

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CAROLINE BOURQUE

Applicant

- and -

NORMAN McDONALD

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter was before me in Chambers on April 30, 2009. After having heard submissions from counsel I advised that I would review the evidence before finalizing my Order. This Memorandum sets out my conclusions.

[2] Mr. McDonald seeks a variation of an Order made by this Court on July 15, 2005. In that Order, the Court granted sole custody of the parties' two children to their mother, Caroline Bourque, and Mr. McDonald was ordered to make child support payments based on an imputed annual income of \$60,000.00.

[3] There are two children, M., born in 1992, and R., born in 1987. The first variation that Mr. McDonald seeks is for M. to be in his day to day care. He deposes that M. lived with him from April 2006 to February 2007, returned to live with his mother, but later came back to live with him and has lived continuously with him since October 3, 2007. This evidence is uncontradicted, as Ms. Bourque did not appear on the application, nor did she file any evidence with the Court. Under the circumstances, it is appropriate for the 2005 Order to be varied to reflect that M. is in the day to day care of Mr. McDonald.

[4] The second area of relief Mr. McDonald seeks is an order rescinding or reducing his child support arrears. He seeks to have his child support obligations recalculated to take into account the time that M. has spent in his day to day care over the last few years, the fact that his child support obligations towards R. ceased some time ago, as well as changes in his circumstances that have reduced his ability to work.

[5] It is appropriate to recalculate the child support obligations to reflect the children's actual living arrangements at the relevant time.

[6] As for the readjustment of arrears based on a change in income, it must be approached with more caution, because what it really amounts to is a request to retroactively vary the basis upon which the child support was calculated.

[7] Courts are reluctant to vary or rescind arrears, and requests to do so are, and should be, carefully scrutinized. Generally speaking, arrears are only varied or rescinded if the Court is satisfied on a balance of probabilities that the payor spouse cannot then pay, and will not at any time in the future, be able to pay the arrears. *Haisman v. Haisman* [1994] A.J. No.553 (Alta C.A.). In my view, similar considerations apply when a request is made to recalculate child support based on actual income, as opposed to whatever income was set out in the Court's original Order.

[8] Mr. McDonald has adduced evidence that there was a significant reduction in his income in 2007, as compared to the two previous years. His income was \$61,657.00 in 2005, \$56,627.00 in 2006 and \$27,781.00 in 2007. In his affidavit, he deposes that this reduction in his income was due to his inability to continue with his previous employment because of a chronic medical condition (terminal emphysema). This evidence is uncontradicted, and corroborated to an extent by a brief letter from a registered nurse in Fort Smith which is attached as an Exhibit to his affidavit. That letter states that Mr. McDonald suffers from a chronic medical condition and that his prognosis "continues to remain unfavourable".

[9] I am satisfied that Mr. McDonald's medical condition has affected his ability to earn income in the year 2007, and that this is going to persist in the future.

Under the circumstances, I find that it is appropriate to recalculate his child support obligations and adjust the arrears accordingly.

[10] For the years 2005 and 2006, however, I am of the view that the child support should be calculated in accordance with the existing Order, on the basis of annual income of \$60,000.

[11] For the year 2005, based on an income of \$60,000, child support was owed for R. and M. from May to December (8 months), at a rate of \$907.00 per month.

[12] In 2006, two events must be considered in recalculating Mr. McDonald's child support obligations; the first is that M. went to live with Mr. McDonald in April. The second is that R. turned 19 in July, and had already been living on her own for some time. Accordingly, support was owed for both of the children from January to March (3 months), at a rate of \$907.00 per month; it was owed for R. only from April to July (4 months), at a rate of \$555.00 per month.

[13] For the year 2007, the child support should be calculated on the basis of Mr. McDonald's actual income of \$27,781.00, and was payable from March to September (7 months), for the period of time where M. returned to live with his mother; the applicable rate is \$251.00 per month.

[14] I therefore calculate Mr. McDonald's child support obligations for those years as follows:

For 2005: 8 months @ \$907.00 = \$7,256.00

For 2006: 3 months @ \$907.00 + 4 months @ 555.00 = \$4,941.00

For 2007: 7 months @ \$251.00 = \$1757.00

The total adds up to \$13,954.00.

[15] Exhibit "B" to Mr. McDonald's affidavit is a Debtor Financial Report prepared by the Maintenance Enforcement Office. It shows that as of January 2009, he had paid a total of \$14,407.52 in child support, and owed \$5,903.22. On April 30 his counsel filed a similar report, updated to April 2009, which shows that he has paid, to date, \$16,960.26 and owes \$3,350.48. I am satisfied that under the

circumstances, it is appropriate to grant his application to have the arrears rescinded.

[16] Finally, Mr. McDonald seeks child support from Ms. Bourque, retroactive to April 2006. His counsel asked that that particular matter be adjourned to May 28, 2009.

[17] Accordingly, an Order will issue as follows:

1. The Order of this Court dated July 15, 2005, is hereby amended, and Mr. McDonald is hereby granted day to day care of M., born April 7, 1992.
2. Mr. McDonald's child support arrears are hereby rescinded.
3. The matter is adjourned to May 28, 2009, at 10:00 a.m., to speak to Mr. McDonald's application for child support.
4. Ms. Bourque shall be served a copy of the Order, and of this Memorandum; service shall be effected by sending the documents to her by registered mail to her home address in Alberta, and also faxed to her attention to Sodexo, at the Ekati Mine Site.

[18] Counsel is to prepare the draft Order for my review. I do not consider myself seized of this matter.

L.A. Charbonneau
J.S.C.

Dated at this 1st day of May 2009.

No one appearing on behalf of the Applicant.
Counsel for the Respondent: Charlene Doolittle.

S-0001-CV-2005000142

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