Zoe v. Fish, 2013 NWTSC 51

Date: 2013 07 26
Docket: S-1-FM-2012 000099

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BELYNDIA MARIE ZOE

Applicant

-and-

TYRONE ALFRED FISH

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an Application to vary a child support Order made by this Court in December 2012. The father seeks to have the amount of income imputed to him in that Order varied, and to have his child support obligations adjusted accordingly. He also asks that the variation be retroactive to December 2012.

[2] The mother is not opposed to a variation but argues it should be prospective only. She also takes issue with the father's proposed method to determine what income should be imputed to him.

I) BACKGROUND AND EVIDENCE IN SUPPORT OF APPLICATION

1. The Order made December 13, 2012

[3] The mother filed an Originating Notice seeking custody of the parties' child, and child support, on October 9, 2012. In support of the relief she was seeking she filed her own affidavit as well as an affidavit from Lena Church. One of the exhibits to Ms. Church's affidavit is information taken from the Statistics Canada

website, setting out average income information for residents of the Northwest Territories and for the residents of the community of Behchoko.

[4] The Originating Notice and supporting documents were served personally on the father on October 25, 2012, in Behchoko. In accordance with the *Children's Law Act*, S.N.W.T. 1997, c.14, these documents included a notice informing him of his obligation to provide specific financial information and documentation within thirty days of being served.

[5] By the time the matter was spoken to in this Court on December 13, 2012, the father had still not complied with the requirement to provide his financial information. He did not appear in Court, nor have anyone appear on his behalf. The matter proceeded and the Court issued an Order (the December Order) granting the mother sole custody of the child; imputing annual income of $63,104.00 to the father; and making a child support order of $586.00 per month, in accordance with the *Child Support Guidelines*. The child support was ordered payable effective November 1, 2012. The father was served personally with the December Order on February 25, 2013.

2. The father's Application to vary the December Order

[6] On May 29, 2013, the father filed a Notice of Motion seeking a variation of the December Order in two respects. The first thing he sought was a provision dealing with access. That issue was later resolved by consent.

[7] The second thing the father sought was a variation of his child support obligations. In support of that request, he filed an affidavit which includes information about his employment and income. The father deposes that his income has never been as high as what was imputed to him in the December Order. He deposes that he has never worked full time since the time he finished school, as his employment has always been seasonal.

[8] He provides the following particulars about his employment situation at Paragraph 6 of his affidavit:

> I am presently not employed, but am seeking employment. I am 25 years of age and have completed grade 11. The last five jobs I held were located at the Snap Lake mine. I was a fuel handler. The jobs were all seasonal employment. Since that time, the Applicant has charged me with assault and I was convicted. The Snap Lake mine will not hire me back on account of my criminal record. I am presently applying for work at the BHP mine. I'm not sure if my criminal record will be a problem for them. I have applied to take a carpentry trade's course, which starts in September.

[9] The father's affidavit also includes the following explanation regarding his lack of participation in the December hearing in Yellowknife:

> (…) I did not attend [the December 13] court hearing. I was in Territorial Court (TC) in Behchoko at the same time for a sentencing hearing and could not make the hearing in Supreme Court in Yellowknife. I was in TC being sentenced for assaulting the Applicant. I did call the Supreme Court to advise them, but was told it was too late to change the date. I do not own a vehicle and it is difficult for me to get to Yellowknife. Usually I have to request a ride from someone who is travelling to Yellowknife and has room to take me in their car.

[10] The father's affidavit exhibits copies of his income tax returns for the years 2010, 2011, 2012. The annual income reported in those documents is $18,645.00 for 2010; $20,088.08 for 2011; and $46,794.37 for 2012.

[11] The father's affidavit also exhibits a document provided to him by the Northwest Territories Maintenance Enforcement Program. It shows $1,736.75 in child support arrears as of May 2013.

3. The positions of the parties

[12] The father argues that the evidence establishes that he has never held full time employment. He points out that even the evidence adduced by the mother prior to the December hearing was that he worked only seasonally. He appears to question whether income should have ever been imputed to him on the basis of statistical information about full-time workers. He argues that, in any event, the evidence he has now adduced establishes clearly that his income has never been anywhere near the income imputed to him in the December Order.

[13] The father deposes that as he is currently unemployed and that there is some uncertainty about his future employment prospects. Because his income has not been the same over the last three years, he argues that the most appropriate method to set his income for child support purposes is to use the average of his earnings for those years. Using that approach, his income would be set at $29,175.00 which, pursuant to the *Guidelines*, corresponds, for one child, to $255.00 in child support.

[14] The father also argues that the variation should be retroactive to December 2012. If his child support obligations are varied to $255.00 per month, the total support payable for the period from November 2012 to May 2013 (7 months) would be $1,785.00. According to the Maintenance Enforcement records, the father had, as of May 2013, paid a total of $2,365.25 in child support. Accordingly, if his position prevails, the arrears would be rescinded entirely, and there would be a credit of $580.25 on his account. Presumably, that credit would

be applied to the child support owed for June 2013 onwards. This would cover the months of June and July and a small portion of what he will soon owe for the month of August.

[15] The mother agrees that the father's child support obligations should be revised and based on a lower income than what was imputed to him in the December Order. However, she disagrees with the calculation method he proposes. She argues that this is not an appropriate case to use an average of his income over the last three years. She argues that his child support obligations should be based on what he earned in 2012, which is the most recent income information available for a full year. She also argues that the variation should not have any retroactive effect.

II) ANALYSIS

1. Determination of income

[16] I want to make clear at the outset that to the extent that the father's submissions call into question the appropriateness of the Order made in December 2012, I have disregarded them. The proper way to challenge an Order made by the Court is to appeal it, not to call its legitimacy into question in subsequent variation proceedings.

[17] It is true that the December Order was made based on general statistical information, as opposed to accurate information about the father's actual income. But the responsibility for that rests entirely on the father. He did not attend the hearing in Yellowknife on December 13, nor provide any information about his situation ahead of that hearing date. The explanation that he provides for that in his affidavit is less than compelling.

[18] Even accepting that other court proceedings may have interfered with his ability to attend the proceedings in Yellowknife, he surely knew about those other proceedings well in advance. If the two separate proceedings created a scheduling conflict for him, there are a number of things that he could have done: he could have written to this Court to seek an adjournment; he could have asked someone to attend on his behalf to ask for an adjournment; he could have requested to appear by telephone; he could have taken steps to retain counsel.

[19] As for his failure to disclose information about his financial situation, he provides no explanation whatsoever for it. Litigants who fail to provide relevant information can hardly complain when the decisions made in their cases do not

accurately reflect their financial situation. That is the very reason why the obligation to disclose financial information exists in the first place.

[20] All that being said, the fact is that now, the Court does have much more specific information about his income and I agree that it is appropriate to vary his child support obligations accordingly. The question is what the revised income amount should be in light of the evidence now available.

[21] Sections 16 and 17 of the *Child Support Guidelines* are among the provisions that set out how a Court should determine a parent's income for child support purposes:

> 16. Subject to sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule C.
>
> 17. (1) If the court is of the opinion that the determination of a parent's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
>
> (...)

[22] Section 16 sets out the general approach and starting point in the determination of income: it consists of using the total income reported for income tax purposes (this is subject to certain adjustments set out at Schedule "C" of the *Guidelines*, but those adjustments do not apply here). The method set out at section 17, which consists of examining the parent's pattern of income, is to be used only where the Court is of the opinion that the method set out in section 16 would not be the fairest determination of that income.

[23] There are a variety of circumstances where using the most recent income information could be considered to not be the fairest way of determining income. Depending on the situation, it could be unfair to the parent whose income is being determined, or it could be unfair to the parent who will be the recipient of child support. For example, where the evidence discloses ongoing major fluctuations in income, the most recent income information may not accurately represent what can be expected to occur from year to year. In those circumstances, fairness may require using the average in income over a period of time. That said, not every fluctuation or variation in income engages the application of section 17.

[24] I am not convinced that the cases that the father relies on support his position. In *Praetzel* v. *Porter*, 2009 NWTSC 18, the Court noted some fluctuation in the income but declined to apply section 17. Instead, the Court based its decision on the father's income for the most recent full taxation year.

[25] As for the two other cases that the father relies on, they involved situations that were factually quite different from this one. In *Cran* v. *Huynh*, 2008 NWTSC 60, the father had been incarcerated for part of the time frame for which child support was being claimed; that fact had, obviously, caused great fluctuations in his income. It is the type of (hopefully) non recurring event that may well make it unfair to determine income in accordance with section 16.

[26] In *Anderson* v *Angasuk*, 2009 NWTSC 16, the significant fluctuations in the father's income were found to be inherent to the nature of his employment: he was a pilot, and his earnings were based on the number of hours flown and the type of aircraft piloted, which could vary considerably from month to month and from year to year. That is quite different from the situation here.

[27] In some respects I find the situation in this case to be analogous to that which arose in *Heron* v. *Fabien*, 2012 NWTSC 72. The evidence in that case was that the father's income had been $38,458.16 in 2007; $27,261.60 in 2008; $37,556.86 in 2009; $31,515.00 in 2010; $44,455.95 in 2011; and as of the end of July 2012, $21,125.00. The Court noted the fluctuations in his income but did not approach the matter by using averages. Rather, the Court considered the matter from the point of view of the father's demonstrated earning capability:

> The financial information demonstrates that Mr. Fabien, if he puts his mind to it, is capable of earning $44,000 per year, as he did in 2011. There is no evidence to suggest that this income is not attainable in the future

Heron v. *Fabien*, *supra*, at para. 22.

[28] Here, the father is a healthy young man and has demonstrated an ability to earn $46,794.37 in 2012, even though he was not employed full-time. There is nothing to suggest that he is not capable of earning income in a similar range in the future. I recognize that there is evidence that his criminal record is an obstacle to securing employment with the same employer he had in 2012, but there is no evidence that his record presents an absolute obstacle to him securing other employment and have comparable earnings.

[29] I have also considered the father's evidence about having applied to take a carpentry course starting in the fall. His interest in acquiring new skills is

understandable, but if taking this course means he would no longer have an income, the reality is that he may not have the option to do so at this time, given his obligation to support his child. Like anyone who becomes a parent, he is no longer at liberty to make all the choices he wishes he could make without taking his obligations to his child into account.

[30] Under the circumstances, in my view, it is not necessary to resort to section 17 of the *Guidelines* to determine the father's income. I conclude that his income in 2012 is an adequate basis to determine his child support obligations. His income will be set at $46,800.00 for purposes of calculating his child support obligations. Pursuant to the *Guidelines*, this corresponds to monthly support, for one child, of $419.00.

[31] Having so concluded, I do not find it necessary to deal with the issue of underemployment at this time, beyond what I have already stated: the father is not free to make decisions that affect his ability to earn income irrespective of his obligations to support his child. That point has been made in other cases from this jurisdiction. *Tybring* v. *Tybring*, 2003 NWTSC 67, at paras 9-10; *Vornbrock* v. *Jaeb*, 2008 NWTSC 95, at paras 19-22.

2. Retroactivity

[32] The father has framed this as an application for retroactive variation of his child support obligations but practically speaking, it amounts to an application to rescind or vary the arrears that have accumulated since November 2012. Adjusted to the rate of $419.00 per month, the total child support owed for the period between November 2012 and May 2013 would be $2,933.00. The father, as of May 2013, had made payments totaling $2,365.25. Therefore, if his obligations are varied retroactively, this will result in a reduction of the arrears from $1,736.75 to $567.75.

[33] For many years, the Courts in this jurisdiction have followed the principles set out in *Haisman* v. *Haisman* [1994] A.J. No.553 (Alta C.A.) when dealing with applications to rescind child support arrears. That case sets a high threshold and stringent test for someone who makes such an application:

> 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 payment of 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 can not pay and will not in the future be able to pay the arrears.
>
> In short, in the absence of some special circumstance, a judge should not vary or rescind an order for 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 can not then pay and will not at any time in the future be able to pay, the arrears
>
> *Haisman* v. *Haisman*, *supra*, at paras 27-28.

[34] There are a number of policy reasons that underlie the requirement for caution when dealing with applications to rescind or reduce child support arrears. A parent who obtains a support order is entitled to rely on that order and plan accordingly. Courts should uphold their orders and be seen to do so. Because arrears accumulate when a court order is not complied with, there is always a risk that the rescission of arrears will be seen, in effect, as rewarding non-compliance.

[35] A second consideration, as noted in *Haisman*, is that where one parent does not provide support for his or her child, someone else has to make up for the shortfall, or, in the alternative, the child's needs may not be met and his or her quality of life may be diminished. *Haisman* v. *Haisman*, *supra*, at paras 39-40. The strict enforcement of arrears is a way to compensate those who have been impacted by a payor's failure to comply with the child support order.

[36] At the same time, in some circumstances, a more nuanced approach may be justified. When a Court relies solely on statistical information about average incomes to make a child support order, the Court does not make a factual finding about the payor parent's income or actual earning capacity. Rather, in the absence of any other evidence, the Court is forced to rely on very general information, which has a greater chance of being at odds with the payor's veritable circumstances.

[37] At the same time, the imputation of income based on statistical information is almost invariably the result of the respondent parent having failed to disclose financial information. Given this, I would be extremely reluctant to grant a retroactive variation that would have the effect of creating a credit on the payor parent's maintenance enforcement account, thereby relieving that parent from making child support payments for a period of time. A parent who has obtained a child support order and who has received payments in accordance with that order should be able to plan and manage the family finances accordingly. That being so,

a retroactive adjustment that would have the effect of depriving the recipient parent from ongoing payments for a period of time would, in my view, be very unfair.

[38] In the circumstances here, however, no such credit will be created if the variation applies retroactively. Having regard to the whole of the circumstances, including the evidence now before the Court about the father's situation and the evidentiary basis upon which the December Order was made, I conclude that it is appropriate to make the variation retroactive to December 2012 and to adjust the arrears accordingly.

III) CONCLUSION

[39] For these reasons, the application is granted and the Order made by this Court on December 13, 2012, is varied as follows:

1. Paragraph 2 of the Order is hereby replaced by the following:

   (a) The Respondent's income is imputed at $46,800.00;

   (b) the Respondent shall pay child support to the Applicant for the benefit of the child, T.Z. in the monthly amount of $419.00;

   (c) the income imputed and corresponding child support obligations are effective as of November 1, 2012, and;

   (d) the calculation of the Respondent's child support arrears are to be adjusted accordingly.

2. A copy of this Order shall be served on the office of the Northwest Territories Maintenance Enforcement Program.

L.C. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
26 day of July, 2013

Counsel for the Applicant: Candace Seddon
Counsel for the Respondent: Donald Large, Q.C.

S-1-FM-2012 000099

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-and-

TYRONE ALFRED FISH

Respondent

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE L.A. CHARBONNEAU

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ADDENDUM TO MEMORANDUM OF JUDGMENT FILED JULY 26, 2013

[1] This is an Addendum to the Memorandum of Judgment filed on July 26, 2013, reported at 2013 NWTSC 51.

[2] The Memorandum of Judgment dealt with an application by the father to vary his child support obligations. To dispose of the application, the father's income had to be determined. I concluded that the income should be based on the father's income for the year 2012.

[3] On July 29, 2013, the mother's counsel sent a letter to the Registry, copied to the father's counsel, raising an issue about a discrepancy between the

Memorandum of Judgment and the evidence pertaining to the father's income in 2012. Counsel wrote:

> The Exhibit containing the amount is somewhat blurred and difficult to read, but the amount is actually $48,794.37, and not $46,794.37 as noted in the Memorandum.
>
> I have confirmed with Counsel for the Respondent, Mr. Donald Large, Q.C., that the Exhibit actually reads $48,794.37, and that was in fact the Respondent's Line 150 Total Income for 2012, not $46,794.37.

[4] In light of this correspondence, I have re-examined the document in question, which is one of the documents included in Exhibit "A" of the father's affidavit sworn May 28, 2013. I have satisfied myself that that amount showing at Line 150 of the father's Tax Return Summary for the year 2012 is $48,794.37, not $46,794.37 as I originally thought.

[5] Given my conclusion that the father's income for child support purposes should be based on his income in 2012, some of the figures that appear in the Memorandum of Judgment filed July 26, 2013 must be corrected. The corrections that are required are the following:

1. all references to the father's income for 2012 should read **$48,794.37 instead of $46,794.37**; such references appear at Paragraphs [10] and [28];

2. the father's income for purposes of calculating his child support obligations should read **$48,800.00 instead of $46,800.00**, and the corresponding monthly child support ordered should read **$438.00 instead of $419.00**; this change affect the figures that appear at Paragraphs [30], [32] and [39]; and

3. At Paragraph [32], in addition to the amount of monthly child support being corrected, the total amount of child support due from November 2012 to May 2013 should read **$3,066.00 instead of $2,933.00**; the remaining amount of arrears should read **$700.75 instead of $567.75**.

[6] I direct that this Addendum be appended to the Memorandum of Judgment filed July 26, 2013. It should be added to the decision posted on the Court

library's website, and to any copy of the Memorandum sent to publishers or otherwise disseminated.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
7 day of August, 2013

Counsel for the Applicant: Candace Seddon
Counsel for the Respondent: Donald Large, Q.C.

S-1-FM-2012 000099

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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FILED JULY 26, 2013 OF
THE HONOURABLE JUSTICE L.A. CHARBONNEAU