

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHARON PELLISSEY

Applicant

- and -

CRAIG SKEARD

Respondent

MEMORANDUM OF JUDGMENT

[1] This Memorandum addresses the application brought by Mr. Skeard (to whom I shall refer as “the father”) for variation of the child support order made in these proceedings and rescission of arrears. This follows on my review of the further written submissions filed on his behalf (the mother neither appearing nor participating in these current proceedings).

[2] The parties lived in a common-law relationship and are the parents of three girls. On March 7, 1997, an order was issued granting the mother sole custody and ordering the father to pay child support of \$300.00 per month per child. The parties, however, reconciled shortly thereafter and remained together until the end of 1997. In May 1998, the children were apprehended and put under the protection of the Director of Child and Family Services. The children were shortly thereafter returned to the mother who retained custody pursuant to a plan of care supervised by the Director.

[3] The mother encountered continuing problems in caring for the children. The Director’s officials removed the children from her home for lengthy periods of time. In

August 2002, the Territorial Court issued a further temporary care and custody order in favour of the Director. The children were then in a foster home and had been in foster care for some time.

[4] On November 8, 2002, this Court issued an order setting aside the previous custody order and granted custody of the children to the father. This was done with the support of the Director. On December 17, 2002, the children went to live with their father on a permanent basis.

[5] Meanwhile, the support obligations continued to accrue. By the terms of the original order, the total amount of support due from the date of the order up to December 2002 is \$62,100.00. Over the years, the father has paid \$8,019.00. Arrears in excess of \$54,000.00 have accumulated and the father now seeks rescission of the entire amount.

[6] The principles governing rescission are well-known. In the absence of special circumstances, arrears should not be rescinded unless the payor establishes that he could not pay the support in the past, cannot pay them now, and will not be able to pay them at any time in the future: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.

[7] Here, the father says that there has been a significant change of circumstances justifying variation and rescission. Obviously there is. The children are now living with him. He is their sole support. The mother has been described as suffering from a number of difficulties, including chronic alcoholism, and is unable to financially assist with the care of the children.

[8] The father's counsel has carried out an analysis of the support obligation for the past five years. She submits first that there should be no support payable for 1997 while the parties were reconciled. This would eliminate in excess of \$4,800.00 from the arrears.

[9] Second, the father's counsel has estimated what the support payments should have been based on the father's actual income each year. His annual income has fluctuated from a low of \$11,400.00 in 1998 to a high of \$47,000.00 in 2001. By this method, the total support obligation is calculated to be only \$39,192.00 (based on the applicable table amount pursuant to territorial legislation). There is validity to this approach but it is not determinative on the question of rescission. I refer to the comments of Professor J.D. Payne in his *Child Support in Canada* (3d ed., 2001), at Part 13-19:

A court will not order a total or partial remission of child support simply because the guidelines would have provided a lower amount of child support than the order under

review. However, given that the applicable table amount of child support under the guidelines is based on the obligor's actual or imputed income, and the amount payable is subject to annual review and change, it may be relevant to take into account this same income or imputed income over the period of time that the arrears accrued, when deciding whether there should be a reduction of arrears, and if so in what amount.

[10] The father's counsel also calculated the amount of support that accrued during the periods when the children were in foster care. This amounts to something in excess of \$18,000.00. Again, this is relevant but not necessarily determinative. The obligation to pay child support does not necessarily cease simply because a child is no longer living with the person who is to receive the support payment: *McKay v. Collins*, [1999] B.C.J. No. 950 (C.A.). That person may still incur financial obligations on the child's behalf. Here, there is no evidence that the mother had any such obligations while the children were in foster care. There is also no evidence in this case that the mother assigned her rights under the previous support order to any government social assistance agency.

[11] All in all, the father's counsel submits that if these adjustments were taken account, the balance of arrears would be reduced to approximately \$13,000.00.

[12] The final argument put forth by the father's counsel is, in my opinion, the determinative one in this case. The father is now the sole provider for the children. Payment of the arrears would not benefit the children; indeed it may detrimentally affect the children because it would impinge the financial resources available for the children in this new family unit. These are special circumstances which warrant rescission of the arrears.

[13] For these reasons the relief sought is granted. An order will issue vacating the child support order of March 7, 1997, and rescinding all accumulated arrears. If any funds are currently held by the Maintenance Enforcement Office, as a result of garnishment or otherwise, those funds are to be released to the father in care of his solicitor.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT,
this 4th day of February 2003

Counsel for the Respondent (Applicant): Jill A. Murray

CV 06865

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THE HONOURABLE JUSTICE J.Z. VERTES
