DiFrancesco (formerly Couto) v. Couto
[Indexed as: DiFrancesco v. Couto]

56 O.R. (3d) 363
[2001] O.J. No. 4307
Docket No. C35930

Court of Appeal for Ontario
Laskin, Feldman and Simmons JJ.A.
November 9, 2001

Family law -- Support -- Child support -- Arrears -- Dismissal of application to rescind arrears does not constitute absolute bar to future rescission of those same arrears in event of change of circumstances sufficient to warrant variation -- Finding of present incapacity to pay does not foreclose prospect of ability to pay in future -- Motions judge did not err in reducing quantum of child support on basis of father's present inability to pay -- Motions judge erred in rescinding arrears without assessing father's future capacity to pay those arrears.

The father was ordered to pay child support in the amount of $250 per month for each of the parties' two children in 1992. He brought an application in 1995 to vary the quantum of child support and rescind arrears. The applications judge found that the father had the ability to meet the terms of the support order and dismissed the application. In 2001, the father applied for similar relief. The motions judge found that the father was an alcoholic and that he did not have the earning capacity to pay the arrears or the support order. He imputed an income of $9,000 to the father and ordered him to pay child support in the federal Child Support Guidelines amount of $102 per month. He also rescinded all outstanding arrears of child support. The mother appealed.

Held, the appeal should be allowed in part.

There was sufficient evidence before the motions judge to justify the conclusion that there had been a change of circumstances warranting a reduction in the quantum of child support. The father had failed to generate even a subsistence level of income over a period of several years. The motions judge did not err in imputing an income of $9,000 to the father.

The finding of a present incapacity to pay does not, of itself, foreclose the prospect of ability to pay in the future. The motions judge erred by rescinding arrears without assessing the father's future capacity to pay those arrears. Moreover, the father's

failure to make any voluntary efforts at compliance was a factor that militated against even partial rescission of arrears. Enforcement of outstanding arrears should be suspended, save to the extent of $50 per month.

The dismissal of an application to rescind arrears does not constitute an absolute bar to future rescission of those same arrears, provided there is a change in circumstances sufficient to warrant a variation.

APPEAL from an order varying child support quantum and rescinding arrears.

Haisman v. Haisman (1994), 1994 ABCA 249 (CanLII), 22 Alta. L.R. (3d) 56, 116 D.L.R. (4th) 671, 7 R.F.L. (4th) 1 (C.A.) [Leave to appeal to S.C.C. refused (1995), 15 R.F.L. (4th) 51n, 195 N.R. 159n], revg in part (1993), 1993 CanLII 6988 (AB KB), 7 Alta. L.R. (3d) 157 (Q.B.), consd

Other cases referred to *Carl-Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125, 110 Sol. Jo. 425, [1967] R.P.C. 497 (H.L.); *Filipich v. Filipich* (1996), 1996 CanLII 1294 (ON CA), 26 R.F.L. (4th) 53, 92 O.A.C. 319 (C.A.); *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27, 141 Sask. R. 241, 134 D.L.R. (4th) 321, 196 N.R. 321, 114 W.A.C. 241, [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177; *Gray v. Gray* (1983), 1983 CanLII 4531 (ON SC), 32 R.F.L. (2d) 438 (Ont. H.C.J.); *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270, 40 C.C.E.L. (2d) 1, 99 C.L.L.C. 210-013 (C.A.), affg (1997), 30 C.C.E.L. (2d) 123 (Ont. Gen. Div.); *Setinas v. Setinas* (1984), 1984 CanLII 4756 (ON CJ), 43 C.P.C. 44, 39 R.F.L. (2d) 43 (Ont. Prov. Ct.)

Statutes referred to *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 17(1), (4); *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 21; *Family Responsibility and Support Arrears Enforcement Act, 1996*, S.O. 1996, c. 31; *Support and Custody Orders Enforcement Act*, R.S.O. 1980, c. S.28, s. 14 [renamed *Family Support Plan Act*, S.O. 1991, Vol. 2, c. 5, s. 1(1); repealed S.O. 1996, c. 31, s. 73(1)]

Rules and regulations referred to Child Support Guidelines, O. Reg. 391/97 (*Family Law Act*), s. 14 Federal Child Support Guidelines, SOR/97-175 (*Divorce Act*) O. Reg. 167/97 (*Family Responsibility and Support Arrears Enforcement Act, 1996*), s. 19

Michael B. Wannop, for appellant Dianne Rose DiFrancesco.
Michael David Lannan, for respondent Richard George Couto.

Richard A. Noll, for respondent Ministry of Community and Social Services.

The judgment of the court was delivered by

[1] SIMMONS J.A.: -- This appeal raises two issues. The first issue requires consideration of when a change of circumstances will justify rescission of arrears of child support on a variation application. The second issue is whether the dismissal of an application to rescind child support arrears bars a future application for rescission.

[2] Ms. DiFrancesco appeals from an order dated February 8, 2001 that rescinded outstanding arrears of child support totalling almost $40,000, reduced the amount of child support payable to her by Mr. Couto for the parties' two children from $500 per month to $102 per month, and directed that Mr. Couto provide her proof of his income by affidavit every three months.

[3] Ms. DiFrancesco says no variation should have been made because there had been no change in circumstances since the date of the last variation order as required by s. 17(4) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). Further, she says the motions judge erred by rescinding arrears that had accumulated prior to the date of the last application to rescind, which was dismissed. Finally, she says the motions judge erred by "imputing" an income of only $9,000 per annum to Mr. Couto, given that he lost a better paying job as the result of misconduct, and has indicated he will not support his children.

[4] I would allow the appeal in part, by setting aside the order for rescission of arrears, and by suspending enforcement of arrears against income sources, save to the extent of $50 per month.

Background

[5] Ms. DiFrancesco and Mr. Couto divorced on August 31, 1992. The divorce judgment required Mr. Couto to pay child support in the amount of $250 per month per child for each of the parties' two children.

[6] Ms. DiFrancesco assigned the order for child support to the Ministry of Community and Social Services on June 1, 1991, as she was in receipt of family benefits at the time. The assignment remained in effect for various periods between June 1, 1991 and November 30, 1995. The arrears that accumulated during that period were accordingly the property of the Ministry. They totalled approximately $8,000 as of January 30, 2001.

[7] Mr. Couto brought the first variation application on May 25, 1995. It was confirmed that child support arrears were at a zero balance as of July 1993; that Mr. Couto had been on public assistance since June 1993; and that approximately $7,000 in child support arrears had accumulated since that date. A parental support worker for the Social Services Department of the Regional Municipality of Waterloo also indicated that the Ministry of Consumer and Social Services was prepared to waive its share of child support arrears, totalling $6,485.17 as of April 30, 1995.

[8] Ms. DiFrancesco submitted that Mr. Couto lost the job he held on the date of the Divorce Judgment as a result of misconduct. She said he worked for his cousin while receiving workers' compensation benefits, and that he was also disentitled from receiving unemployment insurance benefits because of his actions.

[9] The applications judge concluded that "in [his] opinion the applicant [had] the ability to meet the terms of the existing support order" and dismissed the application for a variation of periodic support and rescission of arrears.

[10] By notice of motion dated December 11, 2000, Mr. Couto applied for similar relief to that requested on May 25, 1995. On February 8, 2001, the motions judge made the following findings:

> The Respondent has long been an alcoholic. He does not have the earning capacity to pay the arrears nor the current support order. I accept that a reasonable imputed income to him at the present time based on the material before me is $9,000 per year.

[11] The motions judge reduced ongoing child support payments to $102 per month, being the amount payable pursuant to the federal Child Support Guidelines, SOR/97-175, for two children based on an income of $9,000 per year. He also rescinded all outstanding arrears of child support, including the pre-May 1995 arrears.

[12] Mr. Couto's material filed on the February 2001 motion disclosed his income from 1992 onward as follows: 1992 -- $17,496 (employment earnings of $14,174, tips of $2,247 and other income of $1,075); 1993 -- $12,053 (employment earnings of $5,331, W.C. benefits of $2,587 and social assistance of $4,135); 1994 -- $549 per month (social assistance); 1995 -- $6,447 (social assistance); 1996 - $5,842 (social assistance); 1997 -- $4,974 (social assistance); 1998 -- $4,867 (social assistance); 1999 -- $7,387 (social assistance of $2,096 and employment earnings of $5,291).

[13] Mr. Couto's evidence was that he went to California shortly after the Divorce Judgment was granted to commence rehabilitation for alcohol abuse. He said that he has had a problem with alcohol abuse throughout his adult life and that it has

impacted adversely on his ability to hold a steady job for extended periods of time. He claimed that he worked at one job from September 1999 until May 15, 2000 but that he was unjustly terminated due to a personality conflict. He did not qualify for Unemployment Insurance because his employer advised Unemployment Insurance that it was a voluntary termination. In October 2000, he registered with an employment service and was assigned a temporary position where he earned $9 per hour. He said he was hopeful that he would earn $9,000 in 2001 based on an average of 20 hours per week at $9 per hour.

[14] Ms. DiFrancesco claims that Mr. Couto's annualized income as of the date of the Divorce Judgment was in excess of $26,500 per year. According to her, annualized figures for the jobs he held in 1999 and 2000 reveal an earning capacity ranging from $21,000 per year to $16,548 per year respectively.

[15] Ms. DiFrancesco said the following in her affidavit filed in support of the February 2001 motion:

> From the time we initially separated, the respondent has repeatedly said to me that he will pay nothing to me for child support. He expressed this view to me repeatedly and regularly for years while he continued to make no payments under the support Order.

[16] Ms. DiFrancesco claims that payments made by Mr. Couto over the years have all been involuntary. She points particularly to the fact that although he was working during portions of 1999 and 2000, there is no indication Mr. Couto ever gave notice of his income sources to the Family Responsibility Office.

[17] Although apparently prepared to waive arrears at one time, the Ministry of Community and Social Services supports the position taken by Ms. DiFrancesco on this appeal, that it was not open to the motions judge to rescind arrears accumulated prior to a dismissed rescission application. It submits the decision, in that respect, is res judicata.

Decision

[18] In my view, there was sufficient evidence before the motions judge to justify his conclusion that there had been a change in circumstances as of February 2001 warranting a reduction in the quantum of periodic child support. It is apparent that as of February 2001, Mr. Couto had failed to generate even a subsistence level of income over a period of several years. This, combined with Mr. Couto's recent history of temporary work placements through an employment agency, led the motions judge to impute to him an annual income of only $9,000.

[19] The motions judge attributed Mr. Couto's persistent failure to generate additional income to alcoholism, and not to wilful non-compliance. He obviously concluded that Mr. Couto's longstanding failure to generate income had affected his capacity to earn income. Accordingly, unlike the situation existing in May 1995, when the applications judge determined Mr. Couto still had the capacity to generate sufficient income to pay the original support order, the motions judge in February 2001 determined that was no longer the case. Based on the evidence before him, I am unable to say his conclusion was unreasonable.

[20] I agree that the motions judge would have been justified in imputing additional income to Mr. Couto, however, I am not persuaded that he erred in arriving at a figure of $9,000. Mr. Couto had only recently returned to the workforce after a very lengthy absence and had no track record of steady employment. The nature of Mr. Couto's continuing employment was uncertain.

[21] The motions judge's findings that Mr. Couto lacks the capacity to pay the original support order on an ongoing basis, and that a variation of ongoing support is therefore necessary, are justified based on an imputed income of $9,000 per year. In my view, however, the finding that Mr. Couto lacks capacity to pay relates only to his present capacity to pay. The motions judge did not consider, nor was there evidence concerning, the likelihood of Mr. Couto regaining the capacity to make payments on account of the arrears in the future.

[22] The finding of a present incapacity to pay does not, of itself, foreclose the prospect of ability to pay in the future. In *Haisman v. Haisman* (1994), 1994 ABCA 249 (CanLII), 7 R.F.L. (4th) 1, 116 D.L.R. (4th) 671 (Alta. C.A.) Hetherington J.A. said the following at paras. 26-27:

> 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.
>
> 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.

[Emphasis in original]

[23] The decision to rescind arrears involves consideration of a variety of factors. In *Filipich v. Filipich* (1996), 1996 CanLII 1294 (ON CA), 26 R.F.L. (4th) 53, 92 O.A.C. 319, this court noted that some of the factors a court may consider are set out in *Gray v. Gray* (1983), 1983 CanLII 4531 (ON SC), 32 R.F.L. (2d) 438 (Ont. H.C.J.) at p. 441. They are as follows:

> (1) the nature of the obligation to support, whether contractual, statutory or judicial;
>
> (2) the ongoing financial capacity of the respondent spouse;
>
> (3) the on-going need of the custodial parent and the dependent child; . . .
>
> (4) unreasonable and unexplained delay on the part of the custodial parent in seeking to enforce payment of the obligation, tempered, however, in the case of child support with the fact that such support obligation exists for the child's benefit, is charged with a corresponding obligation to be used by the custodial parent for the child's benefit and cannot be bargained away to the prejudice of the child;
>
> (5) unreasonable and unexplained delay on the part of the respondent spouse in seeking appropriate relief from his obligation; and
>
> (6) where the payment of substantial arrears will cause undue hardship, the exercise of the court's discretion on looking at the total picture, weighing the actual needs of the custodial parent and child and the current and financial capacity of the respondent, to grant a measure of relief, where deemed appropriate.

[24] In light of the exercise of discretion involved in rescinding arrears, I would not adopt as strict a position as that set out in *Haisman*, *supra*. Rather, in my view, the motions judge erred in this case by rescinding outstanding arrears without assessing Mr. Couto's future capacity to pay those arrears.

[25] I note as well that there was no evidence before the motions judge that Mr. Couto had made any voluntary payments on account of arrears following the dismissal of his last application for a variation. Similarly, there was no evidence indicating that he had notified the Family Responsibility Office that he had resumed employment in 1999. Mr. Couto's apparent failure to make any voluntary efforts at compliance is a factor that militates against even partial rescission of arrears at this time. Wilful non-

compliance with the terms of a support order should not be condoned or rewarded by the court.

[26] I do not, however, view the dismissal of an application to rescind arrears as an absolute bar to future rescission of those same arrears, provided there is a change in circumstances sufficient to warrant a variation.

[27] First, I note that the language of the provisions authorizing a variation is very broad. Although the *Divorce Act* stipulates that the change in circumstances necessary to trigger the right to seek a variation must occur after the date of the last variation order, there is no such language limiting the scope of variation available. [See Note 1 at end of document]

[28] Second, the issues presented on succeeding motions for rescission of arrears lack the identity necessary to give rise to issue estoppel. [See Note 2 at end of document] The first issue for determination on an application for variation of support payments or arrears is whether there has been a change in circumstances sufficient to warrant the variation sought. Once that threshold is met, the presenting issue is whether rescission is justified in the context of the changed circumstances. The fact that a prior application did not meet the threshold for variation does not, of necessity, determine the issue of whether rescission of those same arrears is justified in the context of subsequent changed circumstances.

[29] In *Setinas v. Setinas* (1984), 1984 CanLII 4756 (ON CJ), 39 R.F.L. (2d) 43, 43 C.P.C. 44 (Ont. Prov. Ct.) at para. 18, Main Prov. Ct. J. made the following comments about the application of issue estoppel to matrimonial litigation, and variation applications in particular:

> Fundamental to the doctrine of estoppel by record including issue estoppel is that it is in the public interest that there should be an end of litigation: *interest reipublicae ut sit finis litium* . . . However, it must be borne in mind that matrimonial litigation, as it relates to the issue of ongoing support, both as to enforcement and variation, differs from ordinary litigation. Finality can be achieved only where a support obligation ceases and when all outstanding arrears are either paid or rescinded. Until that point is reached, s. 21 of the [*Family Law Reform Act*, R.S.O. 1980, c. 152] allows for applications to vary and to rescind. To that extent, the maxim must be modified. This is not to say that frivolous or vexatious proceedings will be tolerated. The six-month limitation on applications to vary, without leave of the court, an award of costs on a solicitor and client basis and the power in the court to stay or dismiss as an abuse of process are sufficient to dissuade litigants from making such applications.

[30] *Setinas* involved a question of whether findings made in an enforcement proceeding could give rise to issue estoppel in a subsequent application to vary made pursuant to the *Family Law Reform Act,* R.S.O. 1980, c. 152. Although not directly applicable here, the comments are instructive in that they address a particular feature of family law legislation, namely the ability to seek a variation of a prior order based on changed circumstances.

[31] Finally, the requirement that there be a change in circumstances as a precondition to the right to seek a variation protects against abuse and signals that the scope of the variation available is very broad. Once the threshold of changed circumstances is met, the court's discretion to make the order that would have been appropriate, had those circumstances existed in the first instance is engaged. The fact that an order for rescission was inappropriate on an earlier date, may impact on the manner in which the discretion to grant a variation is exercised; for example, where a debtor was recalcitrant in fulfilling his obligations. It does not, however, bar the court's discretionary authority to make the appropriate order, based on the changed circumstances existing when a subsequent application is made.

[32] The determination that issue estoppel does not bar subsequent rescission of arrears following an unsuccessful application to vary, is consistent with decisions relating to variation of orders for custody and access. Those decisions indicate that once the threshold of changed circumstances is met, the court must embark on a fresh inquiry into what is in the best interests of the child, not based on a presumption in favour of the custodial parent, but rather based on the findings of the judge who made the previous order, as well as the evidence of the new circumstances. Ultimately, the issue to be determined is the best interests of the child: *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177.

[33] At this point, Mr. Couto has not demonstrated either a present willingness to support his children voluntarily, or an accurate picture of his future capacity to contribute to outstanding arrears. It is not, therefore, appropriate to rescind outstanding arrears. Rather, enforcement should be suspended to an extent that reflects the motions judge's finding concerning Mr. Couto's present ability to pay. In my view, it would be unreasonable to conclude that Mr. Couto could contribute more than $152 per month to the support of his children from an annual income of $9,000.

[34] A question arose on the appeal as to how any arrears that are collected should be applied. The assignment executed by Ms. DiFrancesco provides:

> The Recipient agrees that the Director under the [*Support and Custody Orders Enforcement Act*] [See Note 3 at end of document] pay the Assignee any money

> in arrears . . . in the manner provided by the [*Support and Custody Orders Enforcement Act*].

Section 14 of the *Support and Custody Orders Enforcement Act* provided:

> 14. Money paid on account of a support order shall be credited,
>
> > (a) first to the principal amount most recently due and then to any interest owing on that amount; and
> >
> > (b) then to the balance outstanding in the manner set out in clause (a), unless the debtor specifies otherwise at the time the payment is made or the court orders otherwise.

The *Support and Custody Orders Enforcement Act* was superseded by the *Family Responsibility and Support Arrears Enforcement Act, 1996*. Section 19 of Regulation 167/97 to that Act provides:

> 19. Money paid on account of a support order and support deduction order shall be credited in the following order:
>
> > 1. To the principal of the most recent support accrual due and then to any interest owing on that principal.
> >
> > 2. To the principal balance outstanding and then to any interest owing on that principal in the manner set out in paragraph 1.

Disposition

[35] I would accordingly allow the appeal in part. I would set aside para. 1 of the order of Hambly J. and substitute an order:

> 1. dismissing the respondent's application for rescission of arrears;
>
> 2. suspending enforcement of outstanding arrears as against income sources of Mr. Couto, save to the extent of $50 per month; provided that the order for suspension of enforcement of arrears will terminate immediately if, subsequent to the date of the order, Mr. Couto fails to comply with his obligation to provide disclosure of his income to Ms. DiFrancesco; provided any default may be proven by affidavit from Ms. DiFrancesco, filed with the Family Responsibility Office and with the Superior Court office in Kitchener; and provided that the order will

> not preclude enforcement of outstanding arrears against refunds payable to Mr. Couto from any government source; and 3. directing that all payments received on account of arrears shall be applied first in payment of the most recent support accrual due and then to interest on account of that principal, and next on account of the then most recent support accrual due and then to interest on account of that principal, and so on until all arrears are paid in accordance with O. Reg. 167/97 as amended.

[36] I would award costs of the appeal to the appellant.

Appeal allowed in part.

Notes

Note 1: Section 17(1) of the *Divorce Act* provides:

> 17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> > (a) a support order or any provision thereof on application by either or both former spouses; ...

Before varying child support, "the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order": *Divorce Act*, s. 17(4). Finally, leaving aside the issue of whether the enactment of the Guidelines alone constitutes a change justifying a variation, the Child Support Guidelines, O. Reg. 391/97, provide that any "change in the condition, means, needs or other circumstances of either parent or spouse or of any child who is entitled to support" constitutes a change of circumstances: Child Support Guidelines, s. 14.

Note 2: The requirements of issue estoppel, as set out by Lord Guest in *Carl-Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935, [1966] 2 All E.R. 536, are that (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel is final; and, (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised. Canadian courts have consistently applied these three requirements: see *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270 (C.A.).

Note 3: R.S.O. 1990, c. S.28, renamed the *Family Support Plan Act* by S.O. 1991, Vol. 2, c. 5, s. 1(1), proclaimed in force March 1/92. Repealed S.O. 1996, c. 31, s. 73(1), proclaimed in force May 12, 1997.

Note 4: S.O. 1996, c. 31.