NOVA SCOTIA COURT OF APPEAL

Citation: ***Hiltz v. Anderson***, 2013 NSCA 147

Date: 20131217
Docket: CA 411471
Registry: Halifax

Between:

Angela Jayne Hiltz

Appellant

v.

Patrick Jerome Anderson

Respondent

Judges:	Saunders, Farrar and Bryson, JJ.A.
Appeal Heard:	December 10, 2013, in Halifax, Nova Scotia
Held:	Appeal is dismissed without costs, per reasons for judgment of Bryson, J.A.; Saunders and Farrar, JJ.A. concurring
Counsel:	Appellant in person Respondent in person

Reasons for judgment:

[1] By order issued March 28, 2012, Associate Chief Justice Lawrence O'Neil fixed child support payments payable by Robert Jerome Anderson to Angela Jayne Hiltz under s. 37 of the *Maintenance and Custody Act*, at $1,169.00 per month based on Mr. Anderson's annual income of $85,347.00.

[2] On August 12, 2012 Angela Jayne Hiltz filed an application with the Supreme Court (Family Division) to increase child support payments from Patrick Jerome Anderson with respect to their two their children. Ms. Hiltz based her application on Mr. Anderson's 2011 T4 income tax return which showed "total income" of $111,392.00. The application was heard by The Honourable Justice Elizabeth Jollimore on December 12, 2012.

[3] The parties were unrepresented before Justice Jollimore and before this Court.

[4] Mr. Anderson is a DND firefighter. He receives a military pension in addition to his firefighter's income. At the hearing before Justice Jollimore, Mr. Anderson explained that an error in the calculation of his pension payments resulted in a one-time pension adjustment which produced an increase of his 2011 income to $111,392.00.

[5] Justice Jollimore gave an oral decision at the December 12, 2012 hearing. Based on his pay stubs and evidence in response to questions from Justice Jollimore, she calculated Mr. Anderson's regular annual income at $80,965.78. Using this figure, Justice Jollimore calculated child support payments, using The Federal Child Support Guidelines for Nova Scotia. She fixed child support payments at $1,102.00 a month. The order implementing Justice Jollimore's decision was issued December 27, 2012. It only varies child support payments. All previous orders "continue to be in force and effect".

[6] Ms. Hiltz has appealed, claiming in her Notice of Appeal that Justice Jollimore was wrong to "take [Mr. Anderson's] word" for what his income was. She says support payments should not have gone down and should have been based on Mr. Anderson's 2011 T4 income of $111,397.00.

[7] Justice Jollimore made her decision relying on the evidence before her, including Mr. Anderson's explanation of his sources of income. She accepted his evidence. That is a finding of fact with which we cannot normally interfere. As this Court said in *Gill v. Hurst*, 2011 NSCA 100:

> [21] … this Court has emphasized many times that it is not for a court of appeal to retry a case or revisit factual findings of a trial judge, provided that there was evidence to support them. Absent "palpable and overriding error" which means an obvious mistake with respect to material evidence, the court will not interfere with findings of fact by a trial judge.

[8] This principle applies to credibility findings. In *Hubley v. MacRae*, 2011 NSCA 25 this Court said:

> [29] Determining credibility is a function squarely within the competence of trial judges. They are called to make such determinations on a daily basis. They have the advantage of seeing and hearing the parties testify. They are entitled to accept all, some or none of any witness's testimony.

[9] Justice Jollimore had evidence to support her finding of Mr. Anderson's annual income. She properly calculated support payments based on that income. She did not err in doing so.

[10] Although it was not raised in her Notice of Application before Justice Jollimore, Ms. Hiltz also complained that Mr. Anderson was not paying for ballet lessons for one of their children, despite provision for that in the March 28th order of Associate Chief Justice O'Neil. In this respect the order actually says:

> Patrick Anderson must continue to pay for the costs associated with ballet for M., for as long as he and M. agree that she wishes to continue with ballet, and for as long as his financial situation allows for him to continue paying these costs. Should Patrick Anderson not be able to continue to pay this expense, he will provide 30 days' notice of his intention to discontinue paying to Angela Hiltz.

[11] Ms. Hiltz did not file any evidence with respect to ballet, but during Justice Jollimore's oral decision the following exchange occurred:

> **MS. HILTZ:** But what about ballet and stuff …
>
> **THE COURT:** That amount will start ... ma'am, I have not been asked to vary the amount for ballet.
>
> **MS. HILTZ:** That's why we're here.
>
> **THE COURT:** The ballet order is contained in the previous order. It's not being changed. The previous orders, as they relate to contributions to special or extraordinary expenses are not being changed. The application in front of me is an application filed on August 28, 2012, to vary the table amount of child maintenance. It speaks to nothing else. There's no request to vary payments for ballet lessons or for anything else. All I've been asked to do ...

[12] In the Notice of Appeal before this Court, Ms. Hiltz did not raise the question of payments by Mr. Anderson for ballet for one of their children. In her Notice of Appeal Ms. Hiltz requested an order "… that the court should allow the appeal and the judgment appealed from be varied and according[sic] to his actual income on his income tax".

[13] Ms. Hiltz did refer to ballet payments in her factum saying that Mr. Anderson told her at a conciliation meeting on November 27, 2012 that he would not be paying for ballet any longer. She claims ballet payments are not now being made and that "this needs to be enforced".

[14] In his factum Mr. Anderson concedes that he notified Ms. Hiltz that he could not pay ballet. He explained he was paying additional expenses such as cell phones for the children and dental expenses (although he was reimbursed for these expenses after submitting claims for them). There was also evidence before Justice Jollimore of Mr. Anderson paying for items requested by his children. He says he paid ballet expenses of $185.20 a month until October 2012. Mr. Anderson claims that he gave appropriate notice to Ms. Hiltz of his intention to cease paying for ballet lessons owing to his circumstances in accordance with the March 28, 2012 order of Associate Chief Justice O'Neil.

[15] The question of ballet expenses was not before Justice Jollimore. Nor is it properly before this Court which does not enforce maintenance orders. There is a Maintenance Enforcement process. The record indicates Ms. Hiltz would be familiar with that. In making this observation, the Court is not commenting one

way or the other on whether there has been any breach of the March 12, 2012 order with respect to ballet expenses.

[16] The appeal should be dismissed. Mr. Anderson does not seek costs which he says would only result in hardship for his children. No costs should be ordered.

Bryson, J.A.

Concurred in:

Saunders, J.A.

Farrar, J.A.