Snow v. Smith, 2001 NWTSC47

Date: 2001 06 19
Docket: S-001-CV-2000000102

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the *Children's Law Act,*
S.N.W.T. 1998 c.17, as amended

AND IN THE MATTER of the *Maintenance Orders Enforcement Act,*
R.S.N.W.T. 1988 c. M-2, as amended

BETWEEN

THOMAS SNOW

Applicant

-and-

ANDREA COLLEEN SMITH

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter came before me in Chambers on March 16, 2001, as an application for child access, variation of a child support order made in 1996 and rescission of arrears of over $48,000.00 accumulated under the 1996 order.

[2] On March 16, I ordered that the Applicant, Thomas Snow, have reasonable telephone access and other access as may be arranged and agreed to by the children, who are presently 16 and 14 years of age. I also varied the child support order which had been granted by the Ontario Court (General Division) on May 29, 1996 in the amount of $1,100.00 per month so as to bring it in line with the *Child Support Guidelines.* In doing so, I imputed income to Mr. Snow in the amount of $25,000.00 annually, and ordered monthly child support payments under the *Guidelines* in the amount of $388.00.

[3] I reserved my decision on rescission of the arrears, pending receipt of calculations from counsel based on the Applicant's actual earnings after 1996 and the *Child Support Guidelines*. Having now received those calculations by way of a Memorandum to the Judge from the Applicant's counsel filed on May 31, 2001 and a Memorandum in Response from the Respondent's counsel filed June 8, 2001, my decision on the issue of the arrears follows.

[4] The factual material before me consists of an affidavit from each of the parties. Many of the facts are undisputed. Mr. Snow and Ms. Smith were involved in a common law relationship for approximately thirteen years. When they separated in 1995, he moved to Yellowknife, where he still lives, to seek employment. Ms. Smith lives in Ontario with the children.

[5] Mr. Snow is 40 years old and has a grade 8 education. He has always worked as a labourer and says that accordingly, his income has fluctuated. It hit a high of $63,153.00 in 1996, when he obtained work in a bush camp. The order made in 1996 appears to have been made on the basis of that income amount.

[6] In his affidavit, sworn October 22, 2000 Mr. Snow deposes that he received the following income for the years 1995 to 2000:

1995	$16,876.00 (including unemployment insurance benefits)
1996	$63,153.00 (including unemployment insurance benefits)
1997	$33,457.99
1998	$22,616.96
1999	$ 9,624.00 plus undisclosed unemployment insurance benefits
2000	$20,310.58 plus undisclosed unemployment insurance benefits

[7] Some documentation was filed to substantiate the foregoing amounts. Mr. Snow was not cross-examined on his affidavit or the financial information.

[8] Mr. Snow deposes that he was overwhelmed by the amount of child support directed in the 1996 order and that his ability to find long term or lucrative work was limited by his lack of formal education and an economic downturn in the Northwest Territories. He says that as a result of garnishment of his unemployment insurance benefits he is left with so little income that he is unable to support himself or pay rent.

He also says that he has debts, particularly to the telephone company, and has been denied a telephone, which impedes his ability to make and receive contacts for purposes of finding work. His lack of money leaves him unable to purchase tools or proper work clothing which further impedes his ability to find work. His situation is hopeless, he says, whereas Ms. Smith has remarried and both she and her husband are employed on a full-time basis. His explanation for not applying earlier for variation of the support order is that he was refused legal aid.

[9] In opposition to the application for rescission of the arrears, Ms. Smith in her affidavit says that Mr. Snow has never made a voluntary child support payment since the 1996 order was granted, that he is in good health and she knows of no reason that would prevent him from becoming fully employed, that he has informed her that he has spent the majority of the time since their separation living with various self-supporting women, thus has not had to pay most living expenses, and that in November 2000 he send a gold necklace and glamour photograph of himself in a tuxedo to their daughter. She asks the Court to conclude that Mr. Snow does have disposable income.

[10] Under the 1996 order, the child support payments were to begin on June 1, 1996 and bear interest at 7%. The Debtor Financial Report from the Maintenance Enforcement Program attached to Mr. Snow's affidavit indicates that he was in arrears of payment under the order in the amount of $4,700.00 in September 1996. The Report, which shows total arrears of $48,322.95 as at September 2000, reveals that not once was a full payment made. In 1996, when Mr. Snow earned $63,153.00, a total of only $38.00 was paid and that by garnishment. In 1997, when he earned $33,457.99, a total of only $3218.00 was paid, again by garnishment. Most of the remaining payments appear to have resulted from garnishment.

[11] The Report does show a few payments of $50.00 each received from Mr. Snow in 1998 and 1999. I have no information as to how those payments came about. The total payments from the date of the 1996 order to September 22, 2000 amount to $9,353.05.

[12] The overall picture leads to the conclusion that Mr. Snow has made no real effort to meet his child support obligations over the time period in question, including the years when he was earning a good or reasonable income. For this reason, I am skeptical about Mr. Snow's claim that he is unable to pay child support because of limited earning capacity. His track record demonstrates instead an unwillingness to pay child support.

[13] The guiding principles in dealing with arrears of child support were set out by Hetherington J.A. in *Haisman v. Haisman* (1994), 7 R.F.L. (4th) 1 (Alta. C.A.) and adopted in a number of cases in this Court (for example, *Whalen v. Boivin*, [1996] N.W.T.R. 111 and *Lafferty v. Football*, S.C.N.W.T. No. CV 03052; May 20, 1997). They may be summarized by quoting the following paragraph from *Haisman*:

> 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.

[14] I am satisfied that the coming into force of the *Child Support Guidelines* is a sufficiently special circumstance to justify considering whether, had Mr. Snow applied to the Court after they came into effect, his child support payments would have been varied to conform to the amount payable under the *Guidelines* by a person earning his income. Although the territorial *Guidelines* came into effect after those under the federal *Divorce Act* came into force, it makes sense to treat child support for the children of unmarried parents, as in this case, the same as child support for the children of married parents, as I said in *Lafferty v. Football.*

[15] In the absence of any evidence contradicting the income Mr. Snow says he has made over the past few years, I accept that his income has fluctuated. Had he applied for a variation of child support earlier, it is likely that the payments ordered in 1996 would have been reduced to comply with the *Guidelines*. A variation of the arrears is warranted on that basis.

[16] Counsel in their memoranda have suggested different ways of calculating what Mr. Snow would have been ordered to pay for child support had he made a timely variation application. I have decided, after reviewing their calculations, that the variation should, to the extent possible, reflect the income he actually received. However, in those years where Mr. Snow reported undisclosed unemployment insurance benefits, I am going to impute income of $25,000.00. I do so because of Mr. Snow's unexplained failure to disclose the amount of the benefits.

[17] Varying the arrears in this way results in reduction of the arrears to the amount of $21,434.95 as at March 1, 2001 as follows:

1996:	payments June 1 through December 1 at $1100.00 per month	$7700.00
1997:	based on income of $33,400.00:	
	January 1 through April 1 at $1100.00 per month	$4400.00
	May 1 through December 1 at $500.00 per month	$4000.00
1998:	based on income of $22,600.00:	
	January 1 through December 1 at $351.00 per month	$4212.00
1999:	based on imputed income of $25,000.00:	
	January 1 through December 1 at $388.00 per month	$4656.00
2000:	based on imputed income of $25,000.00:	
	January 1 through December 1 at $388.00 per month	$4656.00
2001:	based on imputed income of $25,000.00:	
	January 1 through March 1 at $388.00 per month	$1164.00
Total required payments		$30,788.00
Total payments received as per Report		$ 9,353.05
Balance outstanding		$21,434.95

[18] The question then becomes whether the arrears should be reduced even further. I do not have current information about Mr. Snow's employment situation. I also have very little information about the extent to which he has sought employment, although there is a letter attached to his affidavit indicating that he has been in regular contact with one former employer. Looking at his employment income history, one sees that he hit a peak in 1996, his income then decreased quite dramatically to a low in 1999 but then doubled from that amount in 2000. There is a reasonable possibility that it will continue to increase. In these circumstances, I am not satisfied on a balance of probabilities that Mr. Snow will not at any time in the future be able to pay the arrears as reduced.

[19] I therefore order that the arrears of child support under the 1996 Ontario order be reduced to $21,434.95 as at March 1, 2001.

V. A. Schuler
J.S.C.

Dated at Yellowknife, NT this 19th day of June, 2001.

Counsel for the Applicant: D. Jane Olson
Counsel for the Respondent: Margot L. Engley

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