. In effect, this recognizes the value of the occupation rent which the mother then waived.

Issue 5: How is child support to be dealt with in the future?

(a) For Nelson:

(i) When he lives with the mother?

(ii) When he lives with the father?

[48] Until Nelson ceases to be a "child of the marriage", child support will be payable to the parent with whom Nelson resides from time to time, at the table amount under the

[4] *Enman* v. *Enman,* [2000] P.E.I.J. No. 48 (P.E.I.S.C.) at para. 35
[5] *Enman*, cited above

Guidelines. Obviously, this is subject to any further agreement between the parties or any arrangement for shared custody of Nelson.

(b) Do the terms of the verbal agreement reached between the parties remain in effect with respect to Nelson?

[49] No. The verbal agreement came to an end at the end of May 2002 and there is insufficient evidence that the parties clearly addressed their minds to re-establishing the arrangement upon Nelson returning to live with his father. In other words, it is not possible to find that there was "certainty" of terms, and therefore it is not possible to find a valid oral contract, from that point forward. Even aside from whether there was a valid oral contract, the arrangement itself was not clear. For example, the child support claimed by the mother for the period June to October 2002 was not resolved when Nelson returned to his father.

(c) For Mitchell:

(i) is there any child support payable for Mitchell after he turned 19 on July 15, 2004, or

(ii) should a party requesting child support make an application to Court to determine the issue depending on the circumstances at the time child support is requested?

[50] I find that there is no child support payable for Mitchell after he turned 19 on July 15, 2004. Pursuant to s. 3 of the *Child Support Guidelines*, he is no longer a child "under the age of majority" for which child support is payable. Mitchell would only fit within the definition of "child of the marriage" in s. 2(1) of the *Divorce Act,* after he turned 19 years of age, if he continues to be under one of his parents' charge, but is "unable, by reason

of illness, disability or other cause to withdraw from [his parents'] charge or to obtain the necessaries of life".

[51] Attached to the mother's third affidavit is an e-mail from Mitchell dated June 9, 2004, indicating that he plans to work this coming fall and not return to Yukon College as originally planned. He has been employed on both part-time and a full-time basis for the last two years.

[52] *Olson* v. *Olson,* [2003] A.J. No. 230 (C.A.), a decision of the Alberta Court of Appeal, relying upon *Whitton* v. *Whitton*, [1989] O.J. No. 1002 (Ont. C.A.), makes it clear that the onus to prove that a child over the age of majority is a child of the marriage rests on the party who seeks maintenance for that child. I agree. Accordingly, there will be no child support payable for Mitchell after July 15, 2004, unless the parent with whom he resides makes an application for a declaration that he continues to be a child of the marriage for whom child support is payable.

POST-SCRIPT

[53] If the parties require any further direction on any point, if I have erred in my arithmetic, or if I have failed to address anything that needs to be addressed, they may approach the trial co-ordinator to arrange for another appearance before me for that purpose.

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GOWER J.