

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

ERIC GARGAN

Petitioner

- and -

LENA GARGAN

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter came on before me for hearing on August 8, 2001. It had been submitted as a “desk divorce” but because there were some discrepancies in the affidavit material, I directed that it be set down for a hearing so that the Petitioner, Mr. Gargan, could provide *viva voce* evidence.

[2] Mrs. Gargan did not appear, although served with notice of the hearing, nor has she responded to the divorce proceedings.

[3] On August 8, 2001, at the hearing, I granted a divorce judgment and an order that the parties have joint custody of the child Erica Gargan, born October 10, 1991. I also ordered that the child reside with Mrs. Gargan, as she has since the separation, and that Mr. Gargan have reasonable access to her on reasonable notice to Mrs. Gargan and as agreed to by her.

[4] I further ordered that child support payable by Mr. Gargan for Mrs. Gargan’s children from a previous relationship, Shawn Moosenose, now 20, and Adrian Moosenose, now 14, be terminated. Ongoing child support for Erica in the amount of \$268.00 per month based on income of \$29,100.00 was also ordered.

[5] Counsel requested, and was granted, leave to file affidavit material on her client's request for rescission of arrears of child support. The last of this material was filed on October 30, 2001. Having reviewed both the evidence at the hearing and the material subsequently filed, I have decided that the arrears should be reduced to \$1128.00 for the following reasons.

[6] The background may be summarized briefly. The parties separated in 1995. There were earlier proceedings taken between them in action CV05991 under the *Maintenance Act*, R.S.N.W.T. 1988, c. M-1, as amended. In that action, on October 30, 1995, an order issued that Mr. Gargan pay one child support payment of \$100.00 by November 20, 1995. Then on December 11, 1995, Mr. Gargan was ordered to pay as interim support the sum of \$100.00 per month per child, commencing January 1, 1996 and continuing until further order of the Court. As at October 11, 2001, arrears had accumulated in the amount of \$9,071.94. Mr. Gargan seeks to have these arrears rescinded.

[7] From the various tax returns (the majority of which seem to be Mr. Gargan's working copies) and other documents filed, it appears that Mr. Gargan's gross income since the order was made has been the following:

1995 -	\$26,335.00
1996 (to September 5) -	\$14, 284.26
September 5, 1996 to September 29, 1998 - no income due to incarceration	
1998 (after September 29) -	\$960.96
1999 -	\$8,000.36
2000 -	\$21,928.76
2001 -	\$29,100.00

[8] Mr. Gargan bases his argument that the arrears should be rescinded on a number of factors. First, he points to the two years that he was incarcerated. Second, he points out that Shawn Moosenose turned 19 in November 1999 and would no longer have been considered a child of the marriage after that. As to Adrian

Moosenose, Mr. Gargan testified that his natural father has been paying child support for him since sometime in the year 2000 pursuant to various court orders, although none of the orders were put into evidence. Mr. Gargan also says that he assumed the bulk of the family debt on separation, \$9,240.58 owed for housing for the house left in Mrs. Gargan's possession and \$8000.00 or so for a truck, although it is not clear who kept the truck. Finally, Mr. Gargan relies on the *Child Support Guidelines*, which came into effect on May 1, 1997.

[9] 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.

[10] I am satisfied that the coming into force of the *Child Support Guidelines* is a sufficiently special circumstance to justify considering whether, if Mr. Gargan had applied for a variation of his child support payments after the *Guidelines* came into effect, his payments would have been reduced to the *Guidelines* amount payable according to his annual income. This should apply to the years after the *Guidelines* came into effect; for the years before May 1, 1997, I am not persuaded that the same should apply because a different calculation and tax treatment would have been used.

[11] In this case, there is no evidence to suggest that the amounts set out above do not accurately reflect Mr. Gargan's income and no evidence which suggests that he could have earned more than he did. Therefore I will accept the figures as set out above.

[12] However, I am not persuaded that I should take into account the debts that Mr. Gargan says he has taken responsibility for. There is no evidence as to who, if anyone, kept the truck and no current evidence as to the amount owing on it, or what, if anything, has been paid on the loan. As to the housing debt, there is no evidence that Mrs. Gargan has been released from liability for that debt and no evidence that Mr. Gargan has in fact made any payments towards it.

[13] As to whether or how any adjustment should be made to those arrears which pertain to the child support payable for Adrian Moosenose, I take into account the discretion the Court has under s. 5 of the *Guidelines* with respect to child support payable by a person who stands *in loco parentis*, the fact that Mrs. Gargan has not responded to or contested the request for rescission of the arrears, and Mr. Gargan's testimony that although he did treat Shawn and Adrian Moosenose as his children, he no longer has any contact with them (the significance of this factor has as yet not been definitively settled in the law as explained by Vertes J. of this Court in *McBride v. McBride*, 2001 NWTSC 59, but I will take it into account in this case). It was not clear, however, on the evidence, when or how their relationship broke down. I also take into account that there is no evidence before me as to how much child support Adrian's natural father is paying or has paid. For that reason, I am not going to rescind all of the amounts that were payable for the two boys but I will adjust the arrears so that the responsibility to pay child support for Shawn ends at the end of 1999, when he would have turned 19, and the responsibility to pay for Adrian ends at the end of 2000.

[14] Finally, I note that Mr. Gargan's income seems to be on the upswing again after his term of incarceration and so there is reason to believe that he can pay the arrears which will remain after the adjustments below are made.

[15] In my view, therefore, the amounts which Mr. Gargan should have paid up to October 2001 are as follows:

1995: one payment of \$100.00	\$100.00
1996: \$300.00 per month as per December 11, 1995 order	\$3,600.00
1997: incarceration	\$0.00
1998: incarceration	\$0.00
1999: \$47.00 per month for three children x 12 (based on income of \$8,000.36)	\$564.00
2000: \$326.00 per month for two children x 12 (based on income of \$21,928.76)	\$3,912.00

2001: \$268.00 per month for one child x 10 (to October 2001)	\$2,680.00
Total:	\$10,856.00
Amount actually paid:	\$9,728.00
Balance owing:	\$1,128.00

[16] Accordingly, the arrears are reduced to \$1,128.00 as at October 11, 2001 and counsel may take out an order reflecting that.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 5 day of December, 2001

Counsel for the Petitioner: Jane Olson
No one appearing for the Respondent

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