Date: 2011 05 17
Docket: CV 06930

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JENNIFER MENZIES

Respondent

- and -

AMOS SIMON

Applicant

MEMORANDUM OF JUDGMENT

[1] This is an application for variation of a child support order pursuant to s. 32 of the *Interjurisdictional Support Orders Act*, S.N.W.T. 2002, c.19. The parties are the parents of a boy, now 16 years old, who resides with his mother (the respondent on this application) in Yellowknife. The father (the applicant) resides in Saskatchewan.

[2] In this case I had the opportunity to conduct a hearing where both parties gave *viva voce* evidence. I am therefore in a much better position to assess the evidence than is ordinarily the case in these interjurisdictional cases.

[3] Proceedings relating to custody, access and support were originally commenced in this court in 1997 under the then *Domestic Relations Act*, R.S.N.W.T. 1988, c. D-8. Custody was granted to the respondent. Also, an order was made on April 25, 1997, requiring the applicant to pay monthly child support of $1,200.00 to the respondent (payable on the last day of each month). That amount has never been varied. For reasons which will discussed further, very little was ever paid towards support and, as of the end of February, 2011, arrears

totalling $195,870.16 have accumulated. The applicant now seeks to vary the amount of monthly support and to rescind the arrears.

[4] The law in the Northwest Territories has changed since the making of the support order in this case. The *Domestic Relations Act* was replaced by the *Children's Law Act*, S.N.W.T. 1997, c.14, which came into force on November 1, 1998. That Act introduced the *Child Support Guidelines* for the calculation of support. 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 sine 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.

[5] This section requires a "change in circumstances" in order to trigger a variation. What constitutes a change is stipulated in s. 14 of the *Child Support Guidelines*:

> 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.

[6] Since the support order in this case was made before the *Children's Law Act* came into force, there is deemed to be a "change in circumstances".

[7] There is no evidence as to how the original support amount of $1,200.00 per month was calculated. The financial information filed in 1997 revealed that the applicant was then earning a gross annual income of $73,840.98. Since the Guidelines were not in force at the time, and in the absence of evidence as to some error in principle in coming to the original support amount, I do not see any cause to vary that order up until November 1, 1998. If a variation application had been brought on that date, based on that income the monthly support payments would have been reduced to $635.00 per month pursuant to the Guidelines.

[8] Oral evidence at the hearing indicated that from 1998 to 2003 the applicant worked steadily in Saskatchewan earning $75,000.00 to $80,000.00 per year. There was also documentary evidence showing the applicant's gross income for the years 2004 to 2008. These fluctuated from a low of $47,980.00 in 2006 to a high of $88,155.00 in 2008. The applicant became unemployed in October 2009. His income for 2009 totalled $48,899.00 according to the financial data filed with this application. He testified that throughout 2010 he received disability benefits of $1,300.00 per month and EI benefits of $1,500.00 per month. The disability benefits were due to a diagnosis of cancer in January, 2010, and the subsequent removal of a kidney. The applicant testified that he is now working on a contract job as a millwright at a salary of $36.00 per hour (which would work out to $74,880.00 per year). This job started on March 9 of this year (which would work out to $60,480.00 for the remaining 42 weeks in 2011).

[9] Based on these figures, I have calculated what the applicant's support payments should have been in each year applying the Guidelines. The results are as follows:

| | **Year** | **Annual Income** | **Monthly Support** | **Support for Year** |
|---|---|---|---|---|
| 1. | April 1997 to Nov 1998 (20 months) | | $1,200.00 | $24,000.00 |
| 2. | Dec 1998 | | $635.00 | $635.00 |
| 3. | 1999 | $77,500.00 (mid-point) | $714.00 | $8,568.00 |
| 4. | 2000 | $77,500.00 | $714.00 | $8,568.00 |
| | | | | |

| | Year | Annual Income | Monthly Support | Support for Year |
|---|---|---|---|---|
| 5. | 2001 | $77,500.00 | $714.00 | $8,568.00 |
| 6. | 2002 | $77,500.00 | $714.00 | $8,568.00 |
| 7. | 2003 | $77,500.00 | $714.00 | $8,568.00 |
| 8. | 2004 | $73,368.00 | $678.00 | $8,136.00 |
| 9. | 2005 | $72,488.00 | $671.00 | $8,052.00 |
| 10. | 2006 | $47,980.00 | $440.00 | $5,280.00 |
| 11. | 2007 | $52,899.00 | $487.00 | $5,844.00 |
| 12. | 2008 | $88,155.00 | $806.00 | $9,672.00 |
| 13. | 2009 | $48,899.00 | $448.00 | $5,376.00 |
| 14. | 2010 | $33,600.00 | $306.00 | $3,672.00 |
| | | | **TOTAL** | $113,507.00 |

[10] During this same time period, at $1,200.00 per month, the applicant's support obligations would have totalled $198,000.00 (13 years and 9 months). Therefore there is a potential overage of $84,493.00.

[11] For 2011, based on a potential income for the year of $60,480.00, the monthly support payments would be $560.00 per month.

[12] But this is not a case simply about doing mathematical calculations. The applicant submits that the entire amount of the arrears should be rescinded because the respondent led him to believe that he was not the father of the child and she did not pursue enforcement. The respondent, however, says that the application should be dismissed because the applicant has failed to provide the information required by the legislation.

[13] The applicant testified that after the child was born he exercised access to his son. In fact much of the dispute during the initial stages of the proceedings commenced in this court centred on the exercise of access. However, in 1998 he moved to Saskatchewan. He said that prior to his move he had a confrontation with the respondent where she told him that he was not the father of the child. He

asked his lawyer to arrange for a DNA test but the respondent refused to co-operate. As a result, he thought he had no more obligations to pay support.

[14] The respondent denied that she ever told the applicant that he was not the father. According to her, the applicant was constantly paranoid about whether he was in fact the father. She acknowledged, however, that she did not pursue enforcement measures for the support payments. She claimed she wanted peace and quiet; she did not want to be going back and forth to court; and, she did not want to fight with the applicant. There was no contact between them after he moved and she wanted to keep it that way.

[15] It was not until 2009 that the respondent went to the maintenance enforcement office to start enforcement proceedings. It was then that the applicant became aware of his outstanding obligations. A DNA test was done that confirmed paternity and the applicant took steps to re-establish contact with his son. He also paid for some things directly for his son.

[16] Why did the respondent start enforcement proceedings in 2009? There were a number of reasons outlined by the respondent in her testimony. She had become sick and found it more difficult to work. Also, her son, who she described as "high maintenance" due to the fact that he has a learning disability and ADHD, started to require more specialized services and counselling.

[17] I can understand how the applicant would come to think that he had no financial obligations even if the respondent had never explicitly said to him that he was not the father. She refused to go along with a DNA test back in 1998; she fought him on access; and, she did not pursue him for the support payments. I am not saying, as his counsel wants me to, that the respondent actively led the applicant to believe he was not the father. I am merely saying that I accept that the arrears did not build up due to some flagrant disregard by the applicant to his obligations. But the fact remains that there was a valid support order in existence and now arrears have accumulated to a significant amount, an amount that the applicant is unable to discharge.

[18] It is important to have regard to first principles. Parents have a joint and ongoing legal obligation to support their children. Support is the right of the child, not the parent with custody, and cannot be bargained away or ignored by the

custodial parent to the prejudice of the child. Delay by the custodial parent in enforcing child support payments does not operate as a waiver of the right to support. And, there is an onus on the parent asking for a reduction or a cancellation of arrears to bring forth detailed evidence as to their financial circumstances, in the past and the present. A deficiency in evidence may be a sufficient ground to deny relief.

[19] The guiding principle with respect to relief from accumulated arrears was articulated in *Haisman* v. *Haisman* (1994), 7 R.F.L. (4th) 1 (Alta.C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 86. A trial judge should not vary or rescind an order for child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the payor cannot pay now, and will not at any time in the future be able to pay, the arrears. This principle has been consistently applied in this jurisdiction.

[20] The judgment in *Haisman* also addressed the question of delay in the enforcement of support (at para. 46):

> Is delay by custodial parent in attempting to collect arrears of child support otherwise relevant on an application for a variation of the child support order? In my view it is not. Very often all of the custodial parent's resources, – financial, physical and emotional, – are used up in caring for the child. I do not think that either parent or child should be penalized because for a period of time no attempt is made to enforce a maintenance order, even if it is a long period of time. Nor do I think that the non-custodial parent can reasonably infer from that failure to enforce that the custodial parent has waived his or her rights under the order. A failure to enforce a child support order without more is not evidence of waiver.

[21] In this case, I do not fault the respondent for not enforcing the support order for so many years. She obviously felt that she could get by and she, quite understandably, wanted to avoid the stress of time-consuming court proceedings. But, nevertheless, that delay has resulted in a huge debt confronting the applicant, one that he cannot now pay nor one that he can reasonably be expected to pay in the near future. I am satisfied on this general point notwithstanding the serious deficiencies in the applicant's evidence (as noted by respondent's counsel).

[22] While delay itself is not relevant on a variation application, as stated in *Haisman*, the circumstances resulting from that delay may still be taken into account. I see nothing in *Haisman* that derogates from the court's discretion to

grant a measure of relief where appropriate, particularly where the payment of substantial arrears would cause undue hardship: see, for example, *Filipich* v. *Filipich* (1996), 26 R.F.L. (4th) 53 (Ont.C.A.).

[23] In this case, if I apply the Guidelines calculations I set out above, the arrears would be reduced by $84,493.00. Considering all of the circumstances in this case, I have concluded that there should be a further recision. I will therefore reduce the arrears owing as of February 28, 2011, by half, from $195,870.16 to $97,935.08. The applicant's on-going child support obligations will be set at $560.00 per month commencing as of March 31, 2011.

[24] I have not ignored the evidence from the applicant that he made some payments directly to or on behalf of his son over the past 12 months. However, in the absence of an agreement, money spent on behalf of a child in lieu of making the ordered support payments are not to be off-set against arrears owing: see *Haisman*, at paras. 79-81.

[25] With respect to the arrears still owing, I am not going to order some additional monthly payment, such as $100.00 per month, towards arrears. Such a payment is unrealistic since at that rate it would take the applicant over 80 years to pay off the arrears. Instead, I want to encourage the applicant to make some arrangements to satisfy the arrears by lump sum payments. He told me that a few years ago he received $70,000.00 as an arbitration award from his dismissal from employment. Perhaps some or all of this could be applied to the arrears. Perhaps he can make some other arrangement. The point is that the arrears are an on-going obligation and he will be subject to any and all enforcement proceedings if those arrears are not paid off.

[26] In summary, I order as follows:

> 1. The support order of April 25, 1997, will be varied to provide that the applicant will pay on-going child support in the sum of $560.00 per month, payable on the last day of each month. The effective start date for these payments is March 31, 2011. The payments will continue, unless otherwise further ordered, until the child reaches the age of majority or, if over the age of majority, the child is unable to withdraw from his custodial parent's charge.

2. The accumulated arrears, as of February 28, 2011, will be reduced to the sum of $97,935.08.

3. The stay of enforcement proceedings, as ordered previously, is vacated.

[27] In the circumstances, there will be no order as to costs.

J.Z. Vertes
J.S.C.

Dated this 17th day of May 2011.

Counsel for the Applicant (Simon): D. Jane Olson

Counsel for the Respondent (Menzies): Jeannette Savoie

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