**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***Smith v. Helppi***, 2011 NSCA 65

**Date:** 2011/07/12
**Docket:** CA 337900
**Registry:** Halifax

**Between:**

Jamie Rene Smith

Appellant

v.

Arla Stephanie Helppi

Respondent

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| **Judges:** | Oland, Fichaud, Farrar, JJ.A. |
| **Appeal Heard:** | May 19, 2011, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed per reasons for judgment of Oland, J.A.; Fichaud and Farrar, JJ. A. concurring |
| **Counsel:** | Jamie Rene Smith, appellant in person<br>Arla Stephanie Helppi, respondent in person |

**Reasons for judgment**:

[1] The appellant, Jamie Smith, appeals an order requiring him to pay a certain amount of child maintenance based on imputed income, and arrears of child maintenance.

[2] In December 2006, 13 years after they began living together and eight years after their marriage, Mr. Smith and the respondent, Arla Helppi, separated. They have two children, born in 1994 and 2000 respectively. The parties are not yet divorced.

[3] In January 2007 Mr. Smith was ordered to pay child maintenance of $644 per month ($574 maintenance for the two children and $70 for special expenses). His payments were based on his then annual income as a short haul truck driver of $39,600.

[4] Mr. Smith made regular, timely child maintenance payments while employed and, from February 2009 to September 2009, while unemployed and drawing Employment Insurance. After that, he did not have regular income. He was unemployed and without income from October 2009 until February 2010. No payment was made in December 2009.

[5] In May 2010 Mr. Smith applied to have the existing maintenance and special expenses order varied and the arrears reduced, based on the changes to his employment circumstances. Judge John MacDougall of the Family Court heard his application on July 27, 2010. Mr. Smith testified. He gave evidence as to his work history, including that he was then employed, his work was seasonal and he would be laid off shortly. He also testified that he did not pay child maintenance in December 2009 and afterwards, other than amounts that were garnisheed in the spring of 2010 after he was working again. Mr. Smith was cross-examined by Ms. Helppi who represented herself. Ms. Helppi testified, and was cross-examined by counsel for Mr. Smith.

[6] After hearing submissions by Mr. Smith's lawyer and Ms. Helppi, the judge rendered an oral decision in which he imputed income, reduced the monthly child maintenance payments, and refused to waive the arrears. He observed that Mr. Smith's experience and qualifications are as a truck driver; although, over the last

five or six years he had been released from three truck driving positions, the reasons did not suggest that he is not a competent truck driver; and, by Mr. Smith's own evidence, a fully employed truck driver would make $30,000 a year. The judge stated that even when fully employed, Mr. Smith was "less than efficient" in advising Maintenance Enforcement. In his testimony, Mr. Smith had agreed that it was Ms. Helppi who twice had to find out that he was employed and report it.

[7] The judge continued:

> [17] The evidence that I'm provided, is that Mr. Smith, the applicant, is not as forthright as he ought to be with respect to his obligations in being employed, and also reporting the employment, so that he is making the appropriate amount of contribution for his maintenance to Maintenance Enforcement and to Ms. Helppi-Smith.
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> [18] I do not accept that he has made the reasonable effort that he is required to make in order to secure full time employment. Nor do I come to the conclusion that once he is employed that he is doing what is in the best interest of his children in maintaining that employment or finding replacement employment as quickly and responsibility *(sic)* as he should. ...
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> [19] I'm therefore going to impute income to Mr. Smith at 30,000 dollars, which by his acknowledge *(sic)* is a reasonable amount for somebody fully employed in his trade or in his position.
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> [20] With respect to the arrears, the arrears, in my opinion, are a different issue altogether. Because I'm not satisfied that he was appropriately employed, at this particular time, or in the recent past, I'm not going to waive the arrears either. I don't think that would be reasonable in the circumstances. It is his responsibility to satisfy me that it would be. And as I've already indicated, I have some difficulty with respect to the efforts that Mr. Smith has been making in terms of gaining and retaining full employment.

[8] The judge ordered that, effective August 1, 2010, Mr. Smith's monthly payment of special expenses of $70 would terminate. He also ordered that, effective the same date, his child maintenance payment would be reduced from $574 to $453 per month, being the table amount based on an annual income of $30,000 for two children.

[9] Mr. Smith appeals the judge's decision and his order dated August 20, 2010. In his factum, the self-represented appellant summarized his grounds of appeal thus:

> The judge made an error in law when he awarded arrears for a time when the Appellant had no income and not reducing the amount of child support when the Appellant was in receipt of employment insurance benefits.

In his written and oral submissions, Mr. Smith submits that the judge misapprehended the evidence regarding his employment history and income, he erred in law in failing to waive arrears when he had no income, and the arrears resulted from a delay in his application being heard in court.

[10] In *Hickey v. Hickey,* [1999] 2 S.C.R. 518, the Supreme Court of Canada set out the standard of review for matters involving spousal and child support orders. Justice L'Heureux-Dubé, for the court, wrote:

> 11 Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. ...
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> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[11] It is helpful to begin with the statutory provisions relevant to this appeal. Section 37(1) of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, states that maintenance orders may be varied "where there has been a change in circumstances since the making of the order or the last variation order." Section 37(2) provides that when making a variation order in respect of child maintenance,

the court shall apply s. 10. That section states that when determining the maintenance to be paid for a dependant child, the court shall do so in accordance with the *Child Maintenance Guidelines*, N.S. Reg. 53/98 as amended, made pursuant to s. 55 of the *Act*.

[12] What constitutes a change of circumstances for the purposes of a s. 37 variation is found in s. 14 of the *Guidelines*, which reads in part:

> **14** For the purposes of Section 37 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 maintenance order:
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> (a) in the case where the amount of child maintenance includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child maintenance order or any provision thereof;

[13] Section 19 of the *Guidelines* allows the court to impute income, as it considers appropriate, in certain circumstances. It reads in part:

> **19 (1)** The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
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> (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;

[14] As set out above, s. 37 of the *Act* and s. 14 of the *Guidelines* require a change of circumstances before an existing child maintenance order can be varied. The judge here implicitly found such a change by imputing lower income than had been used as the basis for the January 2007 order for child maintenance.

[15] I will begin my consideration of Mr. Smith's arguments with his assertion that the singular cause of his arrears was the delay by the court in getting the matter heard. The record does not support this position. Mr. Smith testified that he was always aware that he could go to court to have his support lowered. Indeed, according to his evidence, he had made an effort in early January 2008 when he

wanted the payments lowered to reflect his 2007 income. He dropped that application for "personal reasons". It was Mr. Smith who then decided to wait until the spring of 2010, after his 2008 income had fallen below his 2007 income, his job situation had deteriorated in 2009, his Employment Insurance had run out, and he had been without income for some months, before he applied again for a reduction in his child maintenance obligations. In these circumstances, I cannot accept his argument that the accumulation of arrears results from excessive court delay.

[16] Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in *Gould v. Julian*, 2010 NSSC 123, where Justice Darryl W. Wilson stated:

> [27] Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in **Hanson v. Hanson**, [1999] B.C.J. No. 2532, as follows:
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> > **1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". . . .**
> >
> > **2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.**
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> > **3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.**
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> > **4. Persistence in unremunerative employment may entitle the court to impute income.**

> **5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.**
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> **6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.**
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> . . .
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> [33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[17] I am unable to agree that, as Mr. Smith urges, in imputing income the judge significantly misapprehended his employment situation and finances. The appellant faults the judge for believing that he would be laid off shortly. Yet, according to the transcripts, this is precisely what he had testified. In the course of his argument at the hearing of his appeal, Mr. Smith sought to introduce facts and argue new matters not before the judge whose decision he appeals. These included his circumstances and earnings after that decision. No application for fresh evidence having been made or allowed, such material cannot be considered by this court in reviewing the judge's decision.

[18] It is clear from the record and the judge's decision that he considered Mr. Smith's job skills and experience and what, according to his evidence, the appellant had done towards being fully employed. It is also clear that he was not satisfied that Mr. Smith had made the appropriate effort in gaining and retaining full employment. As explained earlier, the judge who sees and hears the parties directly is entitled to a degree of deference. He has an advantage denied this court. I see no error in principle or serious misapprehension of the evidence regarding the appellant's employment history, finances or otherwise which would support judicial interference with the judge's decision to impute income.

[19] I will next consider Mr. Smith's submission that the judge erred by failing to forgive his arrears of child maintenance payments. These arrears are the accumulation of monthly payments not made at all or not made in full.

[20] I observe that there is a distinction between a retroactive award of child support and a retroactive reduction of child support. The former awards payments and thereby increases child support. See, for example, *D.B.S v. S.R.G*, 2006 SCC 37 which set out factors governing retroactive awards of child support. In contrast, a retroactive reduction of child support reduces support, whether it takes the form of forgiveness of arrears or a retroactive decrease in support payable and recalculation of arrears. See, for example, *Brown v. Brown*, 2010 NBCA 5 which distinguished *D.B.S.* on this basis, and *Kuszelewski v. Michaud*, 2009 NSCA 118. Other than *Gould*, the cases supplied by Mr. Smith to support his argument pertained to retroactive awards rather than retroactive reductions.

[21] In *Brown*, Robertson J.A. writing for the New Brunswick Court of Appeal indicated that, in regard to the requisite material change of circumstances, an order to retroactively vary downwards could be based on many factors. He explained:

> **19** There is no reason why the concept of "change in circumstances" cannot be viewed flexibly as it has in the past, thereby accommodating a host of factual developments justifying the issuance of retroactive orders that reflect a partial or full remission of support arrears. Certainly, estoppel and detrimental reliance based arguments that the support recipient led the payer to believe that the obligation to pay support would not be enforced would fall within the ambit of the change in circumstances test. Hence, for purposes of deciding this appeal, and for ease of analysis, I am going to consider the factual scenarios described in ss. 118(1)(b) and (c) of the *Family Services Act* as falling within the concept of "change of circumstances".
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> **20** As a matter of fact, the two most common grounds for relief from the payment of arrears are the payer's reduced ability to pay and the payee's reduced need for support during the period of retroactivity. With respect to the payer's ability to pay, the majority of cases involve payers who experienced a decline in income (most often due to unemployment or illness) in the years during which the arrears were accumulating. Of course, a payer who wants to reduce support arrears because of an income decline must be prepared to make full and complete disclosure.
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> **21** In summary, the jurisdiction to order a partial or full remission of support arrears is dependent on the answer to two discrete questions: Was there a material change in circumstances during the period of retroactivity and, having regard to all other relevant circumstances during this period, would the applicant have been granted a reduction in his or her support obligation but for his or her untimely

> application? As a general proposition, the court will be asking whether the change was significant and long lasting; whether it was real and not one of choice.

[22] Mr. Smith submits that the judge erred by not reducing or forgiving his arrears for the periods when his only income was employment insurance or when he was unemployed and had no income. However, as indicated in the passage from his decision cited in paragraph 7 above, the judge was not satisfied with Mr. Smith's frankness, his repeated failure to report employment and income, and his efforts in gaining and retaining full employment in the trucking field. Not having accepted Mr. Smith's arguments regarding his reduced income and Mr. Smith having acknowledged the lack of full disclosure regarding his income, the judge refused to waive the arrears of child maintenance arrears. In these circumstances, I am unable to accept that the judge erred in not forgiving the arrears.

[23] I would dismiss the appeal and award Ms. Helppi costs of $750.00 inclusive of disbursements.

Oland, J.A.

Concurred: Fichaud, J.A.

Farrar, J.A.