IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *A.D.B. v. S.A.M.*, 2006 NSSC 201

Date: 20060623
Docket: SFH D 005693, 1201-54663
Registry: Halifax

Between:

B.(A.D.)

Applicant

v.

M.(S.A.)

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: May 23, 2006, in Halifax, Nova Scotia

Written Decision: June 23, 2006

Counsel: B. (A.D.), Applicant, self represented
Myrna Gillis, counsel for M. (S.A.), Respondent

By the Court:

[1] In this decision I shall refer to the Applicant as the father and to the Respondent as the mother.

[2] The Federal Child Support Guidelines will be referred to as the guidelines.

[3] In 2001 the father and the mother divorced. There was one child of their marriage. Their Corollary Relief Judgement, dated August 27, 2001, attached their

negotiated minutes of settlement in which father's total annual income was stated to be $164,455.24 and mother's to be $42,600. Upon this income the father was to pay table guideline child support for one child in the amount of $1,204.84 per month. The parties were to share section 7 expenses in proportion to their income. The father was to be responsible for access travel costs. He also was to arrange for the child to be accompanied by an adult, acceptable to the parties, during her travel to and from his place of residence which was then in Ottawa. Travel accompaniment and cost was to be reviewed when the child reached 8 years of age.

[4] By Consent Variation Order dated August 15,2002 the father agreed to increase child support to $2,211.00, based upon his expected income of $300,000.00 CND. The father had accepted a new position in Rochester, Minnesota, U.S.A. At the time this Consent Variation Order was signed both he and the mother were represented by counsel and his employer had confirmed by letter that his expected earnings would be $195,000.00 US. The 2002 average exchange rate was 1.57021. Applying this to the expected US income results in a Canadian equivalent amount of $306,190.95. The mother's 2002 total income was $92,108.00 a significant portion of which was spousal support.

[5] The mother's expected 2006 total income is $35,000. She is no longer

receiving spousal support.

[6] The father has commenced this application seeking to:

- reduce his present payment for child support
- provide a mechanism for regular recalculation of the child support payment based upon his actual earned total income
- retroactively vary the previous Orders to recalculate child support based on the actual total annual income received by the parties from 2003 until the present, resulting, he submits, in a downward variation in his favor
- enroll the child in the unaccompanied minor program for her flights to visit him in Rochester, Minnesota.
- have first choice of summer access time
- an award of costs

[7] The mother has filed a reply and cross application in which she seeks to:

- increase the present child support payment
- provide a mechanism for regular recalculation of the child support payment based upon the actual earned total income of the parties
- retroactively vary the previous Orders to recalculate child support based on

the actual total annual income received by the parties from 2003 until the present, resulting, she submits, in an upward variation in her favor

- be awarded an immediate payment of the child support arrears
- a retroactive award for her section 7 expenses
- maintain the present arrangements in respect to the child's accompaniment when travelling to visit father
- an award of costs

[8] Both parties agreed that I have the jurisdiction to vary the Corollary Relief Judgment in respect to the provisions involving the child's travel. These provisions were to be reviewed when the child reached eight years of age. She is now nine years old and the parties have been unable to agree whether there should be any change.

[9] Each party's analysis of the basis upon which I may and should vary the previous Consent Variation Order are less clear in respect to the child support award. Both appear to agree that if I determine the father received more or less income than is referenced in the Consent Variation Order, I may vary the amount of child support he is now to pay and I may make retroactive adjustments to past payments. The father argues that to vary the current payment I must be satisfied

that the change is “substantial” or “material”. The mother disagrees. There is also disagreement about whether additional income should be imputed to the father because he lives in a jurisdiction with a lower effective income tax rate. The father argues that this was known, or could have been known, to the mother at the time the Consent Variation Order was granted. No additional income was imputed to the father at that time to take this into account and he suggests no income should now be imputed to him.

FOR A VARIATION MUST A CHANGE BE “MATERIAL” OR “SUBSTANTIAL”

[10] Both parties referred to the decision of the Supreme Court of Canada in *Willick v. Willick*, [1994] 3 S.C.R. 670. The father suggests this case stands for the proposition that no variation should be made to an order for child support unless there has been a material change in circumstances that were not within the reasonable contemplation of the parties at the time the order was made and which, if known, would have led to a different order or result . The mother suggests this case supports the proposition that an order for child support can be varied without any necessity to first determine that there has been a change that is “material, or substantial” . She also suggests that a subsequent variation may be based upon a change that was known or could have been known at the time an order was

granted. Essentially the suggestion is that this case stands for two very different propositions. I conclude this confusion results from the very different approaches taken by the majority and the minority in reaching the decision in *Willick.* In that case an application was made by the mother for an increase in child support based upon the father's significant increase in income since the date of the Divorce judgment. The sequence of events were as follows:

- Separation Agreement July 1989. Child support was based upon the husband earning $40,000 per year. Child support was to be increased by 3% each year
- By October 1989 the wife was aware that the husband was earning significantly more than $40,000 per year.
- In her affidavit dated October 30, 1989, to support the grant of the Divorce judgement, the wife stated that she was aware the husband was earning a greater income than was reflected in the parties' separation agreement but the amount she was receiving in child support was adequate to meet the child's needs. The Divorce was granted November 1989 incorporating the parties separation agreement.
- In October 1991 the wife applied for a variation based primarily upon the father's increased income. His income had increased in amount from the previous increase about which the wife was aware at the time of the Divorce.

[11] This decision was made before the implementation of the guidelines. There have been some decisions in Canada suggesting this case is applicable to post guideline variations. At the time this decision was made section 17 (4) of the *Divorce Act, R.S. , 1985, c.3* read as follows:

> Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making a variation order, the court shall take into consideration that change.

[12] This section did not require a change to be "material" but this has been a well accepted threshold requirement in all decisions for variation. Whether this requirement applied to variations of agreements later incorporated into court orders was an issue to be decided by the Supreme Court of Canada in this case. The reasoning of the majority and the minority in reaching the decision are significantly different. The minority determined that courts are always free to override an agreement and any order based on that agreement to ensure that child care costs will be paid and fairly apportioned between the parents. There is no presumption that the agreement of the parents about the amount of child support to be paid is reasonable and the court may vary the agreement or order without the necessity of finding that there has been a material change in circumstances. In fact the minority decision suggests a court may vary any agreement or order based

upon that agreement without finding there has been "a change". Only those orders made after a hearing would require evidence of a change prior to variation.

[13] The majority reasons give more respect to the parties agreement and consider those agreements to be strong evidence that the amount accepted was an adequate amount at the time the agreement was made and at the time the parties consented to an order incorporating their agreement. What the parties knew about the financial position of the other party, at the time the agreement and order were made, would be an important consideration when applying the analysis used by the majority in the *Willick* case. For the majority, whether the change in the parties circumstances was material remains a requirement for variation. Section 17 of the Divorce Act has been amended since the decision in *Willick*. It does continue to give the Court jurisdiction to vary an order prospectively and retroactively. However, Section 17(4) now directs:

> 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...(my emphasis)

[14] Section 17(6.1) states

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

[15] There is nothing in this direction to require a material change.

[16] Section of 14 of the guidelines provides:

> 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;
> (b) in the case where the amount of child support does not include a determination made in accordance with the table, any change in the condition, means, needs or other circumstances of a either spouse or all of any child who is entitled to support; .....

[17] The wording of Section 17 (4) does not require a "material" change in either of its subsections. In subsection (a) any increase or decrease in income that would result in a different payment for child support pursuant to the table justifies a variation. However subsection (b) does have the same wording as was considered in *Willick*. Subsection (b) refers to guideline provisions requiring the exercise of discretion. I have determined that a variation of a child support award based upon provisions of the guidelines requiring the exercise of discretion does require a finding that the change justifying the variation is "material".

[18] As a result of my analysis, if I find that the father has either an increase or decrease in his total annual income that would require a change in the table amount of child support to be paid, I am to grant the variation requested and order him to pay the applicable table amount. In order to make a variation to provisions in the

guidelines that require the exercise of discretion, for example section 7 expenses, I must determine whether the change for which variation is requested is a material change.

RETROACTIVE VARIATION

[19] The directions in section 14 of the guidelines might lead one to conclude that any change in total income of the payor that occurred in the past must result in a change to the table guideline amount that was to be paid and thus to an order for a retroactive recalculation of the award. This result is often resisted. The payor would resist because he or she most usually has spent all of the income paid to him or her in that previous year. As a result, these awards must be paid from present income from which the ongoing child support commitment must also be paid. These awards are resisted by recipients if a decrease is requested for the obvious reason that money received for the support of the child has likely been spent by the recipient who may be unable to pay back monies received and who may be unable to meet the child's needs if future payments are reduced by the amount of the retroactive award. The impact of a retroactive award can often be considered to place an unfair and unreasonable burden on a parent and this has on occasion been considered as an important factor when determining whether or not to exercise the

discretion to grant a retroactive award. There are other factors involved, many of which have been discussed in *Conrad v. Rafuse,* (2002), NSR 2(d) 46 (N.S.C.A.), and in *Lu v. Sun*, 2005 Carswell NS, 338 (N.S.C.A.) In each of these cases the Court of Appeal decided that the decision whether to grant a retroactive award remains discretionary and this applies equally to awards involving the guideline table amount and to amounts calculated as a result of the application of other provisions of the guidelines.

DETERMINATION OF TOTAL ANNUAL INCOME

[20] Essential to a determination of the appropriate amount to be paid for child support, whether prospectively or retroactively, is a determination of the payor's total annual income. The guidelines provide in section 15 that this determination is to be made by the court in accordance with the direction and principles contained in the guidelines. Particularly relevant to this proceeding are sections 20 and 19 of those guidelines.

[21] Sec. 20 (pre May 1, 2006 amendment) states:

> Where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

[22] Sec. 20 (as amended effective May 1, 2006) 20 states:

> (1) subject to sub-section (2) where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.
> (2) Where a spouse is a non-resident of Canada and resides in a country that has effective rates of income tax that are significantly higher than those that are applicable in the province in which the other spouse ordinarily resides, the spouse's annual income is the amount that the Court determines to be appropriate taking those rates into consideration.

Sec. 19 states:

> (1) The Court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following.....
>
> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada."

[23] The guidelines do not inform the Court about the method to be used to convert currencies. The guidelines do not inform the Court about how it is to determine whether a country has an effective rate of income tax significantly lower, or higher, than the effective income tax rate in Canada nor the amount that should be imputed or child support payment adjusted, if this finding is made.

[24] It appears to be generally accepted that the means by which a non-resident's annual income is to be determined, "as if the person were a resident of Canada", is to be accomplished by applying the relevant exchange rate to the total income earned by the non-resident. There is disagreement in the case law concerning the timing for application of the exchange rate. Because there can be rapid fluctuations in currency exchange rates the most common response is to apply the average

yearly exchange rate for the year preceding the determination of total annual income. In this case we do have the average exchange rate for each year in which retroactive support is requested. For 2006 the average exchange rate over the period from January 1, 2006 to June 1, 2006 is 1.14418. I propose to use this average in determining the father's 2006 total annual income. I have done so because the Canadian dollar has been strengthening as against the US dollar and I consider it inappropriate to use the 2005 average when the first six months of 2006 would suggest the Canadian dollar is unlikely to become weaker against the American currency in the near future.

[25] Effective income tax rates can be calculated and compared from country to country. In many cases insufficient evidence has been placed before the court to accomplish this purpose. Even when there is evidence indicating that a country may have an effective rate of income tax lower than the rates in Canada there has been disagreement about whether, in considering this calculation, the court should also consider "cost of living" and, in particular, services supplied to residents of Canada that are not available to non-residents. For example, one significant benefit provided to Canadians and not to residents of the United States is the provision of health care. In *Ward v. Ward*, (2001),19 R.F.L. (5th) 232 (B.C.S.C.) Justice Warren refused to impute income to the mother who lived in the United States. He

explained he did not have before him “reliable expert evidence to establish that the tax rate in New Jersey is significantly lower”. He decided he would also need evidence directed to “any other factors which may need to be taken into account such as health-care costs which provide a benefit to Canadians not shared by residents of the United States”. Finally he determined that the parties were aware at the time they negotiated their consent order of the tax structure in the United States and they chose not to impute additional income to the mother at that time.

[26] In *L.S.P.* v. J.R.P. (2002), 25 R.F.L.(5th) 150 (Sask.Q.B.) , Justice Wilkinson, at paragraph 12, when asked to impute income stated, “..... the parties could have lead evidence, revealing a difference in the income tax rate between a resident of California and a resident of Canada. As well, the parties could have shown that this tax benefit was offset by higher costs of living comparison lower levels of government benefits, such as health-care costs. No evidence was led as to any of these things.” The court declined to impute income. There are cases across the country containing similar findings. None from Nova Scotia have been brought to my attention.

[27] The Ontario Court of Appeal in *Connelly v. McGouran* [2006] O.J. No.993 refused to make any adjustment to total income to take into account the situation of

a person who lived in a country with a higher effective income tax rate than the rate in Canada. This omission has since been remedied by a recent amendment to the guidelines. However, in discussing whether, in addition to proof about the different effective income tax rates, comparison of the cost of living in each country would be relevant, the Court stated:

> Furthermore, because the table amounts do not take intra-provincial or inter-provincial discrepancies in the cost of living into account when a payor spouse lives in another city within a province or in another province, it makes sense that s. 20, which deals with payor spouses who live outside of Canada, be interpreted in a consistent manner.
>
> Finally, if one were to begin to recognize and adjust for discrepancies in the cost of living just to calculate income, such discrepancies would not be limited to countries, but could extend to cities or even smaller areas, and would require extensive evidence in each case. The inquiry would become cumbersome, expensive and potentially unworkable.

[30] The analysis by the Ontario Court of Appeal applies in my opinion to both section 19 and to section 20 (2) of the guidelines. Neither of these sections make any reference to “cost of living or standard of living”. Each directs that a court may consider whether a payor is subject to either substantially lower or substantially higher effective rates of income tax when determining the appropriate amount to accept as the payor’s total annual income. I am persuaded by the reasoning of the Ontario Court of Appeal in respect to this issue. I do not find that the court is to examine issues relating to the cost of living of the payor which would include such

items as the cost of paying for medical care, the cost of housing, the cost of transpiration and so on. These are not factors to be taken into consideration in determining the father's total annual income.

[31] The father's income is as follows based only on applying the average exchange rate for a 365 day period:

Year	Rate	US $	CDN $	Table
2003	1.40097	$199,439	$279,408	$2,063
2004	1.30151	$205,452	$267,398	$1,976
2005	1.21173	$208,473	$252,613	$1,870

[32] For the year 2006 the father expects to earn $209,268 US. As I indicated earlier in this decision I have used the average exchange rate from January 1, 2006 to June 1, 2006 at 1.14418 which provides an Canadian income of $239,440 upon which $1,775 per month would be paid under the old table and $1,849 under the May 1, 2006 table. Changes in the exchange rate can create unexpected implications for those who must have their earnings computed into Canadian dollars. This may result in significant increases or decreases in child support payments caused by the fluctuating exchange rate only.

[33] The mother has requested that additional income be imputed to the father because he lives in Minnesota, U.S.A. where she alleges there is an effective rate

of income tax significantly lower than those in Canada." Krystal Adamski, a chartered accountant practicing as a tax manager with WBLI Chartered Accountants Bedford, Nova Scotia, was called as a witness by the mother. This witness was qualified as an expert to provide evidence about the preparation of Canadian and United States personal income tax returns and the effective of rate of income tax in each country. The father objected to the analysis prepared by Ms. Adamski and to her opinion based upon that analysis. However, he did not provide any evidence producing a different analysis and opinion. Ms. Adamski's analysis first determined the father's net US disposable income in each of the years in question. She then calculated the amount of gross Canadian income he would need to provide an equivalent net Canadian disposable income. The difference results from "the preferential US income tax rates and the fact that in the US taxpayers are permitted to deduct their home mortgage interest and property taxes in arriving at their taxable income".

[34] As a result of her report the father's Canadian equivalent income would be as follows:

2003	$342,855	$2,520
2004	$320,130	$2,356
2005	$303,461	$2,236

Year	US Rate	CAN Rate
2003	35.92%	42.39%
2004	37.48%	42.96%
2005	37.02%	43.05%

[36] However, these rates do take into consideration the deductibility of mortgage interest and property taxes. It is not clear from her evidence whether this is justified as an appropriate consideration when calculating and comparing effective rates of **income tax**. (my emphasis)

[37] Ms. Adamski's calculations reveal a range of difference from 5.48% to 6.47%. The percentages themselves do not appear to be significant. I consider a range difference of 50% to be significant but is a less than 10% difference significant? Is one to look at the results created by the percentages in order to determine whether there is significance? Section 19 directs the Court to consider "effective rates of income tax that are significantly lower" as a factor supporting a decision to impute income. This appears to be a direction to consider the rates themselves not the results the application of the rates would achieve. Percentages applied to greater incomes will always result in much greater incomes suggesting there will likely always be "significance". I have determined that it is the difference in the rates that must be significant and not the difference that occurs as

a result of the application of the rate. I decline to impute income to the father. He is not living in a country that has an effective rate of income tax significantly lower than those in Canada. The father's total annual income for 2006 is $239,440 CDN. The father's annual income for the years 2003, 2004 and 2005 are as shown in the chart, after application of the exchange rate only.

PROSPECTIVE CHILD SUPPORT

[38] The father's income has fluctuated widely because of the effect of the exchange rate. Neither the father nor the mother have requested that I apply section 17(1) of the guidelines. Both the father and the mother want a mechanism to calculate yearly child support retroactively as well as prospectively. Each must fully appreciate the effect this may have. It may remove the opportunity to view such a calculation as a retroactive award for which a party may request a variation. A yearly recalculation can result in an increased payment, it can also result in a decreased payment. The mother has less income available to her now than she did in 2003 because she no longer receives spousal support. She, like the father, has asked that child support be "automatically adjusted in June of any given year, retroactive to January, to reflect the parties' annual income....". She may have done so on the basis that the father's income will only increase, not decrease. However,

in any given year, depending upon the exchange rate, either adjustment is possible. Nevertheless the parties have requested these yearly adjustments. As a result on or before June 15, 2007 each party shall provide to the other a fully completed Income Tax Return for the country of residence, including all schedules and attachments and, in respect to a Canadian return the notice of assessment and, if any, reassessment, and in respect to a non-Canadian return, the equivalent of the notice of assessment and reassessment. If a party is a non-resident of Canada, the Bank of Canada average exchange rate for the year for which the income tax return has been filed is to be applied to the total income disclosed on that return and this shall be the total income of the party for the purpose of calculating child support for the subsequent year and for recalculating chid support for the year to which the return relates. This information is to be provided to the Maintenance Enforcement Office. If these calculations result in an overpayment or underpayment of child support for the year 2006, the party owing money to the other shall pay the entire amount owed to the other on or before December 31, 2007. This process shall be repeated in every year while there is a child of the marriage to support.

RETROACTIVE CHILD SUPPORT

[39] The factors I am to review when considering a retroactive award, as

outlined in *Conrad v. Rafuse* and *Lu v. Sun*, appear to apply more directly to the question of whether there should be a retroactive increase in child support than to a request for a decrease. In my decision I have considering the following in determining whether to make a retroactive award:

- No evidence has been provided detailing the "need on the part of the child".

- No evidence has been provided suggesting that the mother has expended or will need to expend capital to meet the child's needs if a retroactive decrease in child support is awarded ;

- Neither parent has provided a Statement of expenses. I know nothing of the mother's ability to pay, if she must, a retroactive award. I can only observe that because of his greater income the father most likely has a greater ability to pay than does the wife. He has provided nothing to support any inability to pay;

- Neither the father nor the mother has given incomplete or misleading financial disclosure;

- Neither party has an unexplained delay in commencing or responding to

this application;

- Both relied only on the application of the exchange rate in calculating the father's total income for purposes of setting the table guideline amount in the consent variation order and each knew or should have known the exchange rate can increase as well as decrease;

- The mother has known since July 2004 that the father wanted an adjustment to the child support payment. He unilaterally reduced the required payment July 1, 2004. As a result he is in arrears according to Maintenance Enforcement Records. Because of his unilateral reduction there may be no requirement for the mother to reimburse the father should a retroactive decrease in child support be ordered.

[40] An additional factor of importance is whether the amount by which the award will increase or decrease is significant. Will the variation result in a trivial, or, in respect to the income and financial resources of the relevant party, an insignificant change? This reintroduces the concept of a threshold requirement of materiality before a retroactive award should be considered. A child should not be deprived of the benefit of a previous higher award unless the payor's circumstances require this result after consideration of the relevant factors.

[41] In 2003 the father did not have a total income of $300,000 as the parties had expected. Upon this sum he was to pay $2,211 per month table guideline child support. He did earn $279,408 requiring a payment of $2,063 per month table guideline child support. Given the father's financial resources I do not consider the $148 difference to be material. The mother did not know about the father's request to vary child support until July 2004. I am satisfied that the father had the ability to pay this additional amount. I make no retroactive award for the year 2003.

[42] In 2004 the father's total income was $267,398 requiring a payment of $1,976 per month table guideline child support, a difference of $235 per month that I do not consider to be material. The father acted unilaterally and reduced his child support payment. I am satisfied that the father had the ability to pay this additional amount. I make no retroactive award for the year 2004.

[43] In 2005 the father's total income was $252,613, almost $50,000 less than the total income expected at the time of the last consent variation order. The required table guideline child support payment on this total income is $1,870 a difference of $341 per month. I do consider these differences to be material. Even though the father may have the ability to pay the original amount, his income

circumstances had so significantly changed from the premise upon which the previous order was based I find that to fail to grant a retroactive award would be unfair.

[44] The Maintenance Enforcement Program record has arrears calculated against the father. If as a result of this decision arrears remain, he is to pay this amount within thirty days from the date of this decision.

CHILD'S ACCOMPANIMENT WHEN TRAVELING

[45] Presently when this child travels to the U.S. to visit with her father, he accompanies her. He now wishes to enrol her in the unaccompanied minor program offered by the airlines. His reasons are as follows:

- He wishes to avoid the expense of his travel to and from N.S. In addition to the cost of his flight he has transportation and accommodation cost while in N.S.

- His daughter will be 10 years of age in August, 2006. She is now old enough to travel as an unaccompanied minor and she would see this as an adventure.

- He has difficulty arranging his schedule to accommodate this additional time and it reduces his access time with his daughter in his home.

[46] The mother does not consider it to be in her daughter's best interest to travel under an unaccompanied minor program for the following reasons:

- The father has sufficient income to pay his flight expense and has family in N.S. with whom he can stay to avoid the cost of hotels.

- Their daughter enjoys traveling with her father. He now has a spouse and two step-children. This is their daughter's opportunity to be alone with her father.

- Travel between the U.S. and Canada has become more difficult and stressful since 9/11.

- The usual schedule for travel begins with a 5:00am check in at the Halifax airport. The flight is then to Toronto leaving at 6:00am. Customs must be cleared in Toronto and then a bus taken to the appropriate Terminal. The next flight is usually an hour and a half to two hours and any delay leaving Toronto will mean

an overnight in Toronto. This has occurred in the past and is not an unlikely occurrence. The flight from Toronto is approximately an hour and a half as is the drive from the airport in Minnesota to the father's residence. The entire trip, if there is no delay, takes at least ten hours and from home to home almost an entire day.

- The Air Canada unaccompanied minor program has changed significantly and it is unclear whether it will be available for travel between Halifax and Minnesota.

[47] I am not satisfied on the evidence before me that the unaccompanied minor program will appropriately accommodate this child's travel and make adequate provision for delay including rerouting and overnight accommodation. The information provided by the mother appears to be more recent than that provided by the father and it suggests there may be complications if the father attempts to use this program. This concerns me because the child is still young and she may not react well to the stress these complications may create. The mother has suggested she is prepared to pay, proportional to the parties income, the cost of the father's flights to accompany the child. I have decided she should do so and the child be accompanied by her father, or other adult acceptable to the parties, until

the summer when the child is to be twelve years old. For access that summer and thereafter, the child may travel using the unaccompanied minor program, if there is a program that can accommodate her travel including meals, rerouting, and overnight stays in appropriate facilities if there are delays. The father shall be solely responsible for the child's travel with the unaccompanied minor program.

SUMMER ACCESS

[48] Because of the father's schedule there were some difficulties in arranging the time for 2006 summer access. The parties Varied Consent Order dated August 15, 2002 does provide a mechanism to determine the summer access schedule but it does not determine whose request for summer parenting time with the child is to prevail in the event of a disagreement. Clearly the parents will need to be flexible. Either party may, for valid reasons, require a change in the summer access plan. Both must realize that a change may not always be easily accommodated. However, the mother has the child in her primary care. Because of the distance involved the father has few opportunities to have his daughter in his care. The mother shall make every effort to accommodate the father's summer access plan. I am not prepared to order that the father's plan must always be accepted by the mother. I believe they can work co-operatively to resolve the summer access plan

each year within the framework of the Varied Consent Order.

SECTION 7 EXPENSES

[49] The mother has requested that the father be ordered to pay the section 7 expenses as required by the terms of their Varied Consent Order. However, I received very little information about these expenses during the hearing. I do not know the net cost of these expenses. Now that the father's total annual income has been determined, there is no reason for his failure to pay these amounts for the years 2003,2004,2005 and in the future proportional to the parties incomes. He is to be provided with a calculation of these expenses in compliance with the provisions of section 7 and he shall pay his proportional share to the wife within 30 days of receipt of those calculations.

COSTS

[50] I have reviewed the principles upon which costs are generally awarded, the most significant of which are that costs are in the discretion of the Court and a successful party is generally entitled to a cost award. The difficulty, and this has been described by many others who have been asked to adjudicate on the issue of

costs in family proceedings, is the definition of who is the successful party. Overall, I do not consider that one party in this proceeding has had sufficient success upon which an order for costs should be made. I decline to award costs to either party.

_____

Beryl MacDonald, J.