

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BERTHA ZOE-FISH

Petitioner

- and -

SONNY ZOE-FISH

Respondent

MEMORANDUM OF JUDGMENT

[1] This Memorandum addresses the Respondent's application to vary child support and to rescind arrears of support as a result of the additional written submissions filed by Respondent's counsel (the Petitioner neither appearing nor responding to this application).

[2] The parties are the parents of three children: Roxanna, now 19 years old; Rachel, now 17 years old; and, Texter, now 13 years old. The parties were divorced on June 16, 1998, and a Corollary Relief Order was issued granting custody to the Petitioner and requiring the Respondent to pay child support of \$745.00 per month. This support order means that up to and including January, 2003, the respondent was required to pay a total of \$40,975.00 in support. He has in fact paid only \$7,677.70, resulting in arrears of \$33,297.30.

[3] The original child support order was based on an imputed income of at least \$38,600.00. How that came about is readily apparent from the record. Shortly after the Petitioner launched the divorce proceedings, the Respondent filed, as he was required to do, information as to his income. His earnings for the three years prior to 1998 averaged approximately \$6,000.00 per year. In May of 1998, however, he was employed and

earning at least \$15.00 per hour. When the divorce went forward on an uncontested basis, the Petitioner requested that annual income be imputed on the basis of the most recent information. As it turned out, and as the evidence filed on this application confirms, that job was very short-lived and the Respondent only earned \$10,567.00 for all of 1998. His income for 1999 through 2001 was so low that in each year it was below the minimum threshold for the payment of child support pursuant to the applicable table in the *Federal Child Support Guidelines*. In August of 2002, the Respondent started working on a one-year community contract providing him with 20 hours of work each week. His earnings in 2002 were approximately \$9,000.00.

[4] There have been other developments since the Corollary Relief Order was made.

[5] Only one child has consistently stayed in the Petitioner's care, that being the youngest child, Texter. Rachel left her mother's home in August, 1998, and is living in a different community. There is no evidence that she relies on the Petitioner for support. Indeed the evidence is that she has been supported by others. Roxanna left her mother's home in July, 1999. She returned in June, 2000, but has not been attending school. Instead, she has been employed on and off. She is now over the age of majority and there is no evidence of dependence.

[6] I am satisfied that there has been a change of circumstances, as required by s.17(4) of the *Divorce Act* and s.14(a) of the *Federal Child Support Guidelines*, so as to justify a variation.

[7] There is only one "child of the marriage" still in the care and support of the Petitioner. The Respondent's current annual income for support purposes is \$26,644.00. The Corollary Relief Order will therefore be varied, amending paragraph 3 thereof, to provide that the Respondent shall pay child support of \$245.00 per month. This variation is retroactive to August 1, 2002.

[8] With respect to the arrears, counsel's submissions focussed on the Respondent's inability to pay in the past, and his continuing inability to pay, due to a condition of chronic unemployment or underemployment due to alcoholism. She argued that there is no basis for imputing any income due to "intentional" unemployment or underemployment (as permitted by s.19(1)(a) of the Guidelines) since the Respondent's situation is a "health" problem that he is, or at least has been, unable to control.

[9] This is not the case in which to resolve the debate over the meaning of the word "intentional" in s.19(1)(a) of the Guidelines. One line of authority holds that it connotes a

deliberate course of conduct with the purpose of undermining or avoiding one's support obligations: *Smolis-Hunt v. Smolis*, [2001] A.J. No. 1170 (C.A.). Another line of authority holds that such deliberate conduct is not required. All that is necessary is to show that the payor's conduct is unreasonable in the circumstances: *Montgomery v. Montgomery*, [2000] N.S.J. No. 1 (C.A.). Suffice it to say that there are circumstances where chronic unemployment due to an habitual addiction to alcohol could mitigate the general obligation to support one's children in accordance with one's ability to do so. See, for example, the references in *DiFrancesco v. Conto*, [2001] O.J. No. 4307 (C.A.), and *Rajan v. Rajan*, [1981] O.J. No. 150 (C.J.).

[10] In this case I am not convinced that there is sufficient evidence of the Respondent's alcoholism being the sole cause of his employment difficulties. I have no doubt that it is a contributing factor. The point, however, is that he is now employed, after having gone through some treatment programmes, and, as his counsel put it, it is to be hoped that he will continue to be gainfully employed even after his current contract ends. This fact alone militates against forgiving all of the accumulated arrears. As noted in many cases, a past or present inability to pay arrears does not by itself justify a cancellation of arrears. It may, however, justify some different arrangements.

[11] In this case, Respondent's counsel has commendably offered an alternative solution, one that in my opinion offers a practical approach for the benefit of both the Respondent and the Petitioner, as well as the one child still in her care. Respondent's counsel has calculated what the child support would have been taking into account (a) the number of children in the Petitioner's care in each year, and (b) an imputed income based on statistical evidence as to the average employment income in the Respondent's community. By this calculation, the Respondent's child support obligations would total, from July, 1998, to January, 2003, \$11,219.00. Deducting the amount actually paid to date leaves a total owing of \$3,541.24. This calculation takes into account the retroactive variation I previously ordered. The arrears can be paid off over time by an additional payment of \$150.00 per month (meaning that as of February 1, 2003, and for the next two years, the total monthly support payment will be $\$245.00 + \$150.00 = \$395.00$).

[12] In summary, I order as follows:

1. Monthly child support is varied, effective August 1, 2002, to \$245.00.
2. Arrears are fixed, as of February 1, 2003, at \$3,541.24. All other arrears are rescinded.

3. Arrears are to be paid off at a rate of \$150.00 per month.

[13] I thank counsel for her comprehensive submissions.

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

Dated at Yellowknife, NT,
this 17th day of February 2003

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

No. 6101-02971

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
