NOVA SCOTIA COURT OF APPEAL
Citation: *Thomson v. Pitchuck*, 2020 NSCA 65

Date: 20201020
Docket: CA 493257
Registry: Halifax

Between:

John Edward Thomson

Appellant

v.

Karen Ann Pitchuck

Respondent

Judge:	The Honourable Justice M. Jill Hamilton
Appeal Heard:	By way of written submissions. Last submissions received on August 17, 2020
Subject:	Child Support
Summary:	The father appealed retroactive and ongoing child support and the trial judge's decision not to impute income to the mother.
Issues:	(1) Did the judge err by misapprehending the evidence and finding as a fact that R. lived primarily with his mother from 2015 to 2018 inclusive? (2) Did the judge err in law by varying child support retroactively without finding a material change of circumstances since the June 2015 Order? (3) Did the judge err by not imputing income to the mother? (4) Were the judge's reasons sufficient?
Result:	Appeal allowed in part, as agreed by the parties, without costs. The judge made no error in finding that the only child of the parties together lived primarily with the mother, which constituted a material change of circumstances, allowing retroactive child support to be ordered based on the table

amount set out in the *Guidelines*. Nor did he err in not imputing income to the mother. While his brief oral reasons were somewhat confusing, they were sufficient to allow the parties to know "what" he decided and "why" and to provide for meaningful appellate review. The amount of retroactive child support ordered by the judge was reduced from $6,078 to $5,168 because he varied the monthly amount payable prior to the date of the existing order when such a variation had not been sought by the mother.

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Judges:	Bryson, Hamilton and Fichaud JJ.A.
Appeal Heard:	By way of written submissions.
Last submissions received on:	August 17, 2020
Held:	Appeal allowed in part without costs as per reasons for judgment of Hamilton J.A.; Bryson and Fichaud JJ.A. concurring
Counsel:	Candee J. McCarthy, for the appellant Emma L. Astephen, for the respondent

Reasons for judgment:

BACKGROUND

[1] The appellant father, John Edward Thomson, appeals the August 15, 2019 Order of Justice Robert M. Gregan, which ordered him to pay the respondent mother, Karen Ann Pitchuck, $6,078 retroactive child support for the period from January 1, 2015 to the end of 2018 and $149 per month prospective child support commencing January 1, 2019 for their son R.

[2] Given the restrictions arising from the COVID-19 pandemic the appeal was heard on the basis of the record and written submissions.

[3] I would allow the appeal in part, as agreed by the parties, by reducing the amount of retroactive child support to $5,168 on the basis the judge erred in his calculation of the correct time period in ordering retroactive child support prior to the June 18, 2015 Order.

FACTS

[4] R., born in 2004, is the only child of the parties together. They married in July 2005 and separated in May 2007. Justice M. Clare MacLellan granted a final Order on June 18, 2015. It provided for shared custody, with access to be determined by the parties. The father was ordered to pay monthly child support of $149 and for “major purchases for the child when required”. No provision was made for the mother to pay child support. The Order referred to the agreement of the parties that there was no outstanding retroactive child support owing at that time.

[5] The father unilaterally ceased paying child support at the end of June 2017.

[6] The mother commenced divorce proceedings on January 26, 2018. The parties were divorced and a consent Corollary Relief Order (“CRO”) was issued on January 14, 2019. The CRO provided for shared custody, now with R. to decide the amount of parenting time he would have with each parent. The issues of retroactive and prospective child support and imputation of income to the mother were severed and heard by Justice Gregan three months later, on April 24, 2019. His brief oral decision was given on June 18, 2019, followed by his Order of August 15, 2019.

THE DECISION

[7] The judge first dealt with retroactive child support. He noted the shared custody and access provisions of the June 2015 Order. He noted it did not set out a parenting schedule, the incomes of the parents or the basis on which the $149 monthly child support was set. He referred to the evidence presented by both parties as to the amount of time R. spent with each of them from June 2015 to their divorce. He found the evidence of the father's witnesses did not support the father's position that R. lived with him 80 to 90% of the time from the date he stopped paying child support in June 2017. He also clearly rejected the father's own testimony to this effect. The father now agrees the evidence did not support a finding that R. lived with him 80 to 90% of the time from June 2017.

[8] Instead the judge accepted the mother's evidence, that R. lived "primarily" with her:

> … I accept [R.] remained in Ms. Pitchuck's care primarily.

[9] He found the mother's evidence was supported by the November 8, 2018 Child Wish Report prepared by Lisa Fraser-Hill, which indicated R. told her during their interview at the end of September 2018 that he was living with his mother during the week from Monday to Friday:

> The report of Lisa Fraser Hill confirmed this point. That [R.] was residing primarily through the week with Ms. Pitchuck … attending Sydney Academy.

[10] The Child Wish Report also indicated R. wanted to live with his father "on a full time basis" and visit his mother on weekends.

[11] The consequence of the judge finding R. lived primarily with his mother was that s. 9 of the *Guidelines*, which is engaged in determining the amount of child support where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40% of the time over the course of a year, did not apply. The application of s. 9 typically results in amounts of child support lower than the presumptive table amount that would otherwise apply pursuant to the *Guidelines*.

[12] The judge accepted the mother's explanation that she did not work outside the home because she had to be available to deal with R.'s considerable behavioural issues that resulted in him not attending school for long periods of time. Accordingly, he rejected the father's argument that income should be

imputed to the mother on the basis she was intentionally underemployed after June 2015.

[13] The judge stated:

> I find from the evidence as it relates to retroactive support, and I'm not satisfied from the evidence, that a change in the shared, shared [sic] custody is such as to warrant a change in child support.

[14] This statement led to confusion. The father interprets this to mean the judge found there was no change of circumstances as required by s. 17(4) of the *Divorce Act*, R.S.C. 1985, c. 3 before child support can be varied. He says this supports his argument that the judge erred by varying child support retroactively from the $149 set out in the June 2015 Order to the table amount. The mother argues that whatever the judge meant by the above statement, he specifically found a material change of circumstances, namely: R. lived primarily with his mother rather than in the shared custody regime anticipated by the June 2015 Order.

[15] The judge went on to briefly refer to some of the factors to be considered when determining whether retroactive child support should be ordered, which are set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37. He found the mother was not blameworthy but that the father was, for unilaterally stopping payment of child support in June 2017. He also found the father had not proven undue hardship.

[16] The judge ordered the father to pay retroactive child support in the amount claimed by the mother, which was to be based on the full table amount:

> Therefore retroactive support will set at the amount suggested by Ms. Astephen [the mother's counsel] based upon the income information and the calculations provided for the child support guidelines, which results in arrears by Mr. Thomson [of] $6,078.

[17] The judge then dealt with prospective child support from January 1, 2019. He noted the parties had consented to the CRO just three months earlier, which provided for shared custody, now with R. to decide how much parenting time he would have with each parent. On the evidence before him, he declined to predict the amount of time R. would spend with each parent. He encouraged the parents to accept R.'s decision once it was evident and agree to any appropriate changes in light of his choice. He noted their ability to apply for a variation order once R.'s living conditions were established if no agreement could be reached.

[18] The judge did not mention in his reasons the mother's position before him on the amount of prospective child support—that she was not seeking prospective child support based on the table amounts but on a set-off basis because of the anticipated shared custody provided for in the recent CRO. He referred to the amount of child support ordered in the June 2015 Order when shared parenting was anticipated and ordered the same amount of $149 per month prospectively.

ISSUES

[19] The issues are:

(a) Did the judge err by misapprehending the evidence and finding as a fact that R. lived primarily with his mother from 2015 to 2018 inclusive?

(b) Did the judge err in law by varying child support retroactively without finding a material change of circumstances since the June 2015 Order?

(c) Did the judge err by not imputing income to the mother?

(d) Were the judge's reasons sufficient?

STANDARD OF REVIEW

[20] Specifically with respect to appeals involving support issues in family matters, the Supreme Court of Canada set out the applicable standard of review in *Hickey v. Hickey*, [1999] 2 S.C.R. 518:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> 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. These principles were stated by Morden J.A. of the Ontario Court of Appeal in

> *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, per Wilson J.; in *Moge v. Moge*, [1992] 3 S.C.R. 813, per L'Heureux-Dubé J.; and in *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 691, per Sopinka J., and at pp. 743-44, per L'Heureux-Dubé J.
>
> 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.

[21] In addition, the general standards of review this Court applies to findings of a trial judge were set out in *Laframboise v. Millington*, 2019 NSCA 43 as follows:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 ff.; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

ANALYSIS

1. Did the judge err by misapprehending the evidence and finding as a fact that R. lived primarily with his mother from 2015 to 2018 inclusive?

[22] In arguing the judge misapprehended the evidence, the father highlights particular parts of the evidence he considers favourable to his position. He suggests R.'s indication to Ms. Fraser-Hill, that he lived with his mother from Monday to Friday, can be interpreted as meaning he lived with his father from Friday to Monday, three days out of seven constituting 42% of the time. He also says the judge erred in assessing credibility.

[23] The father does not refer to any evidence that is determinative of how much time R. spent with each parent from 2015 to 2018. There was evidence before the judge from which he could make his finding that R. lived primarily with his mother. It was for him to assess the whole of the evidence and, in light of the conflicting and inconsistent evidence, to decide what evidence to accept in making his findings of fact. There is nothing in the record suggesting he failed to do this. While the judge did not refer in his brief reasons to all the evidence the father urges supports his position, he is not required to do so.

[24] On questions of fact or inferences based on accepted facts, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. This Court gives deference to findings of credibility made by trial judges, as they are best positioned to make such findings having the opportunity to see the hearing unfold first-hand.

[25] My review of the record and the submissions does not satisfy me the judge misapprehended the evidence or made a palpable and overriding error in finding as a fact that R. lived primarily with his mother from 2015 to 2018.

2. Did the judge err in law by varying child support retroactively without finding a material change of circumstances since the June 2015 Order?

[26] Section 17(4) of the *Divorce Act* provides:

> Factors for child support order
>
> (4) Before the court makes a variation order in respect of a child support order, 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.

[27] Section 14 of the *Guidelines* provides:

> Circumstances for variation
>
> 14 For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> > (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
> >
> > (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
> >
> > (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

[28] As mentioned in paragraph 14 above, there was confusion with respect to whether the judge found a change of circumstances as a result of the following statement in his reasons:

> I find from the evidence as it relates to retroactive support, and I'm not satisfied from the evidence, that a change in the shared, shared [sic] custody is such as to warrant a change in child support.

[29] As indicated, the father says this shows the judge failed to find the required change of circumstances and therefore erred in varying retroactively the amount of child support. The mother says the judge's specific finding that R. was primarily in his mother's care constitutes a change of circumstances permitting the judge to vary child support retroactively as he did.

[30] Whatever the judge meant by this statement, it is clear from reading the whole of his reasons in light of the record that the judge was satisfied R. was in the primary care of his mother from the time of the June 2015 Order until the end of 2018. This change from the shared parenting regime anticipated in the June 2015 Order constitutes a material change of circumstances permitting the judge to vary of the amount of child support: *Hess v. Hamilton*, 2018 ONSC 661; *Bradford v. Bradford*, 2017 BCSC 661 at paragraphs 156–162; *A.V.R. v. M.J.A.*, 2016 SKQB 272; *Vargas v. Berryman*, 2010 BCSC 542.

3. Did the judge err by not imputing income to the mother?

[31] The judge's decision that income should not be imputed to the mother impacted both retroactive and prospective child support. The judge accepted the mother's testimony as to why she had not been working—that up until that time, she needed to be available for R. due to his past and present behavioral problems, which resulted in him missing significant amounts of time from school. The evidence supports the fact R. was absent from school for substantial periods of time. Under these circumstances, the judge made no error in not imputing income to the mother.

4. Were the judge's reasons sufficient?

[32] In *McAleer v Farnell*, 2009 NSCA 14, Chief Justice MacDonald, as he then was, states:

> [12] I begin with the recent decision of the Supreme Court of Canada in *R.E.M.*, 2008 SCC 51. Although decided in a criminal law context, I nonetheless find that it offers good guidance in this appeal. There, the Chief Justice explained how a trial judge's reasons fulfill five basic purposes: 1) to inform the parties why the decision was made; 2) to provide public accountability for the judicial decision; 3) to permit effective appellate review; 4) to help ensure fair and accurate decision making, and 5) to provide guidance to future courts in accordance with the principle of *stare decisis.*
>
> [13] These basic goals, the Chief Justice explains, are effectively fulfilled if the decision informs the reader as to what was decided and why:
>
> > ¶17 These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in *Morrissey* of the object of a trial judge's reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties <u>what</u> he or she has decided and <u>why</u> he or she made that decision" (emphasis added). What is required is a logical connection between the "what" - the verdict - and the "why" - the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.
> >
> > …

> ¶25 The functional approach advocated in *Sheppard* suggests that what is required are reasons sufficient to perform the functions reasons serve - **to inform the parties** of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. This principle from *Sheppard* was reiterated thus in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 31: ... [Emphasis in original.]

[14] Furthermore, the amount of detail required to meet these basic functions very much depends on the context of each case:

> ¶44 The degree of detail required may vary with the circumstances. Less detailed reasons may be required in cases where the basis of the trial judge's decision is apparent from the record, even without being articulated. More detail may be required where the trial judge is called upon "to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue ...": *Sheppard*, at para. 55.

[15] For this reason, our role on appeal is not to criticize the level of detail or expression. Instead it is to determine if the functions noted above have been fulfilled to the point where a meaningful appeal is available:

> ¶53 However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focused, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.

[33] Thus the question is do the judge’s reasons, read in light of the record and live issues before him, indicate “what” he decided and “why”. “What” the judge ordered is clear, retroactive child support as calculated by the mother and prospective child support of $149 per month. Reading his reasons in light of the record, I am also satisfied they tell us “why” he ordered child support as he did.

[34] With respect to retroactive child support, he found the father was blameworthy for breaching the June 2015 Order in June 2017 by unilaterally stopping his payment of child support, justifying a reconsideration of child support. He found R. lived primarily with his mother from 2015 to 2018 rather than in the shared custody situation anticipated by the June 2015 Order, which constitutes a material change of circumstances. There was no dispute between the parties about

the amount of the father's income and the judge refused to impute income to the mother. He accepted the mother's calculation of the amount of retroactive child support, which was purported to be based on the father paying the table amounts.

[35] With respect to prospective child support, the judge set the amount at $149 per month because: (1) the CRO issued by consent three months earlier provided for shared custody, which would invoke s. 9 of the *Guidelines*; (2) $149 was the amount ordered when shared custody was anticipated in the June 2015 Order and the father's employment had not changed; (3) the mother only sought prospective child support on a shared custody basis, assuming R. would be with each parent more than 40% of the time and (4) the evidence did not satisfy him as to what R.'s future living circumstances would be.

[36] The fact the judge did not specify how the father's additional payments for R. were factored into his decision or specifically refer to the factors in s. 9 of the *Guidelines* that are to be considered when setting the amount of child support, does not result in his reasons being insufficient on this record. His failure to do so does not satisfy me he did not consider all of the evidence and relevant legal principles in reaching his conclusion. He is not required to refer to all of the evidence and law in a "watch me think" fashion in his reasons.

[37] Given the record and the live issues before the judge, his reasons are sufficient as they allow the parties to know what he decided and why and to permit meaningful appellate review.

CONCLUSION

[38] The judge accepted the mother's calculations of retroactive child support. Both parties now agree the calculations incorrectly included an increased amount of child support from January 1 to May 31, 2015, five months prior to the June 2015 Order. Their agreement is appropriate because the June 2015 Order stated no retroactive child support was owing and the mother had not sought a variation prior to the date of that Order. On this basis, I agree with the parties that the appeal should be allowed in part and the judge's decision altered by reducing the amount of retroactive child support by $910 (the $331 per month table amount less the $149 per month paid by the father for five months) to $5,168.

[39] No costs were awarded at trial and I would not award costs on this appeal.

Hamilton J.A.

Concurred in:

Bryson J.A.

Fichaud J.A.