NOVA SCOTIA COURT OF APPEAL
Citation: ***Barkhouse v. Wile***, 2014 NSCA 11

Date: 20140129
Docket: CA 418266
Registry: Halifax

Between:

Kimberley Barkhouse

Appellant

v.

James Wile

Respondent

Judges:	Fichaud, Farrar and Bryson, JJ.A.
Appeal Heard:	December 3, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Bryson, J.A.; Fichaud and Farrar, JJ.A. concurring.
Counsel:	Patrick Eagan, for the appellant Damian Penny, for the respondent

Reasons for judgment:

[1] Kimberley Barkhouse appeals to this Court for the second time in two years arising from a dispute with her former common-law partner, James Wile. In this appeal she seeks to prevent Mr. Wile from setting off child support payments against costs awarded to him in two previous proceedings.

[2] Ms. Barkhouse and Mr. Wile have twin sons from a relationship which ended in 1995. There is a record of acrimonious legal proceedings between the parties. The relevant background to this appeal begins with a hearing before The Honourable Justice Beryl MacDonald on September 30, 2010. That hearing required resolution of numerous issues including child support, retroactive child support, income and disclosure disputes as well as child care expenses. Justice MacDonald decided most of those issues in favour of Mr. Wile (2010 NSSC 400).

[3] In the course of her decision Justice MacDonald was very critical of Ms. Barkhouse whose conduct Justice MacDonald described in various contexts as unreasonable. She granted Mr. Wile costs. Ms. Barkhouse unsuccessfully appealed the costs award to this Court which also awarded costs against her, (2011 NSCA 50). As a result, Ms. Barkhouse owes Mr. Wile total costs for both proceedings of $6,377.56. Ms. Barkhouse has not made any payment against those costs awards.

[4] On June 11, 2013, Mr. Wile applied to set-off the costs award against child support. In an oral decision of the same date, Justice MacDonald decided in Mr. Wile's favour. Ms. Barkhouse appeals, arguing that Justice MacDonald erred in law in ordering a set-off. She acknowledges that the law is unsettled in Nova Scotia, but she says that Justice MacDonald mischaracterized the law of set-off in Ontario on which she relied to render her decision in this case. Moreover, Ms. Barkhouse argues in her decision that Justice MacDonald failed to mention Ms. Barkhouse's argument that the Ontario law relied upon by Justice MacDonald was wrong. Alternatively, assuming that a set-off may be legally possible, Ms. Barkhouse argues that in this case the loss of monthly child support would "create a situation where the child would or could suffer". To place Ms. Barkhouse's arguments into context, some further factual background is required.

Facts:

[5] Since their relationship ended in 1995, each party has entered into new relationships. Ms. Barkhouse's husband is on disability. He receives approximately $27,000 per year in LTD payments.

[6] The hearing before Justice MacDonald on June 11, 2013 occurred in the context of a pending application by Mr. Wile that child support payments to Ms. Barkhouse should be discontinued because the child living with Ms. Barkhouse would be going to university out-of-province in September. In the meantime, he would be working at a Sea Cadet camp for the summer. The child living with Mr. Wile was also to attend university in the fall.

[7] Mr. Wile had been paying child support of $425 a month to Ms. Barkhouse. Based on her modest CPP income of approximately $6,700 a year, Ms. Barkhouse did not pay any child support for her son who resided with Mr. Wile. Some months after her set-off decision, Justice MacDonald ordered that child support payments to Ms. Barkhouse should be discontinued after November 2013. She ordered each party to contribute to each son's university education by direct payment to the institutions. The practical result of the second decision is that the set-off amount in dispute in this appeal is $2,125.

Can Court Set-Off Costs Against Child Support:

[8] Ms. Barkhouse's fundamental submission is that it is wrong in law to set-off child support against another debt owed by the spouse receiving child support. She urges that this Court should adopt the position of the British Columbia Court of Appeal in *Jamieson v. Loureiro*, 2010 BCCA 52 where that court refused to set-off a cost award in favour of Mr. Loureiro against child support owed to Ms. Jamieson. In that case the British Columbia Court of Appeal reviewed the law of set-off generally and then applied it to the specific context of child support. In concluding that no set-off should be permitted, the Court said:

> 54 In my opinion, the question of whether set-off is available against child support must begin with the acknowledgment that child support is the right of the child. The principles were recently stated, in the context of retroactive child support, in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231:
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> > 36 It is trite to declare that the mere fact of parentage places great responsibility upon parents. Upon the birth of a child, parents are immediately placed in the roles of guardians and providers. As La Forest

> J. wrote in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 62, it is "[f]or obvious reasons [that] society has imposed upon parents the obligation to care for, protect and rear their children."
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> 38 The contemporary approach to child support was delineated by Kelly J.A. in *Paras v. Paras*, [1971] 1 O.R. 130. In that case, the Ontario Court of Appeal established a set of core principles that has been endorsed by this Court in the past and continues to apply to the child support regime today: see *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Willick v. Willick*, [1994] 3 S.C.R. 670. These core principles animate the support obligations that parents have towards their children. They include: child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent.

…

57 First, I am unable to conceive of a case in which set-off would be allowed against future child support, and consider that it would be a very rare case in which one would consider set-off against arrears of child support. The support is for the benefit of the child and should not be lost because the person to whom the support is paid may owe, in another capacity, amounts to the payor. There is simply an insufficient connection and an absence of manifest injustice in requiring the payor to pay the full amount of support.

58 Second, it is plain that the limited financial resources of Ms. Jamieson means that, without the child support owed and owing by Mr. Loureiro, the children will suffer a diminished lifestyle, contrary to the principle enunciated in *D.B.S.*

59 Third, the costs award was made against Ms. Jamieson because she was the unsuccessful litigant in Mr. Loureiro's motion to reduce child and spousal support. In my opinion, Mr. Loureiro's cross-claim for costs is insufficiently connected to his legal and moral obligations to pay child support. Rather, his claim can be simply seen as the expected result of successful litigation.

60 In my opinion, the cross-claims in respect of costs and child support lack the necessary nexus to give rise to equitable set-off. The children's right to child support is, in my view, completely separate from the costs awarded, notwithstanding that the costs related to an application to vary child support. Further, the appellant's arguments that Ms. Jamieson stands in a position of trustee of the funds is, in my opinion, unhelpful and inapt. The analogy merely seeks to saddle the children with the litigation strategy of Ms. Jamieson, which I consider irrelevant to the analysis.

[9] Ms. Barkhouse particularly invites us to endorse the argument that, "… it is desirable to maintain a 'bright white line' around child support obligations …", (per *Walsh v. Walsh*, [2008] O.J. No. 98 (Ont. S.C.J.), cited in *Jamieson* at ¶46). She submits that cases that have allowed set-off of child support should not be followed because they do not acknowledge – or give sufficient effect to – the fact that child support belongs to the child, not the defaulting parent. Alternatively, set-off should be limited to arrears only and not prospective child support, as ordered here by Justice MacDonald.

[10] In reply, Mr. Wile refers to a number of Nova Scotia decisions where the Nova Scotia Supreme Court (Family Division) has awarded a set-off of costs of child support. He notes that Justice MacDonald preferred the more nuanced approached of the Ontario Court of Justice in *Peers v. Poupore*, 2008 ONCJ 615 where Justice Spence said:

> 54 Justice Corbett's reference to the "bright white line" of child support seems to suggest that support payments received by a custodial parent are somehow segregated into a separate pool of funds, used solely for the benefit of the child. However, in real life, this is not how parents usually deal with their income and expenses. For most parents, all money received is simply pooled into "general" revenues, out of which they pay their expenses, whether it is for transportation, rent, food or for the support of their children. It is out of that same pool that a parent would then have to satisfy a court-ordered costs award.
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> …
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> 60 As I stated above, the notion of treating child support payments as a segregated fund, does not mesh with the reality of how parents normally run their lives. Accordingly, whether a court is prepared to make a set-off order should depend less on an unyielding rule and, rather, upon the facts of each case. In my view, the inquiry should be directed to ascertaining what is reasonable, fair and just in all the circumstances of a particular case.
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> 61 To impose a blanket prohibition against set-off orders would, in some cases, give a support recipient licence to litigate and to act as unreasonably as he or she saw fit, possibly with complete impunity. That kind of conduct has the potential to drive a support payor of modest means into financial ruin. It must not be forgotten that an order for costs is only as good as the ability to enforce that order.

Justice Spence determined that on the facts of the case before him, the child in question would not suffer from a set-off order.

[11] Mr. Wile also notes that *Jamieson* has been distinguished in British Columbia where child support *arrears* were set-off against costs and no adverse effect on the children would occur*: Petroczi v. Petroczi*, 2011 BCSC 1223.

[12] Some of the cases distinguish between set-off against child support arrears and set-off against prospective child support. For example, in *Woo v. Chin*, [2007] O.J. No. 4590 (S.C.), the court observed:

> 57 The distinction between ordering a set-off of arrears but not of prospective support presumably derives from a consideration that, in the case of an award for arrears, the award may not directly benefit the child, but rather, may be compensation to the parent for expenses that have already been incurred. The same logic would apply to an order for retroactive support. In this case, there is the additional factor that Mr. Chin did not comply with his child support obligations when the children were with Ms. Woo.

[13] Mr. Wile counters that this distinction may encourage a payor spouse to allow payments to fall into arrears so as to accommodate a set-off.

[14] It is quite true that child support is the right of the child. To repeat a quotation from *Jamieson*, in *D.B.S. v. S.R.G.*, 2006 SCC 37, Justice Bastarache, for the majority, put the principle in context:

> 38 The contemporary approach to child support was delineated by Kelly J.A. in *Paras v. Paras*, [1971] 1 O.R. 130. In that case, the Ontario Court of Appeal established a set of core principles that has been endorsed by this Court in the past and continues to apply to the child support regime today: see *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Willick v. Willick*, [1994] 3 S.C.R. 670. ***These core principles animate the support obligations that parents have towards their children. They include: child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent***.
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> [Emphasis added]

[15] Justice Bastarache went on to note the change brought about by the adoption of the *Federal Child Support Guidelines*:

> 41 In rendering his decision in *Paras*, Kelly J.A. followed this tradition. He wrote that the amount of child support should be ascertained based on the care, support and educational needs of the child, and that this sum should then be divided according to the respective incomes and resources of the parents: see pp.

134-35. In this Court's decision in *Richardson*, Kelly J.A.'s comments were related as follows, at p. 869:

> The legal basis of child maintenance is the parents' mutual obligation to support their children according to their need. That obligation should be borne by the parents in proportion to their respective incomes and ability to pay: *Paras v. Paras, supra*.

42 Both the *Paras* and *Richardson* decisions were decided at a time when need-based support was the paradigm being followed. In other words, while the amount of child support due was *divided* according to parents' incomes, it was still *determined* primarily on the basis of the child's needs. With the introduction of the *Guidelines*, which came into force on May 1, 1997, Parliament announced an important change to that regime.

43 The *Guidelines* provide a simplified way for parents – and courts – to quantify child support obligations. They respond to the desire to "take the mystery out" of the process (Department of Justice, *Federal Child Support Guidelines Reference Manual* (July 1997), at p. i). This desire was a response to the need-based system, whereby costly – and unpredictable – litigation was often necessary to define what amount of support was due. Not surprisingly, this fact had preoccupied legislators prior to the *Guidelines*: see Hon. Allan Rock (Minister of Justice and Attorney General of Canada), *House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., April 25, 1995, at p. 11760. ***But while they seek to instill efficiency and consistency in child support matters, the Guidelines are also attentive to concerns of fairness and flexibility, adopting a "children first" perspective***: see *Francis v. Baker*, [1999] 3 S.C.R. 250, at para. 39; *Guidelines*, s. 1.

44 In order to accomplish its goals, the *Guidelines* generally make only two numbers relevant in computing the amount of child support owed: the number of children being supported, and the income of the payor parent. Thus, under the *Guidelines*, not only is the amount of child support divided according to parents' incomes, but it is determined on that basis as well:

> The guidelines will establish without the need for trial the levels of child support to be paid according to the income of the person paying. The amounts are calculated by a formula that takes into account average expenditures on children at various income levels. As income levels increase or decrease so will the parents' contributions to the needs of the children, just as they would if the family had remained together.
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> (Mr. Gordon Kirkby (Parliamentary Secretary to Minister of Justice and Attorney General of Canada), *House of Commons Debates*, vol. 134, 2nd Sess., 35th Parl., October 1, 1996, at p. 4901)

45 The implications of this approach are profound. Except for situations of shared custody, where additional considerations apply, a parent's increase in income will not only increase his/her *share* of the child support burden; it will

> increase the *total amount* of support owed. Under a pure need-based regime, the underlying theory is that both parents should provide enough support to their children to meet their needs, and that they should share this obligation proportionate to their incomes. But under the general *Guidelines* regime, the underlying theory is that the support obligation itself should fluctuate with the payor parent's income. Under a pure need-based regime, when a payor parent does not increase the amount of his/her support when his/her income increases, it is the *recipient parent* who loses: the recipient parent is the one entitled to receive greater help in meeting the child's needs. ***But under the general Guidelines regime, when a payor parent does not increase the amount of his/her support when his/her income increases, it is the child who loses***: the child is the one who is entitled to a greater quantum of support in absolute terms.
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> 46 That said, however, it would be wrong to think that the *Guidelines* represent a complete break from the past. Even before the *Guidelines* came into force, this Court endorsed a more nuanced need-based approach by recognizing that "a significant increase in the means of the payor parent may require that the needs of the child include benefits that previously were not available": *Willick*, at p. 691. By the same token, the *Guidelines* do not impose a regime where the needs of the child are regarded as completely irrelevant. As I wrote in *Francis*, presumptively applicable Table amounts listed for payor parents earning over $150,000 may be altered when they "are so in excess of the children's reasonable needs so as no longer to qualify as child support" (para. 41). Parliament also allows the court to consider "the condition, means, needs and other circumstances of the child" in other situations when the court exercises its discretion in calculating support amounts: ss. 3(2)(*b*) and 9(*c*) of the *Guidelines*.
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> [Emphasis added]

[16] *D.B.S.* emphasized the primacy accorded child support by both the legislature and the courts. The priority of child support is evident in other respects. For example, like spousal support, it has preferred status as a debt of the payor. It also enjoys priority over spousal support.

[17] On the other hand, child support is not the "property" of the child in a narrow, technical sense. If Mr. Wile had served an execution order against Ms. Barkhouse's bank account, any notional amount of "child support" could not be segregated or protected from execution. As much was admitted by Ms. Barkhouse's counsel in argument before this Court. This tends to support the view of Justice Spence in *Peers* that in "real life" all money is pooled for family expenses.

[18] The "bright white line" analysis also ignores the context in which support arises and is paid. Litigation which results in debts which a payor spouse cannot

collect may very well have an adverse effect on a child if it impairs the resources and ability to pay of the payor spouse. Moreover, such an approach may ignore the public interest in swift and inexpensive adjudication of claims on the merits. If an indigent or intransigent spouse persists in unreasonable litigation with impunity, that is neither in the interest of the public, her spouse, or dependent children. In such circumstances, removing child support from the "family pool" can provide a disincentive to the spouse dipping into that pool for other purposes (such as fruitless litigation), and at least mitigates the adverse economic impact on the payor spouse. For these reasons, a "bright white line" rule may not be in the best interests of the public, the parties or their children. Accordingly, in my view it would be preferable to avoid a hard and fast rule and better to permit a more subtle approach to set-off in such cases.

[19] The "bright white line" rule also divorces child support from the litigious means of attaining it. That is an artificial approach which ignores the concrete circumstances in which the obligation arises, is quantified and made payable. It is true that child support is the right of the child – but its actual determination occurs at the instance of a spouse pursuing those rights for the child. To reiterate – to completely insulate the child from the unreasonable or reckless behaviour of its parent, ultimately may do more harm to the payor spouse, to the justice system and even to the child herself.

[20] Certainly, as a general rule, setting off a spousal debt against child support is undesirable and is to be avoided. However, the circumstances of a particular case may dictate otherwise. Accordingly where:

(a) the debt involved – costs here – was incurred in connection with the support claim;

(b) there is no reasonable prospect that the payor spouse will collect costs from the defaulting payee spouse:

(c) there would be no adverse impact on the children involved;

(d) it would not otherwise be inequitable to order a set-off

then it may be appropriate to set-off some or all of child support against costs associated with litigating that issue . However, the burden of establishing no adverse impact on the children should rest with the spouse seeking set-off. In such

cases it will be a matter of discretion for the trial judge, considering the foregoing principles, to decide if, and to what extent, set-off should be ordered.

[21] Applying those principles to this case, Justice MacDonald began her analysis by inquiring about the status of the children. She learned that they were both working for the summer and both attending university in the fall. Justice MacDonald was clearly aware of the circumstances of both children and both families when she made her decision. She said:

> … I have reviewed the material very carefully and I've looked at the facts of this situation very carefully, both re-reading my decision in the matter, re-reading my decision on costs, reading the Court of Appeal's decision on costs and I look to therefore, to what Justice Spence said which is in the Ontario case, (inaudible) where he says:
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> > "As stated above, the notion of treating child support payments as a segregated fund does not mesh with the reality of how parents normally run their lives. Accordingly, whether a court is prepared to make a set-off order should depend less on an unyielding rule and rather upon the facts of each case."
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> And of course in that Judge's view, the inquiry should be directed to ascertaining what is reasonable, fair and just in all the circumstances of the particular case. He went on to say that, and I agree:
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> > "To impose a blanket prohibition against set-off orders would, in some cases, give a support recipient license to litigate and to act as unreasonably as he or she saw fit, possibly with complete impunity."
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> And quite frankly my decision in respect to the cost issues and certainly reading the Court of Appeal one – it echoes these comments so that appears to be the road that Ms. Barkhouse was embarking upon. It indicates that kind of conduct has the potential to drive a support payor of modest means into financial ruin. It must not be forgotten that an order for costs is only as good as the ability to enforce that order. And in this particular situation I know that Ms. Barkhouse has another partner. I know that each has a child in their home to care for and I know that she's paid absolutely nothing and hasn't tried to pay anything for the significant costs awarded against her and I think in all the circumstances of that case, this is one where it is appropriate to permit a set-off of the entire amount of the child support payment as against the cost award.
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> Now that may not last for very long as I say because if this court later and subsequently decides that she is no longer entitled to receive anything, but it's six and one half dozen of another. There is no new money being injected here really so that will have to be left, as I've said, for another day. And I'm now prepared to set another day for the parties to gather together their material on what their

> expectations are, given that these two young adolescents are going have, by my information, some summer employment. One is not going to be living in the home of the parent for the entire summer and then it appears both are going to university, one of which – which child is going to Memorial? I believe that's the child who is living with Ms. Barkhouse, is that correct?

[22] The debt incurred by Ms. Barkhouse – i.e. the costs due to Mr. Wile – arose out of a claim for child support in litigation that was not conducted reasonably by Ms. Barkhouse. As Justice MacDonald said in the initial proceeding (2010 NSSC 400):

> [3] By March 24, 2010 Mr. Wile had provided his calculation of the amount of child maintenance he should have paid from Oct 2005 until March 31, 2010 based upon changes in his income. He was prepared to pay this amount and I ordered him to do so at the hearing. He did not agree to pay for the child care amount claimed by Ms. Barkhouse. Initially the alleged payment was to her mother for the years from September 1998 until October 2002. The total amount requested was $8,600.00. In her affidavit dated September 21, 2010 the payment requested was $16,800.00 for a period from 2000 until 2007.
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> [4] During the hearing, Ms. Barkhouse provided no evidence to deny the correctness of the calculations provided by Mr. Wile in respect to the table child maintenance to be paid from October 2005 until March 31, 2010. In addition, while giving testimony Ms. Barkhouse withdrew her request for contribution toward the alleged child care expense.

[23] This makes it clear that Mr. Wile was meeting his child support obligations and Ms. Barkhouse was unreasonably frustrating settlement of that issue. The expenses incurred by Mr. Wile – and the consequent costs award against Ms. Barkhouse – are obviously connected to the child support issue.

[24] Justice MacDonald was satisfied that there was no likelihood of Mr. Wile collecting costs from Ms. Barkhouse, resulting in an injustice to him. Ms. Barkhouse had behaved unreasonably in the earlier litigation giving rise to the costs awarded. In principle, conduct like that of Ms. Barkhouse could drive a payor spouse to financial ruin and to Justice MacDonald this appeared to be, "… the road that Ms. Barkhouse was embarking upon". Justice MacDonald considered all the circumstances in light of "… what is reasonable, fair and just". Nothing else in the circumstances made it inequitable to order a set-off.

[25] In argument before this Court, Ms. Barkhouse's counsel conceded that the set-off would not likely have any adverse effect on the child who has been residing with Ms. Barkhouse.

[26] In our view, while not articulating the principles as set out above, Justice MacDonald effectively applied them in rendering her decision. She made no error of law or palpable or overriding error of fact in doing so.

[27] I would dismiss the appeal. The respondent did not request costs – none are ordered.

Bryson, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.