Newman v. *Bogan*, 2009 NWTSC 23

Date: 2009 04 14
Docket: S1-CV-1992-3858

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARGARET NEWMAN

Respondent

- and -

MARK BOGAN

Applicant

MEMORANDUM OF JUDGMENT

[1] This is an application for variation of a child support order, rescission of arrears, and an order setting aside a garnishee summons.

[2] The applicant, who is self-represented, is the father of a boy (now 17 ½ years old). On February 19, 1996, I issued an order requiring the applicant to pay child support of $300.00 per month. That order has never been varied or set aside. The applicant never brought an application previously to vary or set it aside. So his obligation to pay the support would continue until the child reaches the age of majority (that being 18 since the child resides with his mother in Alberta).

[3] The applicant did not serve the child's mother (the respondent on this application) with notice of these proceedings. Since she resides out of the jurisdiction, the most that this court can do is issue a provisional order which does not become effective until confirmed by a court in Alberta. Section 27(1) of the *Interjurisdictional Support Orders Act*, S.N.W.T. 2002, c.19, states as follows:

> 27. (1) When the respondent is ordinarily resident in a reciprocating jurisdiction that requires a provisional variation order, the Northwest Territories court may, on application by an applicant and without notice to and in the absence of a respondent, make a provisional variation order taking into account the

> specific statutory or other legal authority on which the application for variation is based.

[4] In this case the materials filed do not strictly comply with the written documentation required under that Act, due to the fact that the applicant does not have the benefit of legal advice, but sufficient information is provided so as to enable this court to proceed. Also, as permitted by s.27(3) of the Act, evidence was received orally.

[5] I should note at the outset that I had the benefit of assistance from legal counsel, appearing on behalf of the Director of Maintenance Enforcement, at the hearing of this application (who appeared on very short notice).

[6] The evidence reveals that the applicant owes, as of today's date, the sum of $44,293.05 pursuant to the 1996 order. He made very little, if any, attempts to pay the support ordered over the years. What has been paid is usually because of wage attachments and other enforcement measures. The support order has been registered in both Alberta and the Northwest Territories, and standing enforcement measures are in place in both jurisdictions. And, it should be made clear, it is the Administrator of Maintenance Enforcement, not the respondent, who is responsible for taking these measures. Pursuant to s.8(1) of the *Maintenance Orders Enforcement Act*, R.S.N.W.T. 1988, c.M-2, all payments due under the order are payable to the Administrator (and to no one else, not the respondent, and not the child directly).

[7] The applicant has been involved in extensive litigation in several jurisdictions respecting his right of access to his son since an order was made by me granting custody to the respondent. He has a second son (now 12 years old) with another woman. They now live in Ontario and the applicant has large outstanding support arrears owing with respect to him as well. There too he has been involved in extensive and ongoing litigation over his access privileges. It appears that neither child want anything to do with him. He alleges a conspiracy as between the two mothers to block him from the contact he feels he should have with his sons. He asks this court to take into account the "enormous amounts" (as he put it) he has spent on fighting for what he describes as his rights. To quote the applicant, he is being "impoverished by the justice system".

[8] The applicant asks this court to endorse face-to-face meetings with his son. This I cannot do. The sole issue before me is the support order. Any review of access must be based on a complete evidentiary record on notice to the respondent in the court with the requisite jurisdiction.

[9] What I can do, now that evidence has been put before me, is to review the support order and consider whether a variation, with a rescission of arrears, is justified. A review of some basic principles is warranted.

[10] Section 58 of the *Children's Law Act*, S.N.W.T. 1997, c.14, imposes a joint responsibility on the parents of a child to provide support for that child. Support is the right of the child. Parental conduct does not extinguish that right nor is the obligation to pay support tied to access. As a matter of public policy, the rescission of support arrears is approached with caution because, in effect, it shifts the joint responsibility form both parents to the one parent who has custody. It would enable the non-custodial parent to avoid his or her responsibility.

[11] Arrears will not be rescinded where the payor possessed the ability to pay but chose not to do so or allocated his financial resources to other things. Generally speaking, undertaking the financial responsibility for a second family, or a third, will not alleviate the obligation to pay support to the first child. An applicant seeking to rescind arrears must prove a past inability to pay and lack of a present ability. But even a present inability will not result in rescission if the arrears arose because of the payor's conduct. And I emphasize that the onus of proving an inability to pay falls on the applicant. Full disclosure of all financial data is expected.

[12] I will address first the issue of variation. Section 61(2) of the *Children's Law Act* provides the power to vary a support order:

> (2) Where the court is satisfied that evidence not available on the previous hearing has become available or that a change in circumstances as provided for in the applicable guidelines has occurred since the making of an order of support or the disposition of another application for variation in respect of the same order, the court may
>
> (a) discharge, vary or suspend a term of the order, prospectively or retroactively;
>
> (b) relieve the respondent from the payment of part or all the arrears or any interest due on the arrears; and

> (c) make any other order under section 60 that the court considers appropriate.

[13] This section requires a "change in circumstances". What constitutes a change is stipulated in s.14 of the *Child Support Guidelines* (N.W.T.), R-138-98, which came into force on November 1, 1998:

> 14. For the purposes of subsection 61(2) of the Act, any one of the following constitutes a change in circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> (a) where the amount of child support sought to be varied includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or provision of the child support order;
>
> (b) where the amount of child support sought to be varied does not include a determination made in accordance with an applicable table, any change in the condition, means, needs or other circumstances of a parent or of any child who is entitled to support;
>
> (c) where the order was made before the Act came into force, the coming into force of the Act.

[14] Since the support order in question was made before the *Children's Law Act* and the *Guidelines* came into force, there is deemed to be a change in circumstances.

[15] The *Guidelines* provide that support is to be calculated on the basis of the income of the non-custodial parent. The amounts are set out in the tables of support amounts adopted for each territory and province. The *Guidelines* stipulate that, for the Northwest Territories, the table amounts are those set out in the Schedule to the *Federal Child Support Guidelines* (made pursuant to the *Divorce Act*).

[16] The applicant has provided income data for the past 10 years. Based on that I have calculated what his monthly support payment should have been in each year (the minimum threshold for a support payment is an income of $8,000.00 per year). The results are as follows:

Year	Annual Income	Monthly Support	Support for Year
1999	$7,061.86	0	0
2000	$25,269.96	$225.00	$2,700.00
2001	$29,452.00	$265.00	$3,180.00
2002	$23,417.00	$209.00	$2,508.00
2003	$14,494.00	$122.00	$1,464.00
2004	$4,771.84	0	0
2005	no info	$300.00	$3,600.00
2006	$23,697.64	$210.00	$2,520.00
2007	$17,680.00	$164.00	$1,968.00
2008	$10,812.94	$50.00	$600.00
			$18,540.00

[17] Over that 10 year period, the applicant should have paid $18,540.00 in support. The Maintenance Enforcement Office, over that same period, allocated a total debt of $36,000.00 to the applicant ($300.00/month X 12 X 10). Therefore there is an overage of $17,460.00.

[18] In addition, his current income is $2,168.36 per month (or $26,020.32 per year). Based on that his monthly support should be $233.00 from January 1, 2009.

[19] The applicant informed me that he plans to leave his job so he can go to Ontario and make a last attempt to form a relationship with his second son. All I can say is that a court works with current conditions, not some speculative future situation. It should be noted, however, that courts do not tend to look with

sympathy on a parent who voluntarily ceases employment while faced with child support obligations.

[20] In respect of rescinding arrears that accumulated prior to 1999, there is simply no evidence before me to support that. The applicant's pattern of employment income suggests that generally he had the capacity to make support payments.

[21] Therefore, I will issue a provisional order:

(a) varying the child support order, retroactive to January 1, 2009, to the sum of $233.00 per month; and,

(b) rescinding the sum of $17,460.00 from the accumulated arrears prior to December 31, 2008.

[22] The enforcement measures will remain in place considering the amount of arrears remaining.

[23] I ask counsel for the Administrator to prepare a formal order for my review and approval.

[24] Once the order is entered, the Clerk is to take all steps necessary, as required by s.27(4) of the *Interjurisdictional Support Orders Act*, to forward to the Northwest Territories designated authority the material for transmission to Alberta. This includes the material filed by the applicant, the transcript of the hearing before me, the exhibit filed, a certified copy of the original support order dated February 19, 1996, and this Memorandum of Judgment.

[25] I ask the designated authority to request the Alberta authority to notify the applicant, at the address in the material, of the date of the confirmation hearing.

J.Z. Vertes
J.S.C.

Dated this 14th day of April, 2009.

To: Mark Bogan (Applicant)

Brian Asmundson
Counsel for the Administrator
of Maintenance Enforcement

Docket: S1-CV-1992-3853

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

MARGARET NEWMAN

Respondent

- and -

MARK BOGAN

Applicant

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