Date: 2013 08 29
Docket: S 1 CV 1994 0005585

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRUCE GORDON BIGGIN

Applicant

-and-

ELIZABETH MARY BIGGIN CENSNER

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application to rescind child support arrears.

History

[2] Mr. Biggin and Ms. Censner were divorced on February 14, 1990 by a judgment of the Supreme Court of Ontario (as it was then called). Ms. Censner was awarded custody of the parties' two children and Mr. Biggin was ordered to pay support in the amount of $250.00 for each child. This amount was to be adjusted annually each year in accordance with the Consumer Price Index.

[3] Arrears began to accumulate shortly after the divorce judgment was granted. In December of 1994 Mr. Biggin filed an application to reduce the amount of ongoing support and to rescind arrears. The matter was heard in 1996, at which time the arrears amounted to $22,000.00. Richard, J. dismissed the application. *Biggin v. Censner*, 1996 CanLII 3645 (NWTSC).

[4] Enforcement proceedings are pending against Mr. Biggin in the Territorial Court of the Northwest Territories pursuant to the *Maintenance Orders*

Enforcement Act, R.S.N.W.T., 1988 c. M-2. Included with Mr. Biggin's affidavit are copies of the summons and affidavit filed on behalf of the Maintenance Enforcement Administrator in that action, which show that the arrears are $16,572.08 as of March 27, 2013.

[5] There is no information about when, exactly, these remaining arrears accumulated. I note, however, that both children are now adults, attaining the age of majority in 2001 and 2004 respectively and Mr. Biggin has not indicated that there has been an *ongoing* support obligation, from which arrears have continued to accumulate, since then.

Process

[6] When this matter was argued, I ruled that if relief was granted to Mr. Biggin, it would be provisional only. This is by reason of s. 18(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), which sets out the process to be taken by an applicant to vary support, including retroactive variation of arrears, where the parties reside in separate jurisdictions. Among other things, it directs that where a respondent is ordinarily resident in another jurisdiction and has not accepted the jurisdiction of the court hearing the application, any variation order is provisional only and has no legal effect until confirmed by a court in the province or territory where the respondent resides.

[7] Ms. Censner, who lives in Ontario, was served personally with notice of Mr. Biggin's application. She sent the Registry a notice of motion and an unsworn document entitled "Rebuttal of Bruce Biggin's Affidavit". Neither of these documents was filed, but both were brought to my attention.

[8] Mr. Biggin's counsel suggested that Ms. Censner, through her actions, accepted this court's jurisdiction to hear the application and so I may make a final order. I disagree.

[9] Ms. Censner's notice of motion contained only a request for leave to appear by telephone based on her inability to retain counsel. This, by itself, does not amount to acceptance of the court's jurisdiction. It is not surprising that an unrepresented party who has been personally served with notice of legal proceedings which could have financial consequences would make this request. The fact that Ms. Censner purported to make the request through a notice of motion, rather than by the usual practice of sending a letter, is of no consequence in these circumstances.

[10] Similarly, the "Rebuttal of Bruce Biggin's Affidavit" that Ms. Censner provided does not amount to acceptance of this court's jurisdiction to make a final order. Again, it is not surprising that an unrepresented litigant in her position would want to ensure that her position would be taken into consideration before the court made a final order. As a practical matter this document, being unsworn and in improper form, could not be, and was not, considered.

[11] Finally, when Ms. Censner appeared at the hearing, by telephone, she confirmed that she did not accept the jurisdiction of the court to make a final order.

Mr. Biggin's Circumstances

[12] Mr. Biggin provided evidence about his income and employment status since 1996, which is summarized below:

Year	Employment	Location	Income
1996	Warehouseman; Self-employment as a handyman, painter and drywaller etc.; Manager/cashier at convenience store	Yellowknife/Ottawa	$12,747.00
1997	Self-employment as a handyman, painter and drywaller etc.; Manager/cashier at convenience store	Ottawa	Unknown
1998	Self-employment as a handyman, painter and drywaller etc.; Manager/cashier at convenience store; Unemployed	Ottawa/Edmonton	Unknown
1999	Unemployed	Edmonton	Unknown
2000	Customer service representative and cashier	Edmonton	Unknown
2001	Customer service representative and cashier	Edmonton	$12,565.00
2002	Customer service representative and cashier; Manager of video store	Edmonton/Hay River	$21,565.00
2003	Manager of video store	Hay River	$21,094.00

2004	Manager of video store	Hay River	$20,834.00
2005	Manager of video store	Hay River	$25,161.00
2006	Manager of video store; Self-employed owner of video store	Hay River	Unknown
2007	Self-employed owner of video store	Hay River	$26,605.00
2008	Self-employed owner of video store	Hay River	Nil
2009	Self-employed owner of video store (closed business); Unemployed	Hay River	$13,585.00
2010	General work at golf club (2 months); Unemployed	Hay River/Yellowknife	$1,248.00
2011	Unemployed	Yellowknife	Nil
2012	Unemployed	Yellowknife	Nil

[13] I pause to note that in the affidavit sworn in support of this application, Mr. Biggin deposes that he had a temporary, three month position with at Colomac Mine in 1996 when his income was $12,747.00. In 1996, however, he swore an affidavit in this action in which he indicated the position was a full-time one and that he left because he was getting married and because he had personal issues to address, which conflicted with his work schedule (*Affidavit of Bruce Biggin, sworn May 2, 1996).* Richard, J. found that Mr. Biggin *chose* to leave the position at Colomac Mine and but for that, Mr. Biggin would have had an annual gross income of $32,850.00 (*Biggin v. Censner, supra,* at paragraphs 5 and 7). Thus, the position was not temporary in the sense that it was for a pre-determined duration of three months. It was temporary only because Mr. Biggin chose to leave it after three months.

[14] Other than a two-month job with the Hay River Golf Club, he has not been gainfully employed since 2009.

[15] Mr. Biggin states that he noticed his health was starting to deteriorate in 2005 and 2006, although it appears that he continued to work and later, operate his own business, for a few more years, until 2009. He included with his affidavit

letters from a physician indicating that Mr. Biggin suffers from a number of medical conditions, including chronic obstructive lung disease, congestive cardiac failure and glaucoma. His physician expresses the opinion that Mr. Biggin is unable to maintain regular employment as a result of his health problems.

[16] Mr. Biggin remarried in 1996. His wife was laid off from her job with the Government of the Northwest Territories the same year, but she found work in Ottawa and the couple moved there. They subsequently moved to Edmonton, Hay River and back to Yellowknife, each time for the purposes of the wife's employment.

[17] Currently, Mr. Biggin's wife is employed with a mine. Although no information was provided about her income, the evidence suggests that she has been the primary breadwinner throughout the marriage.

[18] Mr. Biggin and his wife own a house in Hay River as joint tenants. They purchased the house in 2007 for $205,000.00. The down payment came from funds Mr. Biggin's wife received in a residential school settlement and the balance was financed through a mortgage. Mr. Biggin feels that the current market value of the house is approximately $190,000.00. As of May 28, 2012, the outstanding balance on the mortgage was $179,751.42.

[19] At present, the house in Hay River is rented to tenants who pay $1,275.00 per month. Mr. Biggin and his wife apply this to the mortgage, which is paid in bi-weekly installments of $498.00, a 10% fee to a property management company and any other expenses associated with the house.

Legal Principles

[20] Section 17(1)(a) of the *Divorce Act, supra,* permits the court to make a retroactive variation of a child support order. This includes, in appropriate circumstances, the authority to rescind arrears.

[21] The principles that the court must apply in analyzing the merits of an application to reduce or expunge arrears were set out by Hetherington, J.A., in *Haisman* v. *Haisman,* 1994 CarswellAlta 179: 7 R.F.L. (4th) 1 (Alta. C.A.):

> 29 Where the *past* inability to make child support payments *as they came due* has lasted for a *substantial* period of time, but the former spouse did not apply during that time for a variation order, the situation may be different. On a later application to vary, a judge will have to decide, with the benefit of hindsight, whether it would have been appropriate to suspend enforcement of the support order during the time when the former spouse was unable to pay, or whether at least a temporary reduction in the child support payments would have been in

> order. A judge should view with considerable skepticism any claim that a reduction in the support payments, temporary or indefinite, would have been proper. However, if he or she decides that it would, the judge may for this reason reduce accordingly the arrears of child support which have built up. In my view this is a special circumstance.
>
> 30 I wish to emphasize that the mere accumulation of arrears, without evidence of a past inability to pay, is neither a change under s. 17(4) of the *Divorce Act*, nor a special circumstance.
>
> 31 A *present* inability to pay *arrears* of child support does not by itself justify a variation order. It may justify a suspension of enforcement in relation to the arrears for a limited time, or an order providing for periodic payments on the arrears. However, in the absence of some special circumstance, a variation order should only be considered where the former spouse has established on a balance of probabilities that he or she cannot pay and will not in the future be able to pay the arrears.
>
> 32 In short, in the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay, the arrears.

[22] Hetherington, J.'s comments in *Haisman, supra,* reflect the need for the court to exercise caution in concluding that arrears should be rescinded. Child support is not an ordinary financial obligation. "It is a parental obligation that creates a right in the child". *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231 at paragraph 158. Children rely on their parents for the very essentials of life and if one parent ignores this responsibility, it falls to the other parent, and sometimes the state, to deal with the shortfall. Sometimes, the gap simply cannot be adequately filled and children bear the consequences by going without many of the things they need. Thus, the law makes it a priority. Parents are expected to make it a priority, too. "[P]arents should expect to pay what they are obliged to pay when they are obliged to pay it." *D.B.S., supra,* at paragraph 159.

[23] The importance of child support, and the special status it is accorded, is also reflected in various pieces of legislation, in addition to the *Divorce Act, supra.* For example, a child support obligation, unlike other debt, is not eliminated by bankruptcy (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 178). The *Maintenance Orders Enforcement Act, supra,* grants exceptional remedies to the Maintenance Enforcement Administrator to aid in collection of support payments, such as the power to attach joint bank accounts and the power to order the suspension of drivers' licenses upon the accrual of a certain amount of arrears. Monies garnisheed under the *Maintenance Orders Enforcement Act, supra,* are not

subject to claims by other judgment creditors (*Creditors Relief Act,* R.S.N.W.T., c. C-24). These are but a few examples.

[24] It is within this legal framework that Mr. Biggin's application must be evaluated.

Analysis

Are there Special Circumstances that Justify Reducing Arrears?

[25] Mr. Biggin has not demonstrated that there were special circumstances which prevented him from paying support in the past, nor has he demonstrated that the amount of support he was ordered to pay should have been reduced. If the court is to determine these questions, it requires evidence about past efforts to pay and income levels at the relevant times, at the very least. On this point, Mr. Biggin's evidence is insufficient.

[26] I do not question the veracity of Mr. Biggin's evidence about his illnesses or the limitations they place on his ability to work, but this does not demonstrate a special circumstance that would justify reducing the arrears.

[27] Mr. Biggin's health problems did not prevent him from working until 2009, some nineteen years after he was first ordered to pay support and several years after each of the children had reached adulthood. There is no evidence about what attempts Mr. Biggin made to meet his child support obligations as they arose and no explanation was to why he was unable to meet them. Mr. Biggin has not provided an explanation as to why he has not provided information about his income for the years 1997 to 2000, and 2006. There is also no information about what efforts he made to find work in 1998 and 1999, when he was unemployed.

[28] The evidence shows that Mr. Biggin was steadily and gainfully employed from 2002 to 2005 and that he ran a business in Hay River in 2006 and 2007, from which he earned income. Again, however, there is no explanation offered as to what efforts he made in these years to discharge his support obligations, including payment of arrears that had accumulated to that point.

Is there a Present or Future Inability to Pay that Justifies Reduction in Arrears?

[29] I am not satisfied on a balance of probabilities that Mr. Biggin cannot now or in future pay the arrears. He may be unable to work at this time, but he is not without assets, nor entirely without income. His evidence shows that he is the joint owner, along with his wife, of a home from which rental income is earned. There is equity in the home and it continues to accumulate.

[30] The extent to which this asset might enable Mr. Biggin to satisfy the arrears is something to be determined by the Territorial Court in the default proceedings under the *Maintenance Orders Enforcement Act, supra,* currently before it. For the purposes of this application, however, owning and earning income from the house in Hay River erodes the argument that Mr. Biggin will not be able to pay the outstanding arrears in the future and as such, they should not be rescinded.

Conclusion

[31] Mr. Biggin has not established on a balance of probabilities that there are special circumstances which prevented him from paying support as it came due, nor has he satisfied the court that he cannot now, nor will he in future, be able to pay the arrears. The application is dismissed.

[32] Although Ms. Censner did not make submissions at the hearing, she did attend by telephone and so I direct that a copy of these reasons be provided to her.

K. Shaner
J.S.C.

Dated at Yellowknife, NT
this 29th day of August, 2013.

Counsel for the Applicant: Kenneth Allison
Respondent is self-represented

S-1-CV-2012 000018

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MEMORANDUM OF JUDGMENT OF
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