

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARY ROSE ETTAGIAK

Applicant

- and -

ZIVOOGON JONVONIC

Respondent

MEMORANDUM OF JUDGMENT

[1] Mr. Jonvonic seeks variation or termination of an order made by a Judge of this Court on August 6, 1991, requiring that he pay the sum of \$500.00 per month in child support for a child who is now 14 years old. Mr. Jonvonic also seeks rescission of the arrears of approximately \$60,000.00 which have accumulated under the 1991 order.

[2] Neither Ms. Ettagiak, the recipient under the order, nor the Maintenance Enforcement Officer, appeared on this application, although served with notice of it.

[3] The Court file and affidavit material indicate that Mr. Jonvonic did not respond to the proceedings that resulted in the 1991 order. Mr. Jonvonic's counsel advised that the Maintenance Enforcement Officer has brought contempt proceedings in the Territorial Court against his client for default under the order on a number of occasions. There is, on the Court file for this matter, a transcript of a proceeding taken in the Territorial Court on December 17, 2001 under s. 23 of the *Maintenance Orders Enforcement Act*, R.S.N.W.T. 1988, c. M-2, which permits the Maintenance Enforcement Administrator (or Officer) to require the debtor under a maintenance order to appear before the Court to explain any default in payment. I will refer to this transcript further on.

[4] There is no evidence that Mr. Jonvonic has ever brought an application to vary the 1991 order prior to this application, which was filed in December 2001.

[5] This application appears to have been brought under s. 61(1) of the *Children's Law Act*, S.N.W.T. 1997, c. 14, which permits a party to a child support order to apply for variation of the order. Section 61(2) requires that the Court be satisfied that there has been a change of circumstances since the order sought to be varied was made.

[6] Pursuant to sections 2(1)(c) and 21(1) of the *Child Support Guidelines* made under the *Children's Law Act*, a person who applies for a variation of a child support order and about whose income it is necessary to have information to determine the amount of an order, must include with his application certain material. For a person who is self-employed, as is Mr. Jonvonic, under s. 21(1)(d), the material consists of the financial statements of the business and statements showing salaries and other payments as described in that subsection for the three most recent taxation years. Mr. Jonvonic has not provided this information.

[7] The evidence submitted on the application consisted of affidavits sworn by Mr. Jonvonic and his testimony in Court. Mr. Jonvonic is now 66 years old. He has worked as a taxi driver in Inuvik for many years. He has had type II diabetes for the last 5 years, which he testified makes it possible for him to work only half time or less. He receives Old Age Security in the amount of \$1103.74 per month and does not pay for housing.

[8] In his affidavit, Mr. Jonvonic stated that he never made much money as a taxi driver, even when able to work long hours. He described what he now earns from driving as "virtually nothing" and stated that driving is now almost a hobby he pursues to keep in contact with his friends. In the same affidavit, he disclosed his income for only two of the years since 1991, attaching his income tax returns for those years. The returns show business income of \$7983.42 for 1995 and \$6115.63 for 1996.

[9] In his testimony given under oath in this proceeding, Mr. Jonvonic said that he drives his taxi for a few hours, five days a week, that he takes in about \$90.00 most days and \$135.00 on Fridays. He pays \$225.00 every week for full time taxi stand fees and \$20.00 to \$30.00 a day for gas as well as \$575.00 every three months for insurance. He testified that he takes home about \$400.00 a week from driving his cab after paying for gas.

[10] By my calculation, after expenses, he takes home about \$500.00 a month. When his Old Age Security is added, that gives Mr. Jonvonic income of approximately \$1600.00 per month, thus \$19,200.00 per year.

[11] During Mr. Jonvonic's testimony, an issue arose because of his assertion that he had filed all his income tax returns prior to the year 2000. Counsel asked for, and was granted, an adjournment to clarify that with Mr. Jonvonic's bookkeeper. In the result, he filed a further affidavit sworn by Mr. Jonvonic, indicating that the only return filed, apart from those in 1995 and 1996, was for the year 2001, reporting total income of \$18,942.00. All of that income appears from the supporting documentation to have come from Old Age Security, Canada Pension and federal supplements. No business income is reported in that return and there is no explanation in the evidence for that apparent omission. Nor is there any explanation from Mr. Jonvonic or his bookkeeper as to why no financial information was provided for the years other than 1995, 1996, 2001 and 2002.

[12] All of this presents a significant problem of credibility. Mr. Jonvonic did not disclose in his testimony that his income was almost \$19,000.00 in 2001, but was, in my view, trying to give the impression that his 1995 and 1996 reported income was reflective of what he has been able to earn. Also, despite having a bookkeeper, who he claims has his records and whose fault he said it was if his income tax returns were not filed, he has put no evidence whatsoever before the Court as to what his income was for most of the years since 1991.

[13] Although English is not Mr. Jonvonic's first language, and he seemed to have trouble expressing himself on the witness stand, I do not accept that the discrepancies in his evidence can be explained by that. He has been living and working in Inuvik since at least 1971 according to his affidavit. He has had ample time to acquaint himself with his financial records.

[14] Almost nothing has been paid under the 1991 order. The printout from the Maintenance Enforcement Office which is attached to Mr. Jonvonic's affidavit indicates that only \$2163.30 was paid out of a total of \$61,500.00 owing from the time the order was made in 1991 until November 2001. The payments that are recorded as made in 2001 were by way of garnishment. There is no evidence that Mr. Jonvonic has ever made a voluntary payment or any effort at all to comply with his child support obligations. He did say during his testimony that he "could maybe" pay \$100.00 per month.

[15] All of this leaves me with the impression that it is just as likely that Mr. Jonvonic is unwilling to pay child support as it is that he is unable to. No doubt Ms. Ettagiak has simply given up on him. The difficulty in this case is that on the one hand the Court has before it a 66 year-old man who is in poor health and appears to have few skills, while on the other hand he is also an example of what the Court sees all too frequently: an individual who simply ignores a child support order and then, when the arrears are huge, comes to Court pleading that he cannot possibly satisfy them.

[16] Attached to the transcript of the hearing that took place in Territorial Court in December 2001 is a letter from the Maintenance Enforcement Officer requesting that the transcript be placed on the file for the presiding Judge's perusal. Although the Maintenance Enforcement Officer was given notice of the hearing date, no one appeared on her behalf. Someone, presumably in the Maintenance Enforcement Office, has highlighted the portion of the transcript where the presiding Territorial Court Judge found that Mr. Jonvonic had not satisfied the onus on him to explain his default in payment because he was not being candid with the Court.

[17] A finding of credibility, whether adverse or positive, made by another Judge in another proceeding, is of course not binding on this Court hearing this application. What is more significant about the transcript, especially in light of Mr. Jonvonic's application for rescission of the arrears, is the evidence he gave at that time about his financial situation, particularly his expenses. He testified before the Territorial Court that he spent \$250.00 a month on telephone calls to family members in Yugoslavia, \$85.00 a month on cable television although he never watches television, \$50.00 a month at the hairdresser's although he never goes to the hairdresser and \$50.00 a month on newspapers despite the fact that he is unable to read. Thus he was claiming to have expenses of over \$400.00 per month for things he either did not use or that could not possibly be said to be necessities, while at the same time claiming an inability to meet his \$500.00 a month child support obligation. In the present application, Mr. Jonvonic did not present any evidence as to his expenses save for what I have referred to in regard to the expenses of operating his taxi.

[18] On an application for rescission of arrears of child support, the guiding principles are as set out by Hetherington J.A. in *Haisman v. Haisman* (1994), 7 R.F.L. (4th) 1 (Alta. C.A.) and adopted in this Court (see, for example, *Snow v. Smith*, 2001 NWTSC 47). To quote 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.

[19] In the absence of complete financial information, I am not satisfied that Mr. Jonvonic cannot pay any arrears of child support and will not in the future be able to pay. I am not satisfied that he has made full disclosure of his financial situation or his income for all the years since 1991. It appears that in the past he has made a deliberate choice to spend money on things like telephone calls and newspapers rather than using it for child support. Mr. Jonvonic has not persuaded me that this is not still the case.

[20] Having said that, I do consider that the coming into force of the *Child Support Guidelines* on May 1, 1997 is a change in circumstance and a special circumstance that would justify a recalculation of arrears to reflect what the payor would have paid had he made a timely application to have his support obligations conform with the *Guidelines*. This can only reduce the arrears to a limited extent because the only year since 1997 for which any proof of income was provided is 2001. Despite some lingering doubt as to the accuracy of Mr. Jonvonic's reported income and despite the absence of financial statements, I will accept the income tax return as accurate.

[21] Based on his income of \$18,942.00 for 2001, the child support payable by Mr. Jonvonic under the *Guidelines* would be \$170.00 per month rather than \$500.00. The difference for the year ($\$500.00$ less $\$170.00 = \330.00×12 months) is \$3960.00, which will be deducted from the arrears owing.

[22] As to Mr. Jonvonic's obligation for ongoing support, I have above calculated his present income, from Old Age Security and earnings from driving taxi, at approximately \$19,000.00 and therefore his child support payments are varied such that they will be in the amount of \$170.00 per month pursuant to the *Guidelines* starting January 1, 2002 and any arrears which have accumulated since the latter date will be reduced accordingly.

[23] Due to the lack of financial disclosure and lack of any effort in the past to pay the support ordered, I find that Mr. Jonvonic has not satisfied me that this is an appropriate case to rescind the arrears or reduce them any more than as set out in the two preceding paragraphs.

Dated this 28th day of June, 2002.

V.A. Schuler
J.S.C.

Counsel for the Zivogon Jonvonic: John Rhynes

No one appearing for Mary Rose Ettagiak

No one appearing for the Maintenance Enforcement Officer

CV 03153

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