

42 R.F.L. (4th) 350, [1998] A.J. No. 1173

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Furlong v. Furlong
Dorice Katherine Furlong, Appellant (Petitioner) and Christopher Allan Furlong,
Respondent (Respondent)
Alberta Court of Appeal
Hunt J.A., Langston, Moreau JJ. (ad hoc)
Heard: October 20, 1998
Judgment: October 28, 1998
Docket: Calgary Appeal 17419

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Counsel: D. **Castle**, for the appellant.

C. Purdy, for the respondent.

Subject: Family

Family law --- Support -- Child support -- Practice and procedure on variation of award -- General

Father ordered to pay \$275 per month for each of two children -- Father was in armed forces and base closed -- Father elected to return to school rather than transfer to another base -- Arrears accumulated after father's employment status changed -- Child support varied to \$134.55 per month and arrears ordered to be paid at \$150 per month -- Mother appealed on ground that trial judge erred in not imputing income to father -- Appeal dismissed -- Father declined to move to another base so that he could remain in same city as children -- Trial judge did not err in refusing to impute income to father -- No evidence in minutes of settlement or divorce judgment that would support characterization of child support as special provision shielded from variation order.

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

s. 17(6.2) [en. 1997, c. 1, s. 5(2)] -- considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally

s. 19(1)(a)

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APPEAL by mother from order granting father's application to vary child-support payments.

Hunt J.A. (for the court):

1 In the case of *Furlong v. Furlong*, the panel has reached a unanimous decision and the judgment will be delivered by Madam Justice Moreau.

Moreau J. (for the court):

2 This is an appeal from the order of Hutchinson, J. of September 26, 1997 arising from an application by the respondent husband to vary child support payments.

3 Pursuant to a divorce judgment granted in June of 1996, the respondent was ordered to pay to the appellant child support in the amount of \$275.00 per month for each of the two children of the marriage.

4 The respondent sought a variation of the divorce judgment on the basis of a change in his employment status and the enactment of the Federal Child Support Guidelines. The respondent was employed by the Canadian Armed Forces until December of 1996, the Calgary Base having closed. His employment income was close to \$39,000.00 per year at the time he left the Canadian Armed Forces. He received severance pay in the amount of \$3,000.00 and a return on his pension contributions in the amount of \$16,000.00. The respondent thereafter enrolled in cabinet making courses at SAIT and was working part-time while attending school and full-time when not in school. Arrears of child support started to accumulate in early 1997.

5 The learned chambers justice determined the respondent husband's guideline income to be \$10,711.00 per year based on his January to mid-September 1997 average gross earnings. Accordingly, child support was varied to \$134.55 per month in accordance with the applicable tables and arrears were ordered to be paid at the rate of \$150.00 per month. The order also provided for an annual review of the respondent's income, the appellant being entitled to apply for a variation of child support if the respondent's income increased significantly.

6 The appellant argues firstly that the learned chambers justice erred in refusing to impute income to the respondent pursuant to Section 19(1)(a) of the Guidelines commensurate with his Canadian Armed Forces income, the respondent having elected to go back to school rather than pursue a transfer to another base or other employment in Calgary.

7 Having considered the evidence before the learned chambers justice and counsel's submissions and noting the discretionary nature of the determination under Section 19(1)(a) of the Guidelines, we are not persuaded that the learned chambers justice erred in refusing to exercise his discretion in favour of imputing income to the respondent. The respondent's evidence was that he declined to move to Edmonton so that he could spend more time with his children who were at that time resident in Calgary. It is apparent that the chambers justice declined to make a finding of under-employment based on this evidence. We are not persuaded that he erred in reaching that conclusion.

8 We are further not persuaded that the previous child support order constituted in this case a special provision within the meaning of Section 17(6.2) of the *Divorce Act* so as to shield the order from variation. There is nothing in the Minutes of Settlement or Divorce Judgment which would support a characterization of the child support as such a special provision and, here again, we are not prepared to vary the chambers justice's decision on this basis.

9 The appellant next argues that the learned chambers justice erred in refusing to take into account the respondent's severance pay and return of pension contributions totalling some \$19,000.00 in calculating his 1997 guideline income. We do not have the benefit of the Reasons from the Court below. However, we do note that the learned chambers justice in effect imposed an obligation upon the respondent to pay maintenance at its previous level for a period of nine months in refusing to cancel arrears retroactive to the time he ceased employment. In these circumstances, and given the nature of the debts and expenses paid by the respondent, we do not see here a basis for interfering with the exercise of the learned chambers justice's discretion.

10 Accordingly, the appeal is dismissed.

Appeal dismissed.

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