

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RHONDA RASMUSSEN

Petitioner

- and -

BLAKE RASMUSSEN

Respondent

MEMORANDUM OF JUDGMENT

[1] Blake Rasmussen, the Respondent in these divorce proceedings, applies to the Court for an order varying the amount of ongoing child support payable by him under an interim order dated September 6, 2007, relieving him from the payment of arrears under that order and terminating enforcement proceedings.

[2] The Petitioner, Rhonda Rasmussen, opposes the application.

*Background*

[3] The parties were married in 1998 and separated in 2005. They have one

child together, a girl who is now 12 years old. Ms. Rasmussen commenced these divorce proceedings in July 2007. On July 27, 2007, an interim order was granted which provided among other things that the child remain in the day to day care and control of Ms. Rasmussen with Mr. Rasmussen to have access.

[4] On September 6, 2007, an interim order was granted which confirmed the provisions referred to above and also provided that pending any further order of this Court, commencing August 1, 2007 and monthly thereafter, Mr. Rasmussen would pay child support of \$459.00 per month plus his proportionate share of s. 7 expenses. The interim order does not specify the annual income on which the child support is based, but the child support calculation sheet filed with the Court on September 6, 2007 indicates that \$459.00 is the *Child Support Guidelines* amount for one child based on annual income of \$50,000.00.

[5] At the time the interim order was made, the Court had before it an affidavit sworn by Mr. Rasmussen on July 26, 2007 in which he states that he expects to make about \$35,000.00 in 2007 and that he was unable to work full-time up to July 26, 2007 because he had to provide care to his son (from another relationship) who had serious behavioural problems.

[6] The interim order also provided that a review of the quantum of child support and extraordinary expenses payable by Mr. Rasmussen “in light of affidavit evidence as to his income” would be spoken to on October 11, 2007. An affidavit sworn by Mr. Rasmussen on September 7, 2007 was filed and the matter was subsequently adjourned to October 18, 2007. On the latter date the matter was adjourned *sine die* with the interim order to remain in place in the meantime.

[7] In the affidavit sworn September 7, 2007, Mr. Rasmussen estimates his total 2007 income will be between \$47,414.00 and \$49,664.00. He lists total income earned to the end of August 2007 in the amount of \$29,364.00. He indicates that he has temporary employment expected to last until the end of October and that he expects to receive income of \$6300.00 for the month of September and is confident of earning between \$6,750.00 and \$9,000.00 in the month of October. Therefore, to the end of October he expects to have earned between \$42,414.00 and

\$44,664.00. He adds that if he finds work in November and December, he expects that will increase his income by \$5,000.00, thus resulting in the total 2007 income referred to at the beginning of this paragraph.

[8] In contrast, Mr. Rasmussen's income in 2004 was \$80,084.00; in 2005 it was \$85,199.00; in 2006 it was \$77,878.00. The affidavit does not explain the decrease in income from 2005 to 2007, although, as noted above, Mr. Rasmussen had explained in his earlier affidavit why he was not able to work full-time up to July 2007.

[9] It is reasonable to infer that the \$50,000.00 imputed to Mr. Rasmussen at the time the interim order was made was not challenged on the October court appearances because his affidavit of September 7, 2007 indicated that he estimated his 2007 income would be close to that figure.

[10] Counsel then acting for each of the parties ceased to act in early 2008. In May 2009, Mr. Rasmussen, acting on his own behalf, brought this application.

[11] In the affidavit he filed on this application (the "2009 affidavit"), Mr. Rasmussen attaches information from Canada Revenue Agency showing total income for 2007 of \$29,042.00, of which \$21,229.00 represents total earnings (T4). In his affidavit he refers to \$29,042.00 as his net income, although from the Canada Revenue Agency document it appears to be gross, i.e. before deductions. The affidavit provides no explanation for the discrepancy between the income figure and the figures set out in the affidavit sworn September 7, 2007. According to that affidavit, Mr. Rasmussen had already earned over \$29,042.00 by September 2007 and had employment into October.

[12] In the 2009 affidavit Mr. Rasmussen also provides information that his total income for 2008 was \$8,281.00. However, he has provided no information as to what kind of work he did in 2008 or has done to date in 2009, nor has he provided any information about the efforts he has made to find employment, although he did state to the Court in Chambers that he has recently taken a three month term position with a First Nation which will pay him \$30.00 per hour for a 40 hour work

week. On an annual basis, that would amount to more than \$50,000.00.

[13] The only explanations Mr. Rasmussen gives in the 2009 affidavit for the dramatic decrease in his income to date are the negative impacts of the downturn in the local economy, which he says have hindered his efforts to find employment for which he is trained, and a decline in his physical, mental and spiritual health due to years of abuse by the Petitioner and the stress of the ongoing court proceedings.

[14] The arrears under the interim order were \$2,538.70 as at April 2009. In addition to the explanations referred to in the preceding paragraph, Mr. Rasmussen says that debts to other creditors are a reason he is unable to meet his support obligations. It is not clear from the affidavit material whether the debts were incurred while the parties were together or after they separated.

*The test for a variation of child support*

[15] This is a divorce action and accordingly, the provisions of the *Divorce Act* govern the variation of child support. The combined effect of section 17(4) of the *Divorce Act* and s. 14(a) of the federal *Child Support Guidelines* is that the Court may make an order varying child support if it is satisfied that since the child support order was made, there has been a change of circumstances that would result in a different child support order being made under the *Guidelines*. An increase or decrease in annual income may qualify as such a change in circumstances.

[16] In this case, Mr. Rasmussen must demonstrate a change in circumstances since the interim order was made. Although he has demonstrated that his declared income has decreased, he has not provided adequate evidence in support of his contention that he is unable, by reason of the economic downturn or his health, to obtain employment and earn income that would enable him to meet his child support obligations. The explanations provided by Mr. Rasmussen for the decline in his income are very general. He has provided no evidence as to what employment skills he has or the efforts he has made since the date of the interim order to obtain employment, in his usual field of work or otherwise. He has provided no evidence that he has applied for employment but was turned down.

Nor has he explained why he was not able to achieve the income he estimated he would achieve in 2007. There is no medical evidence before the Court supporting his claim to have health problems or, if he has such problems, supporting his claim that they render him unable to work. I should note that Mr. Rasmussen does not actually state in his affidavit that he is unable to work, but that economic issues and health problems have hindered his efforts to find work.

[17] Counsel for Ms. Rasmussen submitted that Mr. Rasmussen is intentionally underemployed. Section 19(1)(a) of the *Child Support Guidelines* under the *Divorce Act* provides that a Court may impute such an amount of income to a parent as it considers appropriate in circumstances where it finds that a parent is “intentionally under-employed or unemployed”, other than where the under-employment or unemployment is required by the needs of the child or the reasonable educational or health needs of the parent. This concept of under-employment has been said to encompass those situations where a parent chooses to earn less than he or she is capable of earning since child support is based not just on what a parent does earn, but what a parent can earn having regard to age, education, experience, skills, health and other factors: *Tybring v. Tybring*, 2003 NWTSC 67; *Vornbrock v. Jaeb*, 2008 NWTSC 95.

[18] The onus is on Mr. Rasmussen to persuade the Court that there has been a change of circumstances which justify reduction of the amount of child support he has to pay and that he is not under-employed. He has not fulfilled that onus in that he has not provided evidence sufficient to show that he is unable to make the amount of income contemplated in the interim order as opposed to having chosen not to seek or obtain employment that could earn that amount. The unexplained discrepancies between his declared 2007 income and what he stated in his affidavit sworn September 7, 2007 make it impossible to determine what the situation really is. Therefore, I decline to vary the amount of child support payable.

#### *The arrears of child support*

[19] I turn now to Mr. Rasmussen’s application that the arrears of support be canceled and enforcement proceedings terminated. This Court has generally

followed the test in *Haisman v. Haisman* (1994), 7 R.F.L. (4<sup>th</sup>) 1 (Alta. C.A.); for example, in *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.

[20] The comments I have made above about the lack of evidence apply here as well. There is simply insufficient evidence to allow me to conclude that Mr. Rasmussen likely cannot pay the arrears and will not be able to pay them in the future. The existence of other debts is not determinative; child support must take priority over other financial obligations. In light of his income levels in 2004 through 2006, it is reasonable to think that Mr. Rasmussen is capable of earning at least \$50,000.00 on an annual basis.

[21] The Maintenance Enforcement Program Debtor Financial Report attached to Mr. Rasmussen's affidavit indicates that although arrears began to accumulate very soon after the interim order was made, they were reduced to a "nil" balance by the end of October 2008. Very little was paid towards the child support that accumulated after that. However, for that critical time period of November 2008 to April 2009 (the date of the Report), Mr. Rasmussen has provided no evidence about his efforts to obtain employment.

[22] I note as well that according to the Statement of Property filed by Mr. Rasmussen in October 2007, he had some assets at that time. In Ms. Rasmussen's affidavit filed on this application she states that she is aware of assets such as a boat, ski-doo's and one or two vehicles. Mr. Rasmussen has not, on the other hand, made disclosure of the assets he currently has and which might provide him with recourse to pay off the arrears of child support. It is also of note that the Canada Revenue Agency material attached to his most recent affidavit indicates he received RRSP income in both 2007 and 2008.

[23] For the foregoing reasons, the applications for cancellation of the arrears and termination of enforcement proceedings are also dismissed.

[24] Counsel for Ms. Rasmussen indicated in Chambers that once documents have been exchanged and examinations for discovery held, this matter can be set down for trial. I urge the parties to move towards that so the issues between them may be more fully examined and determined. I am mindful of the fact that Mr. Rasmussen indicated in Chambers that he had documents he wanted to present on this application; however they were not in proper form for filing with the Court and had not been served on counsel for Ms. Rasmussen. Even if, as he stated is likely, Mr. Rasmussen is not able to retain counsel for trial, I would urge him to seek legal advice as to the proper way to present evidence at trial.

[25] In summary, the applications for variation of child support, cancellation of arrears and termination of enforcement proceedings are dismissed. The interim order of September 6, 2007 will continue in place pending trial.

V.A. Schuler  
J.S.C.

Dated at Yellowknife, NT, this  
15<sup>th</sup> day of July, 2009.

Heard at Yellowknife July 9, 2009.

Counsel for the Petitioner, Rhonda Rasmussen: James Scott.

The Respondent, Blake Rasmussen, appeared in person.

S-1-DV 2007103825

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