CV 05585

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRUCE GORDON BIGGIN

Applicant

- and -

ELIZABETH MARY BIGGIN CENSNER

Respondent

## REASONS FOR JUDGMENT

1 The applicant and respondent were divorced by order of the Supreme Court of Ontario on February 14, 1990. By the same order, the applicant was required to pay child support of $250 per month (to be increased annually in accordance with the Consumer Price Index) for each of the two children of the marriage. At the time the children were five and eight years of age. During the past six years, the applicant has not paid the child support as ordered. He now seeks a variation of the child support order to $100 per month per child, and recision of the arrears which have accumulated, approximately $22,000.

2 The Petition for Divorce was served personally on the applicant in December 1987. He did not file an Answer, and did not appear in the divorce proceedings either personally or by counsel. He says he could not afford a lawyer at the time.

3 On this application he says that he has been unable to pay the required amount of child support, both in the past and at the present time, because "my income has been insufficient to support such payments". A review of the material on the file indicates that he did make (partial) voluntary payments in accordance with the February 1990 order from April 1992 to April 1993 and since that time it has been necessary for Maintenance Enforcement officials to garnishee his employment and UIC cheques.

4 In his affidavit he states his employment record as follows:

| | |
|---|---|
| March 89 to present: | Casual Driving Instructor for GNWT |
| Oct. 89 - Nov. 89 | Ideal Plumbing |
| Dec. 89 - June 90 | UIC |
| June 90 - March 93 | G.W. Business Machines |
| April 93 - March 94 | UIC |
| June 94 - Sept. 94 | Fyremaster Equip. Sales & Service |
| Jan. 95 - Jan. 96 | UIC |
| Jan. 96 - 26 April 96 | Colomac Mine |

5 He voluntarily left his employ at Colomac Mine. In his affidavit sworn May 2, 1996, he states:

> "8. That I left my job at Colomac Mine because I am getting married in June and because there are personal issues that I must attend to that my work schedule did not allow me to address.
>
> ...
>
> 10. That I am not collecting unemployment insurance at present and have resumed working part-time as a Driving Instructor for Aurora College, with a net income of approximately $800.00 per month.

> 11. That I share expenses with my common-law spouse, but my monthly expenses exceed my monthly income by approximately $500.00, without including the child support payments in the amount of $546.64 per month."

6 The applicant states his annual gross income as follows:

| | | |
|---|---|---|
| 1989 | ... | $26,304.00 |
| 1990 | ... | $25,971.59 |
| 1991 | ... | $31,141.00 |
| 1992 | ... | $37,300.00 |
| 1993 | ... | $26,244.00 |
| 1994 | ... | $23,586.59 |
| 1995 | ... | $16,563.20 |

7 His last pay cheque from Colomac Mine in April 1996 was $2,737.50, a rate of $32,850 per annum.

8 For her part, the respondent at the time of the divorce was on social assistance and she and the children remain today on social assistance. Although she has since the divorce upgraded her job skills, today she continues to experience difficulty in obtaining permanent full-time employment.

9 I shall deal firstly with the applicant's request for a reduction in the amount of the monthly payments he must make for the support of his two children. I begin by reminding myself that the order of February 14, 1990 was made pursuant to s.15 of the *Divorce Act* and that therefore that order (a) recognized that both parents have a joint financial obligation to maintain the children, and (b) apportioned that obligation between the parents according to their relative abilities to contribute to the performance of the

obligation. While it is not for me to "review" the February 14, 1990 order of the Supreme Court of Ontario, it does seem that where one parent has a minimum income of $26,000 and the other is on social assistance, an order requiring the father to pay $6,000 per annum (tax deductible) for the maintenance of his two young children is not unreasonable.

10 The onus on the applicant parent is to satisfy the Court that there has been a change in circumstances since the February 1990 order which would justify a variation of that support order. This is a statutory requirement:

> s.17. (4) 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 the variation order, the court shall take into consideration that change.

11 The applicant father has not met this onus on this application. The only "change" that he alleges is with respect to his own financial resources. There is no meaningful change. In 1990 he had the ability to contribute $6,000 per annum to his children's maintenance. In general terms, he retains that ability today. His voluntary decision to leave his employment with Colomac Mine does not strip him of the ability to contribute to his children's support.

12 I turn now to the applicant's request that all accumulated arrears be rescinded. This request is also made pursuant to s.17 of the *Divorce Act*. As stated in

*Whalen v. Boiven*, [1995] N.W.T.J. No. 67, two important factors to consider when deciding whether to order remission or cancellation of arrears of child support payments are (a) the payor's ability/inability to pay during the time period that the arrears accumulated and (b) the payor's present ability/inability to pay the arrears.

13 Once again I find guidance in the words of Hetherington JA in *Haisman v. Haisman* (1994), 7 R.F.L. (4th) 1 at p.11:

> ... Where a former spouse has not been able, for relatively *short* periods of time in the *past*, to make child support payments *as they came due*, this circumstance does not justify a variation order which has the effect of reducing or eliminating *arrears* of child support.
>
> Where the *past* inability to make child support payments *as they came due* has lasted for a *substantial* period of time, but the former spouse did not apply during that time for a variation order, the situation may be different. On a later application to vary, a judge will have to decide, with the benefit of hindsight, whether it would have been appropriate to suspend enforcement of the support order during the time when the former spouse was unable to pay, or whether at least a temporary reduction in the child support payments would have been in order. A judge should view with considerable scepticism any claim that a reduction in the support payments, temporary or indefinite would have been proper. However, if he or she decides that it would, the judge may for this reason reduce accordingly the arrears of child support which have built up. In my view, this is a special circumstance.
>
> I wish to emphasize that the mere accumulation of arrears, without evidence of a past inability to pay, is neither a change under s.17(4) of the *Divorce Act* nor a special circumstance.
>
> A *present* inability to pay *arrears* of child support does not by itself justify a variation order. It may justify a suspension of enforcement in relation to the arrears for a limited time, or an order providing for periodic payments on the arrears. However, in the absence of some special circumstance, a variation order should only be considered where the former spouse has established on a balance of probabilities that he or she cannot pay and will not in the future be able to pay the arrears.

> In short, in the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay the arrears. [emphasis in original text]

14 Of the present arrears of approximately $22,000, $12,500 had accumulated as of March 1992. On the applicant's own evidence, he had the ability to pay child support in the period March 1990 to March 1992. With hindsight, had he made application for a variation order during that time period, that application would have been denied.

15 In the past two and one-half years, during periods when the applicant's current monthly income was reduced, it may have been appropriate to temporarily suspend enforcement of the full amount of the child support payments and arrears. In fact, this was done when, by order of this Court dated February 21, 1995, enforcement and garnishee proceedings with respect to the outstanding arrears were suspended, as was payment of the monthly child support obligations save for $200 per month, pending disposition of the application presently before the Court.

16 However, the applicant has not satisfied me that there should at any time have been a variation order indefinitely reducing the level of child support payments.

17 The applicant has not established on this application that he will not in the future be able to pay the arrears.

18 Before concluding these reasons, I wish to address a "special circumstance"

put forward by the applicant. Although he acknowledges that he was served with the Petition for Divorce in 1987, he claims he never received a copy of the Divorce Judgment ordering him to pay child support until sometime in 1992. He says that he was "totally unaware" of the amount of child support payable until he received a letter from the Maintenance Enforcement Officer in March 1992. It is submitted on his behalf that he should not be required to pay those arrears which accumulated during a time period when he was unaware of the specific obligation. In finding that there is no merit in this proposition, I am in agreement with the words of McEachern, C.J.B.C., in rejecting a similar submission in *Meyers v. Meyers*, [1995] 12 R.F.L. (4th) 170 (B.C.C.A.) at p.175:

> "It makes no sense to conclude that a parent of a child who fails to file an answer in divorce proceedings in which a claim for child support is made can succeed in an application to rescind the arrears of maintenance on the ground that he or she was not notified of the support order, when a person served with a writ who fails to file a statement of defence cannot avoid enforcement of a default judgment against him simply by asserting that he was not notified of the judgment after it had been made.
>
> In my view, the order for child support made at the time of the decree nisi is enforceable, regardless of whether the father was notified that the order had been made."

19 For the foregoing reasons, the father's application is dismissed, with costs. An order will issue, to include the following terms:

(a) dismissing the application for a recision of arrears.

(b) dismissing the application for a reduction of child support payments to $200 per month.

(c) reinstating child support payments at $500 per month, or $250 per child, as indexed pursuant to the February

14, 1990 order, as at July 1, 1996.

(d) providing that this Court's order of February 21, 1995 is varied accordingly.

(e) granting to the respondent her costs of these proceedings which are hereby fixed at $1,000, plus reasonable disbursements.

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
June 17, 1996

Counsel for the Applicant: Rae Peters (Student-at-Law)

Counsel for the Respondent: Elaine Keenan Bengts