Edgi v. *Grandjambe*, 2004 NWTSC 11

2004 03 10
CV 06987

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

AMANDA EDGI

Applicant

- and -

MARCEL GRANDJAMBE

Respondent

Applications by father for a) variation of child support order, and b) rescission or reduction of child support arrears.

Heard at Yellowknife on October 31, 2003

Reasons filed March 10, 2004

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Mother: Jane Olson
Counsel for the Father: Kenneth Allison

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REASONS FOR JUDGMENT

[1] The child who is the focus of these proceedings was born on May 28, 1996. The child's parents, who are the parties to these proceedings, were not living together at the time of the child's birth and have not lived together since that time. In May 1997, when the child was one year old, the mother made an application in this Court pursuant to the then *Domestic Relations Act* for an order requiring the father to pay child support of $500.00 per month. On that application she presented a copy of a written agreement dated November 28, 1996, signed by both the mother and the father. In that agreement, the father, *inter alia*:

a) acknowledged that he was the biological father of the child,
b) promised to pay to the mother child support of $500.00 per month commencing December 1, 1996,
c) acknowledged that the child support payments would continue at the rate of $500.00 per month, notwithstanding the (then) pending advent of a statutory Child Support Guidelines regime.

[2] Notice of the May 1997 Court application was served personally on the father, together with copies of the supporting documents, including the signed agreement of November 1996. The father did not attend Court in answer to the mother's application. On May 9, 1997 the Court issued an Order, *inter alia*, requiring the father to pay to the mother child support of $500.00 per month commencing January 1, 1997. A copy of the Court's order was served on the father.

[3] Since the date of the Court's order, the father has not made one voluntary payment of child support. The Order was filed with the office of the Maintenance Enforcement Program. The records of that office indicate that as of September 1, 2003, child support obligations under the Court's order total $40,500.00 (81 months @ $500.00 per month). As of that date, $16,087.98 was extracted involuntarily from the father *via* garnishee summons. There were 54 separate payments made to the Maintenance Enforcement Office, *via* the garnishee process, from various employers of the father and from the Government of Canada. Arrears under the Court order total $24,412.00 as of September 1, 2003.

[4] In the summer of 2003, (six years after issuance of the child support order), the father made application in this Court. Specifically, he sought:

a) an order requiring DNA testing to ascertain whether he is the child's biological father,
b) an order varying, i.e., reducing, the amount of child support payable on an ongoing basis, and
c) an order eliminating or reducing the arrears that have accumulated under the Court order of May 9, 1997.

[5] Since the filing of the father's application, DNA testing has been done and has confirmed that he is the child's biological father. Hence the remaining issues are the request for variation of the existing child support order and the request for elimination or reduction of arrears.

Variation of existing child support order

[6] On November 1, 1998, the *Domestic Relations Act*, under which the existing child support order was made, was repealed. It was replaced by the new *Children's Law Act*, S.N.W.T. 1997, c.14. Section 61(2) of the new Act states that a parent can apply to have a child support order varied (including an order issued under the previous *Domestic Relations Act*) where there has been a change in circumstances. The coming into force of the new *Children's Law Act* together with the associated *Child Support Guidelines* on November 1, 1998 is deemed to be a change in circumstances.

[7] The thrust of the father's submissions is that he has experienced low levels of income in recent years, and that his child support obligations ought to be determined in accordance with the *Child Support Guidelines*. He presents documentary evidence

indicating that his actual annual income since 1997 has ranged from $3500.00 to $20,000.00. In his affidavits he relates some details of seasonal work, part-time work, and casual work he has been engaged in in recent years, but provides no details of his efforts to seek and maintain steady employment in order to support his child. The law says that as a parent he has an obligation to support his child when he is capable of doing so (s.58 of *Children's Law Act*). The evidence before the Court in the affidavit material indicates that the father is 29 years of age, in good health, and able to work.

[8] There is evidence that in May 2002 the father had steady employment in Fort Good Hope at an annual employment wage of $48,000.00. Yet he quit that job in order to follow his girlfriend to Red Deer, Alberta, where she was attending school. They later moved back to Fort Good Hope, and still later to Yellowknife, where they both seek to attend school or college.

[9] On the evidence before the Court I find that the father is intentionally underemployed. Pursuant to s.19 of the *Child Support Guidelines*, I impute income to him in the amount of $48,000.00. I hereby vary the child support order of May 9, 1997, such that the father shall pay child support in accordance with the *Child Support Guidelines* based on a Guideline income of $48,000.00, i.e., $426.00 per month, commencing April 1, 2004.

<u>Rescission or reduction of child support arrears</u>

[10] As stated, the arrears under the existing child support order stand at $24,412.02 (as at September 1, 2003). This, notwithstanding the father's written agreement in November 1996 when his child was 6 months old to pay child support of $500.00 per month to the child's mother. (He now — six years later — says he was intoxicated when he signed the agreement and that he did not bother to read the agreement before he signed it. I do not accept his evidence in this regard.) And this, notwithstanding his failure to attend Court in 1997 to oppose the request for a child support order, nor to take any steps to vary the Court order for six years.

[11] As stated in previous decisions of this Court, there are two important factors to consider when deciding whether to order rescission or reduction of arrears of child support payments: a) the payor's ability/inability to pay during the time period that the arrears accumulated, and b) the payor's present ability/inability to pay the arrears.

[12] On this application, there is an onus on the father to satisfy the Court that it is right and just to grant him relief from the arrears that have accumulated since 1997. This onus was stated by Hetherington J.A. in *Haisman* v. *Haisman* (1994), 157 A.R. 47 (Alta.C.A.):

> "... 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."

[13] The father has failed to discharge this onus. There are no special circumstances here. I find that he has been intentionally under-employed since 1997. The Court order simply required him to pay the amount of child support he had promised to pay as child support. There is evidence that he was capable of supporting his child during the time period that the arrears accumulated, and no evidence to the contrary. Indeed, I note from reviewing the records provided by the Maintenance Enforcement Office that the arrears as at April 1, 2002 were $24,389.00 and as at September 1, 2003 were $24,412.00. This indicates that the amount of child support extracted from him *via* the involuntary garnishee process in that time period was roughly equal to his ongoing child support obligations during that 17-month period.

[14] Similarly, there is evidence that the father has the present-day ability to find and maintain employment in this jurisdiction, and to pay ongoing child support and regular installments in reduction of the child support arrears, and no evidence to the contrary.

[15] The father's priorities are askew, and he needs to rethink them. His financial obligation to his child is a primary obligation. The Court will enforce child support obligations, including substantial arrears, where the evidence reveals that financial obligations to the child have not been a priority for the parent.

[16] For these reasons the father's application for elimination or reduction of arrears is dismissed.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
10th day of March 2004

Counsel for the Mother: Jane Olson
Counsel for the Father: Kenneth Allison

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