Tremblett v. Tremblett, 2008 NWTSC 34 Date: 2008 06 03
Docket: DV 6101-03062

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GISELLE TREMBLETT

Petitioner

-and-

MARVIN TREMBLETT

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by the Respondent, Marvin Tremblett, for variation of a child support order made in divorce proceedings on February 26, 1999 ("the Order"). The Respondent seeks to have the Order varied as follows:

> (a) to retroactively reduce the amount he pays in child support to the Petitioner in accordance with his actual income and the corresponding amount due under the *Child Support Guidelines*;
>
> (b) rescinding and/or reducing the arrears currently owing by the Respondent to the Petitioner;
>
> (c) reducing the ongoing amount payable from the Respondent to the Petitioner to reflect the Respondent's current income;
>
> (d) setting up a repayment schedule for any arrears and suspending execution on the arrears so long as the payment schedule is adhered to; and
>
> (e) discontinuing support for the eldest child on the basis that she is no longer a "child of the marriage" within the definition in the *Divorce Act*.

[2] The parties were divorced in 1999. No order entitled "Corollary Relief Order" was filed but presumably that is what the February 1999 Order was meant to be. The Order provides that the Petitioner and the Respondent have joint custody of their two children, the Petitioner has their day to day care and control and the Respondent is to pay $600.00 per month child support commencing March 1, 1999. The Order also finds the Respondent's income to be $66,965.00. For that income, at that time, the child support payable would have been $938.00 per month under the *Guidelines*. However the court record and the Order reflect that it was set at $600.00 upon the parties' agreement that the Respondent would assume sole responsibility for payment of the family debts.

[3] The Respondent has a grade 9 education. At the time the Order was made, he was a unionized employee of a local mine. In his approximately 10 years at the mine, he went from being a labourer to a machinery operator and his income increased accordingly. He was laid off when the mine shut down in the fall of 2000. Since then, according to his affidavit, he has been unable to obtain employment in mining, despite having made efforts to do so.

[4] Less than a year after being laid off by the mine, the Respondent moved to Alberta. He has worked stacking shelves in a department store, and at a meat plant. Most recently, he has worked as a general labourer since April 2008, having been unemployed after quitting his job with the meat plant in September 2007.

[5] The Respondent's income, as reflected in the documentation he has provided from Revenue Canada, and the monthly amount of child support that would have been payable under the *Child Support Guidelines*, are as follows (the 2006 revised tables have been used only for the years 2006 and after):

1998	$66,965.00	$938.00 (N.W.T.)
1999	$58,379.00	$833.00 (N.W.T.)
2000	$80,110.00	$1096.00 (N.W.T.)
2001	$22,577.00	$342.00 (Alberta)
2002	$21,419.00	$324.00
2003	$24,659.00	$374.00
2004	$23,599.00	$358.00
2005	$18,465.00	$276.00
2006	$27,914.00	$414.00
2007	$20,616.26	$326.00

[6] At his current wage of $17.00 per hour, the Respondent expects a gross annual income of $35,360.00.

[7] The arrears of child support under the Order are now more than $40,000.00. The Respondent does not ask that they be rescinded completely, but that they be recalculated based on the child support amounts that would have been payable for his actual income for the years since the Order was made. He proposes to pay the sum of $400.00 per month, of which $291.00 is the *Guidelines* amount payable for one child (the parties' son, now 18) by a payor resident in Alberta with annual income of $35,360.00. He proposes that the remaining $109.00 per month be applied to the arrears as recalculated, and that enforcement of the arrears be stayed so long as he makes the payments.

[8] The Respondent also submitsthat support should be discontinuedfor the parties' daughter, who is now 22 years old and has recently graduated with a diploma in nursing.

[9] The Petitioner opposes any recalculation of arrears. She says that the Respondent has refused to fulfill his support obligations over the years and did not pay the family debts. She also points out that his proposal for repayment of the arrears would mean that it will be many years before the arrears are actually paid off, which is of little benefit to her. She has supported the children for many years on very little income and despite serious health problems that often disabled her from working.

[10] The Petitioner would like the Order to remain as is or, if it is varied, to include child support for the years 1998 (when the parties separated) to 2000 based on the Respondent's actual income, because of his failureto pay the familydebts. This would increase the amount of child support above $600.00 for some of those years.

[11] The Respondent does not address the family debts in his affidavit and did not seek to file any response to the Petitioner's assertion that they were not paid. He submits that the issue can be addressed by factoring into the recalculation of arrears any child support he would have had to pay under the *Guidelines* in excess of the $600.00 in the Order.

[12] As to the Petitioner's submission that the Respondent has never voluntarilypaid child support, counsel for the Respondent points out that the court file includes a

Memorandum filed on November 17, 1999, by the Petitioner's then counsel, which says that the Respondent has fulfilled his support obligations under the Order and that no arrears have accumulated by that date. Unfortunately, the material from the Maintenance Enforcement Office filed on this application does not go back far enough to determine to what extent payments have been the result of garnishment. However, the material filed does indicate that a substantial balance on arrears has existed for some time.

[13] The Court's jurisdiction to vary a child support order made in divorce proceedings is found in s. 17 of the *Divorce Act*, the relevant parts of which are as follows:

> 17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses;
>
> (4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and in making the variation order, the court shall take into consideration that change.
>
> ...
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicableguidelines.
>
> (6.2) Notwithstanding subsection (6.1), in making a variationorder in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelinesif the court is satisfied
>
> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses,

> or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

[14] Section 14 of the *Child Support Guidelines* is also relevant:

> 14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; ....

[15] The change in circumstances relied on by the Respondentcomes within s. 14(b). He says that since the Order was made and after being laid off by the mine, he has not been able to attain the same level of income he had at the mine. Under the *Guidelines*, the support he would have been obligated to pay based on his actualincome is less than required under the Order.

[16] On the one hand, the Respondent's position does not generate much, if any, sympathy, because he has not been diligent in paying support and, according to the uncontradicted evidence of the Petitioner, has not lived up to his agreement to pay the family debts. On the other hand, had the Respondent applied for variationof the Order soon after being laid off by the mine, he may have been successful in obtaining reduction of the monthly child support payments to the amounts prescribed for his income level by the *Guidelines.* However, the Court hearing that application would almost certainly have been asked to consider his failure to pay the family debts.

[17] That is the main issue before the Court now: whether the Respondent's failureto live up to his agreement to pay the family debts is relevant to the decision whether to reduce the arrears as he requests. Should the Court simply recalculate child support as if there had never been an agreement?

[18] The Respondent's obligation to pay the family debts was not made part of the Order in that he was not ordered to pay the debts; his agreement to pay was simply recited in the preamble to the Order. The court record contains no order for the disposition of family property or debt. There is no evidence before me as to the exact amount of the family debts. The Petitioner's affidavit says that they were never paid, that the Respondent simply walked away and left the debts and this has left the Petitioner with credit problems to this day.

[19] I have referred above to s. 17(6.2) of the *Divorce Act.* That section permits the Court to vary an Order in a manner that is not strictly in accordance with the *Guidelines* if the Court is satisfied that special provisions of the Order respecting the financial obligations of the spouses directly or indirectlybenefit a child and it would be inequitable to order support according to the *Guidelines*.

[20] It can be said that the provisions of the Order in this case which set child support in an amount other than the *Guidelines* amount are specialand were intendedto benefit the children in that they were predicated on the Respondent paying the family debts, thus freeing up the Petitioner's resources for the care of the children. As I am satisfied that was the intention of the Order, and that the Respondent has not lived up to his agreement to pay the family debts, I conclude that under s. 17(6.2) I do not have to make a variation order that is based strictly on the *Guidelines* amounts for the Respondent's income level if I find it would be inequitable to do so.

[21] On the issue of reduction or cancellation of child support arrears, this Court has generally followed the test set out in *Haisman v. Haisman* (1994), 7 R.F.L. (4^{th}) 1 (Alta. C.A.); for example, *Lavoie v. Lavoie*, [2005] N.W.T.J. No. 6 (S.C.) and cases cited therein. That test is that in the absence of special circumstances, arrears should not be reduced or rescinded unless the payor establishes on a balance of probabilities that he cannot pay them now and will not be able to pay them in the future.

[22] In his affidavit, the Respondent does not claim that he was ever unable to pay the child support that was ordered or that he cannot now pay the arrears. He provides

no evidence at all as to what assets he has from which he might be able to satisfy the arrears. His application is based solely on the changes in his incomeand the applicable support payment amounts in the *Guidelines*.

[23] It is true that the drop in the Respondent's income since he was laid off by the mine has been quite dramatic. In many years, the $600.00 monthly child support required by the Order is almost twice what the Respondent would have paid under the *Guidelines*. Pursuant to the *Guidelines*, $600.00 per month for two children is the amount payable by a payor with gross annual income of approximately $43,000.00, whereas the Respondent's income has not come anywhereclose to that in the last seven years.

[24] There is no allegation that the Respondent has been intentionally under-employed or that he could be earning more money or that he has not been diligent in seeking employment commensurate with his education ands skills.

[25] On the other hand, the Respondent has provided no reason why he did not pay at least the *Guidelines* amount for the income he was earning over the years. He says in his affidavit that he has had his driver's licence taken away by Maintenance Enforcement, but they have since reinstated it. He says also that he has told Maintenance Enforcement that he is making this application with respectto the arrears and that he sent them a payment of $600.00 in early April. In light of his past failureto pay child support, it appears likely that it is only the loss of his driver'slicence (and the prospect of that action being taken again) that has prompted the Respondent to put his mind to his child support obligations.

[26] Although I am satisfied that there has been a change in the Respondent's income since the Order was made, I am also mindful of the fact that the Respondent has not provided complete disclosure about his financialsituation over the years,his assetsand expenses and his ability or inability to pay the child support and the family debts.

[27] Based on the Respondent's income from 1999 to the end of April 2008, the difference between the applicable *Guidelines* amounts and the $600.00 per month that he was to pay under the Order comes to approximately $13,500.00.

[28] I take into account that difference. I also take into account the lack of full disclosure about the Respondent's financial situation and his failure to pay the family

debts. In my view it would be inequitable to recalculate the arrears as if there had never been any agreement that he pay the debts, especially considering the situation that has left the Petitioner and the children in. The difficulty, however, is the lack of evidence as to the amount of the debt. Having balanced all of this as best I can, I have decided to reduce the arrears as at the end of April 2008 by $10,000.00.

[29] Although the Petitioner submitted that a figure for child support for the year in which the parties separated, 1998, should be factored into the calculations,the Petition for Divorce did not include a claim for retroactive support and the Order did not grant retroactive support. The application before me is for variation of the Order and no application was filed seeking support retroactive to a period of time before the Order. In these circumstances, I am not able to consider support for a time pre-dating the Order.

[30] The Respondent's projection of $35,360.00 as his annual income at his current wage appears to be reasonable. Ongoing child support will be based on that income at the Alberta table amount. The Respondent says in his affidavit that he was unemployed for approximately six months in late 2007 and early 2008 but gives no evidence as to what efforts, if any, he made to obtain employment. I will therefore attribute income for 2008 in the amount of $35,360.00.

[31] The eldest child was due to graduate in early May with a diploma in nursing. She has for the most part supported herself in the nursing program because her mother had little ability to assist her financially and her father did not do so. She is over the age of majority and there is no reason to think that she will not be able to support herself in her chosen profession. Therefore, she can no longer be considered a "child of the marriage" within the definition in s. 2(1) of the *Divorce Act* and accordingly, as at May 1, 2008, child support will be payable only for the parties' son, who is 18 years old, living at home with the Petitioner and attending school.

[32] I have considered the Petitioner's argument that the $600.00 ordered in 1999 was a global amount, not dependant on how many children support was paid for. However, since I have decided that ongoing support should be varied to be consistent with the *Child Support Guidelines*, it has to be calculated on the basis of the number of children for whom support is payable as well as the payor's income.

[33] As a result, from May 1, 2008, ongoing monthly child support will be $291.00, payable on the first day of each month until the son no longer comes within the definition of "child of the marriage"; that is, until he is able to support himself.

[34] The final issue is whether I should order a repayment schedule and suspend execution on the arrears so long as the Respondent adheres to that schedule. His proposal is to pay $400.00 per month, which would mean that so long as the $291.00 for ongoing support is payable, the monthly payment on the arrears will be $109.00. Even with the arrears reduced by $10,000.00, it will take many years to pay them off at that rate. Even if the full $400.00 is paid on the arrears after the son becomes self-supporting, it will be several years before they are paid off.

[35] While I am satisfied that it is fair that the Respondent have a reduction in the arrears and his ongoing support payments because of the changes in his income since the Order was made, I am not convinced that it would be fair to allow him to pay the arrears over a lengthy period of time, especially once he is no longer liable for ongoing child support. The evidence before me is that the Petitionerand the childrenhave gone without significant child support for the last nine years and the family debts were not paid despite the Respondent's agreement to do so. The Petitioner has had to rely on borrowed money and her own limited resources to support the children during that time. Meanwhile, the Respondent has had the benefit of not paying the family debt and paying only a portion of what he should have in child support.

[36] Even with the reduction in the arrears, the Respondent owes the Petitioner a substantial amount of money. There is no reason why he should not make arrangements to pay off that debt in a timely manner, even if it means borrowing money or liquidating assets to do so. There is no reason why a debt for child support arrears should be treated as less important or less worthy of enforcement than any other debt owed to any other creditor, who would have recourse to enforcementproceedings under the law. When the children for whom the support is paid are young and there is a genuine inability on the part of the payor to satisfy both ongoing payments and arrears for the foreseeable future, a repayment schedule for arrears may have merit so as to ensure the ongoing payments can be made. In this case, however, ongoing support is not likely to continue for very long as the youngest child is 18.

[37] For the above reasons, I decline to order a repayment schedule for the arrears or suspend enforcement. The Petitioner and the Maintenance Enforcement authorities may take proceedings on the arrears as they see fit.

[38] I am also going to order that for so long as ongoing child support is payable, the Respondent provide the Petitioner with a copy of his filed income tax return and any notices of assessment for each year, by no later than June 30 of the following year, beginning with the return for 2008. If his income changes to the extent that the *Guidelines* amount of child support changes, the parties should attempt to agree on the adjustment rather than bringing the matter back to court.

[39] Also in an attempt to avoid the parties' having to come back to court to deal with termination of child support for their son, whose education and employment plans do not appear to be settled at this time, I order that the Petitioner advise the Respondent and the Maintenance Enforcement Office in writing within 30 days of the son becoming self-supporting.

[40] In summary, the orders I make are as follows and the 1999 Order is varied accordingly:

1. the arrears of child support under the February 26, 1999 Order are reduced by the amount of $10,000.00 for the period up to and including April 30, 2008;

2. commencing May 1, 2008, child support is no longer payable for the parties' daughter;

3. commencing May 1, 2008, child support is payablefor the parties' son in the amount of $291.00 per month on the first day of each month, based on annual income of $35,360.00, until such time as the son is no longer a "child of the marriage";

4. for so long as ongoing child support is payable for the son, the Respondent shall provide the Petitioner with a copy of his filed income tax return and any notices of assessment for each year by no later than June 30 of the followingyear, beginningwith the return and notices of assessment for the year 2008;

5. the Petitioner shall advise the Respondent and the Maintenance EnforcementOffice in writing within 30 days of the son becoming self-supporting.

[41] Counsel for the Respondent is requested to draft the formal order incorporating the above terms and submit it for my review.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT this
June 03, 2008.

Counsel for the Respondent: Brian Asmundson
The Petitioner appeared on her own behalf.

1-03062

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