Date: 2000 03 07
Docket: 6101-02133

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARGO SCHICK

Petitioner
(Respondent)

-and-

ROBERT SCHICK

Respondent
(Applicant)

REASONS FOR JUDGMENT

[1] The issues before me on this application are child support and cancellation of arrears of support.

[2] The parties were divorced in 1995. They are the parents of three children. At the time of the divorce, the father (Robert Schick) was ordered to pay monthly support of $500.00 per child. The parties had joint custody of the children but their primary residence was to be with the mother (Margo Schick, now Margo Hopkins). This was, of course, prior to the enactment of the Federal Child Support Guidelines.

[3] In late 1998 the father applied for a variation of his child support obligations and for an order vacating arrears that had accumulated that year. He had lost his job in March of 1998 (with severance pay taking him through April) and, as of May, 1998, his sole source of income was employment insurance. He had been employed as a miner up until then. Also, sometime in 1997, the custodial arrangements had been changed so that the parents shared custody equally. This was facilitated by the father's work schedule which provided a two-week-on/two-week-off rotation. The children spent each two-week-off segment with him (they still do).

[4] The variation application was heard by Richard J. of this court on December 18, 1998. He issued an order that (a) reduced the father's child support payments, effective December 1, 1998, to $222.00 per month; (b) suspended enforcement of any arrears accrued since May 1, 1998; (c) directed a review of the issue of ongoing child support by this court sometime in March or April of 1999; and, (d) adjourned consideration of the request for cancellation of arrears until the review hearing. In September, 1999, the father applied for the review directed by Justice Richard's order. Affidavits were filed and the father was cross-examined. Further financial information has been provided.

Ongoing Child Support:

[5] Since this is a review hearing, and not strictly a variation application, I must determine the question of support afresh on the facts existing at this time.

[6] Things have not improved economically. In fact they have deteriorated since the last hearing. The father's employment insurance payments ceased in May, 1999. He is still unemployed and has no source of income. He has been paying his expenses, including mortgage payments, by relying on lines of credit. Child support arrears now total $12,720.00. No support payments have been made since the employment insurance benefits stopped.

[7] There have been other changes. The eldest of the three children turned 18 years old in August, 1999. He is not now in school and apparently is relatively independent. Thus counsel agreed that the quantum of support can be assessed on the basis of two children only.

[8] The mother is now remarried (she had been remarried as of the 1998 hearing before Richard J.) and her husband earns a modest income. No details were provided of the total household income for the mother but it seems fairly certain from the evidence presented to me, and also available to Richard J., that the mother's financial circumstances are quite modest. At present, the mother (who is unable to work due to chronic depression) receives a Canada Pension Plan disability pension and a child tax credit. These payments total $1,387.23 per month.

[9] The mother's counsel made three points in relation to the question of ongoing support. They all had, as their aim, the objective of convincing me that I should impute income to the father. They were (i) that the father is intentionally

unemployed; (ii) that the father is not utilizing his assets to meet his support obligations; and, (iii) that the father has a history of avoiding his child support obligations. I will deal with these points in reverse order.

[10] I am not convinced that the evidence shows a history of avoidance by the father. To the contrary, it was the father, while he was still employed, who made arrangements with the Maintenance Enforcement Office to have his support payments deducted directly from his pay cheques. The record of payments from the Maintenance Enforcement Office shows that there were no arrears until the father lost his job. Furthermore, as the father's counsel noted, the father did not apply, prior to his unemployment, to bring the support payments in line with the Guidelines even though his income was such as to justify a lower support amount (although, to be fair, as pointed out by the mother's counsel, the higher payments he was making were tax deductible to him so it was not as great a financial sacrifice as it may appear on paper). But, in the end result, I do not accept the submission that the father has deliberately avoided his support obligations.

[11] With respect to assets, the Guidelines provide, in s.19(1)(e), that income may be imputed to a parent where that parent's property is not reasonably utilized to generate income. In this case, the father has the former matrimonial home (on which he is still paying off a mortgage), a recreational cabin, and a motorhome. He has made no efforts to sell them or in other ways to generate income from them.

[12] Generally speaking, imputing income is permissible where a payor has no income but significant assets that could be rearranged so as to generate income. But the cases where this has been done usually show a significant asset base of substantial financial worth: *Marshall v. Marshall*, 1997 CarswellSask 387 (Q.B.); *B.L.M.G. v. D.J.E.G.* [1998] M.J. No. 278 (Q.B.); *Pentland v. Kopp*, [1998] O.J. No. 2678 (Gen. Div.). Here the assets are relatively nominal. The home is required because the children live with their father for half the time. So it is not realistic to dispose of it. The values of the other assets are unknown.

[13] While I am not prepared to impute income on the basis of under-utilized assets in this case, I will say that, as a general principle, a parent is expected to make use of whatever assets are available to him or her so as to meet their support obligations. Those obligations are a priority and it is not acceptable to have arrears accumulate when assets could be readily disposed of to meet such obligations.

[14] The main thrust of the argument before me was over the question of the father's continuing lack of employment. The father is in his forties and has always worked in the mining industry. His evidence was that, in the past two years, he has applied on only eleven job openings. I think it is fair to say that he is hoping that the mining industry locally will rebound so that he can resume the type of work that he did before. He has limited education, no computer skills, and a sense of resignation regarding his job prospects outside of mining. As he said, on his cross-examination, in answer to questions about his ability to do various kinds of work: "... I'm capable of doing many things if they're willing to train me. Most places aren't willing to invest a lot into a person in their --- a male in their mid-40's especially." He has not, however, taken any specific retraining or education upgrading courses.

[15] The mother's counsel forcefully argued that the father could have, indeed would have, found employment if he had made a determined effort to do so. The father's counsel countered that even if he had found a job, such as the ones used as examples in the father's cross-examination, in all likelihood it would have been a menial one at minimum wage. So he would still be left unable to make his support payments.

[16] Section 19(1)(a) of the Guidelines provides as follows:

> 19.(1) The court may impute income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the spouse is intentionally under-employed or unemployed other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by reasonable educational or health needs of the spouse;

[17] In *Williams v. Williams* (1998), 32 R.F.L. (4th) 23 (N.W.T.S.C.), I held that intentional under-employment or unemployment, as used in the Guidelines, connotes a deliberate course of conduct with the purpose of undermining or avoiding the parent's support obligations. In *Smolis-Hunt v. Hunt* (1998), 39 R.F.L. (4th) 143 (Alta. Q.B.), Johnstone J. extended that interpretation to include situations where a payor recklessly disregards the needs of his or her children in furtherance of personal objectives. Generally, in order to impute income on the basis of under-employment or unemployment, there is a requirement to show some type of "malfeasance" on the part of the payor parent, some deliberate

attempt to reduce or avoid their child support obligations: *Risen v. Risen*, [1998] O.J. No. 3184 (Gen. Div.).

[18] Recently, however, some cases have noted an evolution of the law in this area as new fact situations arise. In *Montgomery v. Montgomery,* 2000 CarswellNS 1, the Nova Scotia Court of Appeal held that s.19(1)(a) does not restrict the court to imputing income only in those situations where the payor intended to evade child support or recklessly disregarded the needs of the children. The focus should be rather on whether the conduct of the payor is reasonable in all of the circumstances. That case dealt with a self-induced change and, in essence, suggests that if a payor makes any change to his or her circumstances that results in a reduced income then it had better be objectively justifiable. In circumstances where the change is not voluntary, as here, income may still be imputed if there is an ongoing situation of "intentional" under-employment or unemployment. The considerations, however, are always fact-specific.

[19] There have been a number of cases where no deliberate or intentional "malfeasance" was found and income was nevertheless imputed. Usually these are situations where the payor simply did not try hard enough or exert himself enough to earn income. Two examples are *Clements v. Clements*, 1997 CarswellYukon 46 (S.C.), and *Carson v Buziak* (1998), 40 R.F.L. (4th) 50 (Sask. Q.B.), where in both cases the payors were full-time students but the courts concluded that they were "under-employed" because they failed to make reasonable efforts to obtain part-time or seasonal employment.

[20] In this case I do not find intentional unemployment in the sense of a deliberate plan on the part of the father to be unemployed so as to avoid his support obligations. What I do find is a lack of reasonable effort to take those jobs that would provide him with at least some income even though it may be menial work. The accepted rule is 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": as per *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.), at p.540. As many cases have said, when considering imputing income, it is not so much the amount the payor actually earns that counts; it is his earning capacity that must be examined.

[21] I acknowledge that the father has limited skills. But that does not, as in *Van Gool*, explain his failure or reluctance to obtain work which does not require significant skills or to obtain work where he could learn new skills on the job. He is

apparently in good health and I suspect that he has a wider range of marketable skills than he gives himself credit for. So I think that this is an appropriate case to impute some income to him. The question is how much?

[22] In *Wong v. Wong* (1990), 27 R.F.L. (3d) 215 (Ont. C.A.), the court held that there must be some evidentiary basis to calculating how much income to impute. That was a pre-Guidelines case but the principle remains. Notwithstanding the paucity of evidence in this case, I conclude that the father should be capable of earning at least $20,000.00 in some type of work that he is able to do. I base this figure on the fact that even minimum wage (currently $6.50 per hour) would earn him an annual salary of $13,520.00 (at 40 hours per week x 52 weeks). I therefore impute income to the father, for the next 12 months, at $20,000.00. If he in fact earns more than that then, of course, a retroactive variation could be sought.

[23] The next step is to determine what support, if any, should actually be paid since this is a shared custody arrangement. Shared custody is dealt with in s.9 of the Guidelines:

> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
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> (a) the amounts set out in the applicable tables for each of the spouses;
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> (b) the increased costs of shared custody arrangements; and
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> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[24] This section confers a broad judicial discretion in determining the appropriate order. Each of the criteria in subsections (a), (b) and (c) have to be considered. The starting point is the amount that would be payable by each parent to the other if it were not a shared custody arrangement. This is what is done under s.8 of the Guidelines for split custody arrangements where the amounts payable by each parent are off-set one against the other. In practice the same end result is often found in shared custody arrangements. As noted by Justice D.R. Aston in "An Update of Case Law Under the Child Support Guidelines" (1999), 16 C.F.L.Q. 261 (at p.296), the method of simply determining the amount from the Guidelines tables in the same fashion as is done for split custody is attractive from the perspective of certainty and ease of calculation, but it does not necessarily take account of the fact that there are additional costs in a true shared custody

situation. However, to repeat something I said in *Soderberg v. Soderberg* (1999), 42 R.F.L. (4th) 403 (N.W.T.S.C.), there is an onus on the parties to bring forth evidence as to any increased costs due to the shared custody arrangement or as to any special circumstances. In the absence of such evidence, the discretion should be exercised in favour of applying the table amounts. To do otherwise would be a regression to the pre-Guidelines regime with haphazard budget calculations and unpredictable results.

[25] The Guidelines support amount for two children, based on an annual income of $20,000.00, is $311.00 per month. The mother's annual income (taking into account only her disability pension) is $12,577.00. The Guidelines support amount is $187.54. The difference is $123.46.

[26] Subsection 9(c) requires a consideration of the means, needs and other circumstances of each parent and the children. The "means" would include all pecuniary resources. In this context, the fact that the mother has remarried and that her husband is contributing to her household is a relevant circumstance. On the other hand, there is evidence that the mother has been paying various additional expenses (primarily recreational) for the children. That is another factor to take into account. But, the father maintaining the former matrimonial home can be considered an increased cost of the shared custody arrangement.

[27] Based on all of these factors, I order that the father's child support obligations be varied to $120.00 per month, until further order of this court. This variation will be retroactive to September 1, 1999, being the month in which the father commenced these review proceedings. The quantum of child support is to be reviewed within twelve months of this order. The father is to notify the mother immediately should he secure employment.

Rescission of Arrears:

[28] The father seeks to vacate the arrears of support that have accumulated since he became unemployed. Those arrears total, as noted above, $12,720.00 as of the end of February.

[29] Counsel are agreed on the applicable rule. In the absence of special circumstances, arrears should not be rescinded unless the payor establishes that he could not pay the support in the past, cannot pay them now, and will not be able to pay them at any time in the future: *Haisman v. Haisman* (1994), 7 R.F.L. (4th) 1 (Alta.C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 86.

The issue of the arrears was not dealt with at the hearing of December 18, 1998, having been adjourned until this review hearing.

[30] The order made in 1998 reduced the father's monthly support payments to $222.00. Counsel explained that this was done by simply taking one-half of what the father's support obligation would have been for three children at an annual income of $21,476.00 (being the amount of his employment insurance benefits). That variation did not affect any of the arrears. I have concluded that there are two areas where rescission is warranted.

[31] First, since I made the new monthly support payment retroactive to September 1, 1999, there will have to be an adjustment for the months of September, 1999, through February, 2000 (inclusive). That results in cancellation of $612.00 of arrears ($222.00 minus $120.00 x 6 months). This also coincides with the fact that the eldest child turned 18 last August, a fact that would warrant a variation in any event.

[32] Second, in my opinion, the variation made by Richard J. in December, 1998, should apply back to May, 1998. That is when the father's unemployment insurance commenced. Thus there will be an adjustment for the months of May, 1998, through November, 1998 (inclusive). That results in cancellation of $8,946.00 of arrears ($1,500.00 minus $222.00 x 7 months). I am convinced that if he had applied for a variation earlier he would have received it.

[33] The arrears that are cancelled by this order total $9,558.00. That leaves a balance for accumulated arrears, as of the end of February, 2000, of $3,162.00.

[34] I am satisfied, based on all of the evidence, that the father was unable to pay the support when due in these time frames, nor is he able to pay them now, but he should be able to pay what is left of the arrears in the future.

[35] There will be no costs of these proceedings.

J. Z. Vertes J.S.C.

Dated at Yellowknife, Northwest Territories
this 7th day of March, 2000.

Counsel for the Petitioner (Respondent):
Elaine Keenan Bengts

Counsel for the Respondent (Applicant):
Katherine R. Peterson, Q.C.