

*Tybring v. Tybring* 2003 NWTSC 67

Date: 2003 11 24  
Docket: S-1-DV-6101 02763

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BEVERLEY TYBRING

Petitioner

- and -

KIM TYBRING

Respondent

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Application to resolve two issues: (a) ongoing child support; and, (b) variation and rescission of arrears.

Heard at Hay River, NT, on October 21, 2003

Reasons filed: November 24, 2003

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Plaintiff: Michelle Staszuk

The Respondent represented himself.

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REASONS FOR JUDGMENT

[1] This long-running divorce action was set to commence trial in Hay River on October 20, 2003. The issues were permanent custody and access respecting the children of the marriage, ongoing child support, arrears of support, and division of matrimonial property. On that day, I met privately with the parties and counsel for the petitioner. The respondent acted on his own behalf (he had gone through several lawyers prior to trial). As a result, when the trial formally commenced on October 21<sup>st</sup>, I was informed that many of the issues in dispute had been resolved and I issued orders accordingly (including a divorce judgment). These reasons therefore address the two unresolved issues: (a) ongoing child support; and, (b) variation and rescission of arrears.

Summary of the Evidence:

[2] The parties were married in 1984 and separated in 1995. There are four children ranging in age from 19 to 12 years old. It was conceded by the petitioner that the eldest child was no longer a “child of the marriage” as that term is defined in the *Divorce Act*. The children have always been in the care of the petitioner.

[3] Both parties worked during the course of the marriage. The petitioner worked part-time prior to the separation. Since then she has had to work full-time since she is the primary, and for lengthy periods the only, source of support for the children. The respondent was, and has been until recently, self-employed as a commercial fisherman.

This is a business that was described as highly inconsistent in terms of the income that can be earned from it. It was generally agreed that the commercial fishing industry on Great Slave Lake is not a viable way to earn a steady income. But that is all that the respondent has ever done. He never developed other skills.

[4] An interim order was made in December, 1996, granting custody of the children to the petitioner and requiring the respondent to pay child support of \$500.00 per month. This was done without any in-depth analysis at that time of the respondent's income. That interim order continued until September, 1997, when it was varied so as to increase the child support to \$602.00 per month. This was calculated upon the basis of an imputed income of \$24,287.65 (based on the respondent's 1996 tax return).

[5] Significant arrears in child support have accumulated over the years. A report prepared by the Maintenance Enforcement Programme put the amount in arrears at \$28,697.57 as of October 16, 2003.

#### Ongoing Child Support:

[6] The parties are agreed that ongoing child support should be based on three children, not four, as of October 1<sup>st</sup>, 2003. The petitioner seeks to impute income to the respondent in the sum of \$30,000.00. The petitioner relies on s.19(1)(a) of the Federal Child Support Guidelines (intentional under-employment) and s.19(1)(f) of the Guidelines (failing to provide income information when legally obliged to do so).

[7] Dealing with the second ground first, it is true that the respondent failed to provide income information when required to do so. Why this is so is hard to fathom since, up until February of this year, he was represented by counsel. Presumably his lawyer (or, to be more accurate, lawyers) would have impressed upon him the need to disclose information. It certainly did not seem to me that the respondent was deliberately trying to evade disclosing his income (especially since he had relatively little to disclose). I see no need to penalize the respondent now for his failure to disclose.

[8] The argument respecting intentional under-employment is different. The petitioner's point here is that the respondent should have realized that commercial fishing was not viable and thus given it up as an occupation many years ago. Her counsel argued that it was unreasonable for the respondent to pass the years since separation without obtaining full-time employment. In response the respondent said that fishing was all he had ever done and therefore he kept trying to make a decent living from it. Now, however, he has given up on it. Since 1999 he has looked for any type of work even if it may be only part-time and unskilled. He has managed to hold down different jobs for various lengths of time. He calculated that in 2002 he earned a little over \$24,000.00. He further estimated that his income for 2003 will be approximately \$25,000.00. This is

certainly more than he earned over the years from fishing. Furthermore, the respondent now has plans to take a course that will enable him to obtain a Class 1 driver's license. This will open up more employment prospects for him.

[9] The concept of "intentional under-employment" is meant to encompass those situations where a parent chooses to earn less than he or she is capable of earning. It is an objective assessment of the reasonableness of that parent's conduct in light of all the circumstances.

[10] The general principles are well-known. Parents have a joint and ongoing legal obligation to support their children. The amount of support is based not just on what a parent does earn but on what a parent can earn, having regard to such factors as the age, education, experience, skills and health of the parent as well as such matters as the availability of work and the ability of the parent to relocate.

[11] Since the question here is related to the respondent's current income, then I think it is reasonable to set that at \$25,000.00. This is close to the figure sought to be imputed (a figure based on \$15.00 per hour on a full-time basis). It is also realistic having regard to the factors noted previously and the reasonableness of the respondent's efforts to improve his employment prospects. The income figure can be revisited periodically to ascertain if there has been any improvement in the respondent's ongoing financial circumstances.

[12] I therefore set the current level of child support, for the three remaining children of the marriage, at \$515.00 per month, effective as of October 1, 2003.

#### Rescission of Arrears:

[13] The test respecting arrears of support is whether the parent in default could not pay the support in the past when due, cannot pay them now, and will not be able to pay them in the future.

[14] The respondent provided information showing how his income fluctuated from year to year. Some years he had a negative income taking into account all of the self-employed business deductions claimed. In general, however, it is clear that his income, since separation, was consistently lower than the amount imputed to him in 1997. What is a reasonable and realistic income figure requires an analysis, for each year, of the evidence respecting earnings and expenses.

[15] Generally speaking, a parent's annual income is determined by using the "total income" figure on the T1 general form used for income tax purposes as adjusted by

various provisions contained in Schedule III of the Federal Child Support Guidelines. The important point is that income for the purposes of the Guidelines may be different than that calculated for income tax purposes, particularly with respect to self-employed payors.

[16] The respondent's 1996 income tax return showed fishing income of \$24,287.65 (the amount used in 1997 for his imputed income) and expenses of \$19,858.08, leaving a net income of \$4,429.57 from fishing activities. He also earned a \$400.00 honorarium as a director of a fishery association. Some of the expense items, such as crew costs for food, would undoubtedly have a personal benefit to the respondent. Some other claims, such as capital cost allowance, may or may not be a legitimate expense claim in the case of fishing equipment. Some part of it is no doubt a legitimate expense. But the case was not argued on the basis of unreasonable expense deductions nor was any evidence presented by either side as to the usual accounting practices in a small commercial fishing business.

[17] The petitioner's argument was that none of the arrears should be rescinded since the respondent could and should have earned more than he did. The respondent, however, countered that the imputed income was unreasonable and unrealistic in 1997 and the years since then and he is unlikely to be able to pay off the arrears in any reasonable time frame.

[18] The jurisprudence in this area is generally consistent in holding that a rescission of arrears, in part at least, may be justifiable where the payor is in substantial arrears and lacks the capital or the income to pay them. Partial rescission may be appropriate as well where the payor's income fell short of income that had been previously imputed. Here, part of the difficulty is due to the fact that the imputed income figure was gross income before deduction of business expenses. Generally speaking, however, a court will not automatically rescind arrears because the actual income was lower than imputed. But it is a factor to consider. This is the way it was put by Professor J.D. Payne in his *Child Support in Canada* (3<sup>rd</sup> 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.

[19] In this case, the respondent persisted in self-employment as a fisherman notwithstanding the bleak financial situation of the fishery. This is understandable to some extent given his history. In the last few years he has taken steps to improve his prospects. There is evidence of sincere effort to effect a permanent improvement in his employability. In these circumstances I think it is only fair to rescind some of the arrears. Such a rescission need not be made with mathematical precision but it should have some basis in the evidence.

[20] Based upon the financial information provided, the average annual income of the respondent, since 1996 has been \$11,260.00. This includes the amount to be earned in 2003. If one uses only the years of 1996 to 2002, the average reported income is \$9,969.00. Due in part to the factors I noted above respecting calculation of income and expenses for a self-employed fisherman such as the respondent, as well as due to what the respondent was capable of earning, I conclude that it would be fair to set his income at \$15,000.00 per year. This would result in a monthly child support obligation of \$330.00 per month for four children. Calculating what should have been paid and deducting what was paid over the years results in a deficit of \$6,811.00.

[21] I therefore fix the arrears, as of October 1, 2003, in the sum of \$6,811.00. I further direct that the arrears be paid off over the next five years by an additional payment of \$113.50 per month. This means that the total child support obligation, per month, for the five-year period starting October 1, 2003, will be \$628.50 (\$515.00 + \$113.50).

#### Conclusion:

[22] To summarize, I have ordered that (a) ongoing child support be set at \$515.00 per month as of October 1, 2003; and (b) arrears of support be fixed at the sum of \$6,811.00, as at October 1, 2003, to be paid off by an additional payment of \$113.50 per month over the next 5 years.

[23] In addition, I order that on October 1<sup>st</sup> of each year the respondent provide full and detailed information to the petitioner as to his employment and income. Unless the parties agree otherwise, the petitioner may then apply for a variation of the amount of ongoing support. My hope is that the parties will be able to agree upon any variation of child support necessary, due to changes in the respondent's income, without the need for further court appearances.

[24] The petitioner sought costs. Considering all of the circumstances, what limited financial resources there are available should be used to meet child support obligations. Therefore there will be no order as to costs.

J.Z. Vertes  
J.S.C.

Dated this 24<sup>th</sup> day of November 2003.

Counsel for the Petitioner: Michelle Staszuk

The Respondent represented himself.

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