Date: 19990316
Docket: 6101-2607

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RHONDA ANN BEILSTEIN

Petitioner

- and -

PAUL LOUIS BEILSTEIN

Respondent

Application to vary interim child support order. Dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife, Northwest Territories
on February 26, 1999

Reasons filed: March 16, 1999

Counsel for the Petitioner: Katherine R. Peterson, Q.C.

Counsel for the Respondent: Elaine Keenan Bengts

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RHONDA ANN BEILSTEIN

Petitioner

- and -

PAUL LOUIS BEILSTEIN

Respondent

REASONS FOR JUDGMENT

[1] This is an application to vary an interim child support order. For the reasons that follow, the application is dismissed.

[2] The parties are the parents of one child, now over 4 years old. The parties separated in January of 1995. Proceedings were commenced for divorce, corollary relief, and a division of matrimonial property. On October 30, 1995, a consent order was issued whereby the petitioner (wife) has interim custody of the child while the respondent (husband) pays interim child support of $800.00 per month.

[3] These proceedings have not proceeded expeditiously. Since the 1995 order was obtained, both parties have changed their counsel and delays have occurred. On May 8, 1998, a further consent order was issued whereby this action was set for trial. All that needed to be done was for counsel to provide their available dates to the clerk. This was not done since apparently the parties were not as ready for trial as they thought. I am told that further interlocutory steps may be necessary.

[4] The respondent has now applied to vary the child support payable to nothing and to make that variation retroactive to September, 1997, or alternatively to eliminate arrears accumulated since September, 1997. In essence, he says that his circumstances have changed so that his annual income is now below the minimum threshold set by the Federal Child Support Guidelines for the payment of support.

[5] The petitioner's counsel takes the position that the evidence presented on this application fails to establish that the respondent cannot make support payments. Therefore, without more, any variation should await the trial of this action where all the circumstances can be examined in depth and in context. I agree. Before examining the evidence that was presented, however, I wish to canvass the statutory provisions applicable to this application.

[6] Initially, respondent's counsel made reference to the variation provisions found in s. 17 of the *Divorce Act*. In *Chambers v. Chambers*, [1998] N.W.T.R. 252 (S.C.), I concluded that s. 17 was not applicable to variation of interim orders. There is no need for some statutory enabling power since interim orders are always open to review, alteration or variation. That is an inherent power of the court. My comments in *Chambers*, however, were made in the context of an application to vary an interim spousal support order.

[7] With respect specifically to child support orders, s. 2(4)(a) of the Federal Child Support Guidelines makes the Guidelines applicable to interim orders (as does s. 15.1(3) of the Act). The circumstances for variation are set out in s. 14 of the Guidelines:

> (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 a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
>
> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).
>
> .

[8] Circumstance (a) would seem to cover any situation where the income of the payor has changed. If there is an order to pay a certain amount based on the payor's Guidelines income, then a change in that income would "result in a different child support order". This is understandable since one of the objectives of the Guidelines is to have a consistent and objectively determined method of setting the amount to be paid as

support. Having said that, however, I must also say that I cannot imagine that the legislators intended that there should be continuous applications to vary interim orders with every change in income. There is still merit in the long-standing approach that applications to vary interim orders should not be encouraged. If a party is unhappy with an interim arrangement then the action should be brought to trial where all of the relevant facts can be adequately analyzed. In line with this approach is the view that "there is a heavy onus on the person who, instead of waiting until the trial takes place, brings a motion to vary the interim order": per Freedman C.J.M. in *Coley v. Coley* (1981), 20 R.F.L. (2d) 327 (Man. C.A.), at page 327.

[9] Circumstance (b) would apply to those exceptional situations where the Guidelines provide for some amount other than the applicable Guidelines table amount to be set. Such cases include those where the payor has a very high income, or where the "child" is over the age of majority, or where the payor is one who stood *in loco parentis*, or where the amount is based on an agreement. None of those situations apply in this case (save perhaps the characterization of the 1995 consent order as an agreement, although that was not made pursuant to the Guidelines).

[10] Circumstances (c) does apply, however, since the current child support order was made before the Guidelines came into force (May 1, 1997). But even if an order may be reviewed, as in this case, that does not automatically require a variation. The party applying for variation must still fulfill the requirements of the Guidelines.

[11] This application was argued on the basis of affidavit evidence. I gather no cross-examinations were held since neither counsel made reference to them. Therefore, I am left to deal with this application on the material as it is.

[12] The respondent swears in his affidavit that in the fall of 1997 his business failed. He had been operating a retail sporting goods store, specializing in water sports, in Yellowknife and then in Victoria, British Columbia. He states that he had been drawing an income of approximately $40,000.00 per year, but that ended in 1997. He has been unemployed since then and, only in the latter half of 1998, did he earn some income (although he does not specify exactly doing what). The material contained in this affidavit raises more questions than answers.

[13] The respondent states that, when his business failed, he shut down the store and transferred all the inventory and assets to the business's major creditor. He does not elaborate on how he managed to do this. I would have thought he would have had to get the consent of his other creditors to this arrangement yet he says that he still has a large

number of outstanding debts. In fact, in his affidavit (sworn on January 27th), he says that he is in the process of declaring bankruptcy. His counsel, at the hearing, informed me that he has declared bankruptcy. I would expect to see all of the detailed financial information for that assignment if it has been made. Nowhere is there an itemization of his assets and liabilities.

[14] The respondent states: "in part, the reason for my current financial difficulties arises from the fact that I assumed all of the matrimonial debt as well as the very considerable debt of our family business when the Petitioner and I separated." Those debts are not particularized anywhere. Further, the petitioner disputes the fact that the respondent assumed all debts. She states that judgment has been obtained against her for a loan she co-signed on behalf of the respondent's business and that she has taken steps, unsuccessful however, to satisfy some of these debts. There is nothing before me to help resolve this conflict in the evidence. Since it is the respondent who wishes to vary a consent order, the onus is on him to provide evidence to help resolve such problems.

[15] The respondent says that, from the time his business failed until June, 1998, he had no income. Since he was self-employed, he was not eligible for unemployment insurance. Yet nowhere does he explain how he supported himself. It was only during the hearing that his counsel informed me that he was living with a woman. She may or may not be supporting him. I do not know. I would expect to see details of the respondent's day-to-day expenses and how they are covered if he wishes to claim, as he does, an inability to pay any support.

[16] In his affidavit the respondent states (in para. 10):

> THAT I have been actively seeking employment since arriving in British Columbia in January, 1998. I have recently been able to obtain some employment on a contract basis and continue to seek additional work. I am hopeful that my contacts will lead to further contract work over the next year or so, but cannot say for certain whether this will happen as the companies involved have very little money to spend.

I suspect that the reference to arriving in British Columbia in "1998" is a mere typographical error since other information shows the respondent to have been operating his business there during 1997.

[17] This paragraph, however, illustrates the lack of specific information in the respondent's material. What efforts has he been making to justify the statement that he

has been “actively seeking employment”? Where, when and in what line of work? Is it only in his preferred line of work or in others? What employment has he obtained on a contract basis? What are the terms of any such contract? What “contacts” does he have so as to make him “hopeful” of further work? What companies is he talking about when he says they have “very little money to spend”? All paragraph 10 gives me are generalities.

[18] All of this information is necessary to determine the facts so as to set the appropriate income level for the respondent. This is also important in order to assess the respondent’s claim to a retroactive variation or elimination of support arrears. I do not know what those arrears are (another notable missing fact). The petitioner states that the respondent has not made a voluntary support payment since January of 1997 (well before the failure of his business). As counsel know, the principles governing the elimination of arrears require a careful analysis of past, present and future inability to pay support. The onus is on an applicant seeking such relief to satisfy a judge that he could not pay in the past and will not be able to pay the arrears at any time in the future: see *Haisman v. Haisman* (1994), 7 R.F.L. (4th) 1 (Alta. C.A.), leave to appeal to S.C.C. refused. There is a dearth of evidence on this application to make that analysis.

[19] The respondent states that in 1996 he had income of $35,751.47 and he attaches his 1996 income tax return as an exhibit. This return shows “business income” of $30,642.27 and a capital gain of $5,109.20. Yet the schedules attached to the return as the “Statement of Business Activities” show no sales figures, no cost of goods figures, and the only expense item is a capital cost allowance of $30,642.27 (which is the same figure given as his net income). There is no deduction for child support paid. There is, however, a northern resident deduction since it shows a Yellowknife address for all of 1996. It is unclear to me whether this tax return has been filed since the return is not signed and it has a date of “20-01-99". The return appears to have been prepared by a Yellowknife accounting firm and carries the disclaimer: “Prepared without audit from information supplied by the taxpayer.”

[20] The respondent also states that in 1997 he had a “loss” of $45,980.25 and attaches as an exhibit his 1997 tax return. The “loss” is comprised of $36,380.25 as a “business investment loss” and $9,600.00 of child support payments (payments which he apparently did not make and now seeks to have eliminated). Again, I am not certain that this return has been even filed since the copy attached as the exhibit is unsigned. It is dated “03-09-1998". It appears to have been prepared by a different accounting firm but it too carries the disclaimer: “Prepared without audit from information supplied by the taxpayer.”

[21] The respondent also provides what he calls “income statements” for January to November, 1998. These are statements for some entity called “ArKTek Underwater Services”. If this is simply a business name used by the respondent, and only the respondent, then he does not say so. When I add up his net income and loss figures, I come to a total net income of $4,551.65. Yet there are many unexplained items. For example, each monthly statement shows “rent” of $32.50. What is this for? There are entries for “equipment/shop supplies” and “depreciation”. This suggests that the respondent must have assets, but nowhere am I told what or where. There are expenses claimed for “membership dues” and “professional fees”. What are these?

[22] Perhaps I belabour the point but, in this case, the respondent is pleading such extreme poverty that he wants his child support obligations eliminated entirely, yet he gives me nothing but superficial book-keeping entries and general statements. I do not mean to be critical of counsel since, undoubtedly, any counsel can only work with what their client provides them. But the serious obligation to provide candid and complete disclosure must be obvious.

[23] The over-arching policy of all child support legislation is the recognition that parents have a joint financial obligation to maintain their children. This is expressly stated in s. 26.1(2) of the *Divorce Act*. Many cases have referred to this as the “prime” obligation of parents, an obligation that must take priority over other debts or lifestyle choices of the parents: see, for example, *Levesque v. Levesque* (1994), 4 R.F.L. (4th) 375 (Alta. C.A.), at pages 396-398. The implementation of the Federal Child Support Guidelines did not change this principle. And, as stated in *Levesque* (at page 398), “the parent who invokes poverty as a reason to adjust an award should be prepared to make the fullest disclosure”. This comment is, if anything, even more relevant today when one examines the informational requirements of the Guidelines.

[24] The Guidelines state, in s. 21(1), that “a spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order” must provide certain information. This applies equally to someone like the respondent who is applying to vary a support order since it is his income information that is necessary to determine the amount of the order.

[25] Among the items listed in s. 21(1) that must be included with the application, insofar as they relate to the respondent’s situation, are:

> (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
>
> (b) a copy of every notice of assessment or re-assessment issued to the spouse for each of the three most recent taxation years;

Neither of these requirements was completely complied with (in fact there were no assessment notices provided and, as noted previously, I doubt if the returns have even been filed).

[26] Another subparagraph of s. 21(1) relates to self-employed individuals such as the respondent:

> (d) where the spouse is self-employed, for the three most recent taxation years
>
> > (i) the financial statements of the spouse's business or professional practice, other than a partnership, and
> >
> > (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;

This requires detailed financial statements and not some general outline of income and expenses.

[27] The Guidelines recognize that the income calculation for self-employed individuals requires a careful approach. Even before the Guidelines, courts were aware of the need to meticulously examine the financial records provided by self-employed individuals since merely looking at tax returns may not give an accurate picture of the individual's personal income or ability to pay support: see, for example, *Elliott v. Elliott* (1997), 30 R.F.L. (4th) 339 (Alta. Q.B.), at pages 344-345. Thus the detailed financial statements contemplated by s. 21(1)(d) of the Guidelines must be provided.

[28] Section 16 of the Guidelines states that a spouse's annual income is determined from the sources of income listed on the Revenue Canada T1 form as adjusted in accordance with Schedule III of the Guidelines. A number of the paragraphs in Schedule III may apply to self-employed individuals. For example, paragraph 11 requires the court to add back into income allowable capital cost allowances with respect to real property; paragraph 6 addresses the calculation of capital gains and losses; paragraph 7 requires a

deduction for actual business investment losses; and paragraph 9 requires an adjustment for any payments made to persons not at arm's length. I do not know if any of these required adjustments have been taken into account.

[29] The Guidelines also recognize that what may be a "business" expense for calculation of a self-employed person's business income may not be a true expense in terms of actual income. Section 19(1)(g) of the Guidelines states generally that the court may impute an amount it considers appropriate to a spouse in circumstances where the spouse unreasonably deducts expenses from income. Section 19(2) states that the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*. The reason for this flexibility — the use of a standard of "reasonableness" — is in my opinion because of the need for an objective criterion, such as income, so as to provide some degree of certainty and predictability in setting support, but at the same time recognizing that the terms of the *Income Tax Act* are meant for other purposes (such as raising revenue or providing incentives for certain types of investments) and therefore a strict application of the *Income Tax Act* may not give a realistic picture of how much is or should be available for support.

[30] The failure to provide the financial information required by s. 21(1) could lead to a hearing (s. 22) where the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as the court considers appropriate (s. 23). A court may also impute income in the circumstances set out in s. 19(1) of the Guidelines. A number of those circumstances may apply in a situation such as this one. For example:

1. The respondent is intentionally under-employed or unemployed (s. 19(1)(a)):

[31] The respondent says that he has been able to only obtain a few contracts. He does not say, however, whether his efforts to earn income have been restricted to his desired line of work, or if that type of work is the only one in which he is capable of earning income, or if he has tried to find work in other fields. In *Williams v. Williams* (1998), 32 R.F.L. (4th) 23 (N.W.T.S.C.), I made the comment that the use of the word "intentionally" implies some deliberate course of conduct relative to the purpose of the Guidelines. The intentional under-employment must be for the purpose of undermining or avoiding the parent's support obligation. The evidence in this case does not support such a conclusion. However, some recent cases have gone further and introduced an element of "recklessness" into the concept of intentional under-employment, such as in *Smolis-Hunt v. Hunt* (1998), 39 R.F.L. (4th) 143 (Alta. Q.B.), where Johnstone J. held that the concept encompasses situations where a spouse recklessly disregards the needs

of the children in furtherance of his own (unrealistic or unproductive) career aspirations. Without further information the respondent in this case could well be confronted with such an argument. This point was recently emphasized by the British Columbia Court of Appeal in *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 at page 540:

> . . . this Court has never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because they could not obtain interesting or highly-paid work. Rather, this Court has made it clear that a person is expected to take reasonable steps to obtain employment commensurate with such factors as their age, state of health, education, skills and work history.

2. The respondent's property is not reasonably utilized to generate income (s. 19(1)(e)):

[32] The information does not reveal what property the respondent has available to generate income. But he must have some since, as I noted previously, he claims "depreciation" on his recent monthly income statements. The Guidelines, by emphasizing income as the standard by which to set support, give little guidance in situations where a spouse is asset-rich but income-poor. Courts have begun to address this issue and have imputed income on the basis that assets could be sold or rearranged (if in an investment portfolio for example) so as to generate income for support payments: *Pentland v. Pentland*, [1998] O.J. No. 2678 (Gen. Div.); *B.L.M.G. v. D.J.E.G.*, [1998] M.J. No. 278 (Q.B.). I am not suggesting that the respondent in this case is asset-rich; but I am suggesting that he should have made disclosure of his assets so these questions are not left unresolved. On a related point, the respondent says in his affidavit that one of the reasons why he cannot pay child support or his debts is because the petitioner obtained an order freezing his R.R.S.P. fund. No doubt the order is inconvenient for the respondent since he cannot liquidate that fund for his use. But, if it is truly a major impediment to making his support payments, then the appropriate recourse is to apply directly to set aside that order.

3. The respondent has failed to provide income information that he is obliged to provide (s. 19(1)(f)). I have already canvassed this point.

[33] I am not concluding that any of these situations apply to the respondent. The application was not argued on the basis of imputing income. I am simply pointing out that the lack of information from the respondent could lead to these points becoming

issues. I also note that the circumstances in which income may be imputed are not exhausted by s. 19(1) of the Guidelines. The legislation uses the word "include" to refer to the list of circumstances so it is not all-inclusive. The court may impute income in other circumstances if it is appropriate to do so.

[34] A party who wishes to change an existing order, especially one made on consent, must make complete disclosure and must be prepared to answer, indeed must anticipate, any questions arising from that disclosure. It is not enough to simply say "here is what I earned". The party must be able to document the income he says he earned. And the party must be able to justify that income, not just in the terms of the *Income Tax Act*, but within the parameters set by the Guidelines. This is especially so for self-employed individuals.

[35] In this case I am not satisfied that the respondent is unable to make support payments. The information provided by the respondent is insufficient to make a reasoned assessment of his income. In the absence of such information, the present interim order will remain in force.

[36] This application typifies the adage referred to earlier that, if an interim order is deficient, then the case should be brought to trial so that a final order can be made based on a thorough examination of all of the facts and circumstances. This does not mean that the respondent cannot renew his application to vary the interim order. He can. Any such new application, however, must be fully supported by evidence, not self-serving generalities and vague statements, and there must be complete compliance with the informational requirements of the Guidelines. This indeed applies to all applications under the Guidelines.

[37] The respondent's application is dismissed. The petitioner will have her costs of this application in any event of the cause.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
on this 16th day of March, 1999

Counsel for the Petitioner: Katherine R. Peterson, Q.C.

Counsel for the Respondent: Elaine Keenan Bengts

6101-2607

IN THE SUPREME COURT
OF THE NORTHWEST TERRITORIES

BETWEEN:

RHONDA ANN BEILSTEIN

Petitioner

- and -

PAUL LOUIS BEILSTEIN

Respondent

Reasons for Judgment
of the Honourable Justice J.Z. Vertes
