NOVA SCOTIA COURT OF APPEAL
Citation: ***MacKenzie v. MacKenzie***, 2003 NSCA120

Date: 20031114
Docket: CA192521
Registry: Halifax

Between:

Aaron Keith MacKenzie

Appellant

v.

Janice Leigh MacKenzie

Respondent

Judges:	Cromwell, Oland & Hamilton, JJ.A.
Appeal Heard:	October 7, 2003, in Halifax, Nova Scotia
Held:	Appeal allowed in part and the Corollary Relief Judgement amended as set out in ¶ 16 herein; costs of $1,500 awarded to the respondent, as per reasons of Hamilton, J.A.; Cromwell & Oland, JJ.A. concurring.
Counsel:	Peggy Power, for the appellant Angela Swantee, for the respondent

Reasons for judgment:

[1] Aaron MacKenzie, owner of a used car business and residential landlord, appealed the April 9, 2003 decision of Justice J. E. Scanlan of the Supreme Court wherein he imputed an annual income of $46,000 to Mr. MacKenzie and ordered child support on that basis.

[2] The parties married on August 1, 1997, had one child born June 21, 1998 and separated on April 28, 2001. They were each represented by counsel when they entered into a separation agreement dated October 23, 2001. It provided that Mr. MacKenzie would pay monthly child support based on an annual income of $32,700, of $278 plus 42% of the net child care expenses retroactive to May 1, 2001.

[3] Ms. MacKenzie applied for an uncontested divorce on April 30, 2002, forwarding the separation agreement and some financial information with her application.

[4] By letter from the Prothonotary at the Truro Justice Centre dated June 10, 2002, Ms. MacKenzie was advised her application for an uncontested divorce would not proceed until additional financial information relating to Mr. MacKenzie was provided. By letter dated June 25, 2002, Ms. MacKenzie sent Mr. MacKenzie a Notice to File **Federal Child Support Guideline** Information. He did not reply to this Notice. Ms. MacKenzie, with notice to him, applied to the trial judge on August 14, 2002, for an order requiring Mr. MacKenzie to provide the required additional financial information. Mr. MacKenzie did not attend the court hearing. An Order issued August 27, 2002, requiring him to produce additional financial information and setting a date for trial. Mr. MacKenzie did not provide that information nor did he appear at the trial held December 18, 2002.

[5] Ms. MacKenzie was examined at the trial about Mr. MacKenzie's income. She gave evidence that Mr. MacKenzie earned "much more than appeared on paper". According to Ms. MacKenzie, during the marriage Mr. MacKenzie's company paid for personal gas expenses and he had written cheques for child support on his rental property bank account. On the basis of her evidence the trial judge deemed Mr. MacKenzie to have an annual income of $46,000 and ordered him to pay base child support of $382 per month, in accordance with the

Guidelines for this amount of income, and 50% of the net daycare expenses. The trial judge also ordered that this increased amount of child support be paid retroactively to July 1, 2001.

[6] Before turning to the merits of the appeal itself, I must first deal with a preliminary matter. In connection with his appeal, Mr. MacKenzie made an application for the admission of fresh evidence pursuant to **Civil Procedure Rule 62.22**. He sought to have some of the financial information that the trial judge ordered him to produce on August 27, 2002, plus additional financial information concerning his used car business, admitted and considered by this court in coming to its decision on the appeal. In response, Ms. MacKenzie sought to have certain of his child support cheques admitted. At the hearing of the appeal, Mr. MacKenzie's application was denied and Ms. MacKenzie was not permitted to admit the cheques, with reasons to follow. These are those reasons.

[7] In **Edwards v. Edwards** (1994), 133 N.S.R. (2d) 8 (NSCA) this court set out the conditions governing the admission of fresh evidence before the appeal court in ¶ 27 as follows:

> (1) The evidence should generally not be admitted if by due diligence it could have been adduced at trial.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue at the trial.
>
> (3) The evidence must be credible in the sense that it was reasonably capable of belief.
>
> (4) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> (See also **Palmer and Palmer v. The Queen,** [1980] 1 S.C.R. 759)

[8] Since all of the financial information Mr. MacKenzie sought to admit was available to him at the time of the trial, he failed to satisfy the first condition and his application to admit that as fresh evidence was dismissed. Mr. MacKenzie had that information and simply chose not to provide it to the trial judge and Ms.

MacKenzie as required by the **Guidelines**, by **Civil Procedure Rule 57.13** and to some extent by the August 27, 2002 Order. An appeal is not an opportunity for a second trial. To admit this financial information on appeal would be condoning Mr. MacKenzie's disregard of his legal obligation to provide this financial information at the trial stage. It would be tantamount to providing an open invitation to those served with an application for child support to ignore their obligation to provide financial information until such time as they felt it in their interest to do so. Mr. MacKenzie's application having been dismissed, there was no reason to allow that sought by Ms. MacKenzie in response.

[9] I will now consider the issues before the court on appeal. These are whether the trial judge erred (1) in deeming Mr. MacKenzie to have an annual income of $46,000 and ordering child support, including net day care expenses, to be paid based on that income, or (2) in ordering that the child support be paid retroactively to July 1, 2001.

[10] The standard of review applicable in this appeal is as stated by this court in **Dean v. Brown (2002),** 209 N.S.R. (2d) 70 at ¶ 7:

> The standard of review in matters of this nature is as set out by the Supreme Court of Canada in Hickey v. Hickey… On the issue of the approach to be taken by appellate courts in reviewing spousal and child support orders and the principles for varying those orders, Justice L'Heureux-Dube, for the court stated:
>
> > 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**. …
> >
> > 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. The 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.** [emphasis added in original]

[11] Mr. MacKenzie has not satisfied me that the trial judge erred in deeming him to have an annual income of $46,000 and awarding child support on that basis.

[12] Mr. MacKenzie does not deny he was obliged to produce the financial information. He intentionally failed to produce it even after such production was ordered by the trial judge. He failed to attend the divorce trial. In the face of these failures, there was little left for the trial judge to do but to deem the amount of Mr. MacKenzie's income based on the financial information that had been filed with the application for an uncontested divorce, which he found inadequate, and on Ms. MacKenzie's oral evidence of Mr. MacKenzie's income.

[13] Sections 19, 23 and 24 of the **Guidelines** authorize trial judges to impute income in certain circumstances, including where a spouse has failed to provide financial information when under a legal obligation to do so. Sections 23 and 24 further provide that the trial judge may draw an adverse inference against such a spouse. This is what the trial judge did in this case. In doing so, he made no error.

[14] However, Mr. MacKenzie has satisfied me that the trial judge did err in ordering him to pay this increased child support retroactively from July 1, 2001. July 1, 2001 is prior to the trial judge's request in June, 2002 for additional financial information from Mr. MacKenzie, Mr. MacKenzie's receipt of the Notice to File, and the August 2002 application and issuance of an order to produce. Moreover, July 1, 2001 is earlier than the October 23, 2001 separation agreement, negotiated by the parties with the assistance of counsel. It is also to be observed that in her April 29, 2002 affidavit supporting her application for an uncontested

divorce, Ms. MacKenzie stated: "That reasonable arrangements have been made for the support of the child of the marriage."

[15] Until such time as the trial judge raised his concerns about the financial production by Mr. MacKenzie, Mr. MacKenzie had no reason to feel the child support provided for in the separation agreement was not acceptable. There had been financial disclosure acceptable to the parties. The quantum of child support had been accepted by Ms. MacKenzie both at the time she signed the October 23, 2001separation agreement and at the time she filed her April, 2002 affidavit seeking a divorce on an uncontested basis. It was not until the trial judge raised this issue and ordered Mr. MacKenzie to provide additional financial information that Mr. MacKenzie knew or ought to have known that the amount of child support, was being questioned. Having regard to the principles set out in **Conrad** v. **Rafuse** (2002), 205 NSR (2d) 46 (CA), in these circumstances, the trial judge erred in making the increased child support retroactive to July 1, 2001. I would order that Mr. MacKenzie pay the increased child support from September 1, 2002, the first month following the August 27, 2002 Order for further production of financial information.

[16] Accordingly I would dismiss the appeal except to the extent that the Corollary Relief Judgement be amended to delete the date July 1, 2001 in ¶'s 3 and 4 and to replace it with the date September 1, 2002.

[17] I would order costs payable by Mr. MacKenzie to Ms. MacKenzie in the amount of $1,500, including disbursements.

Hamilton, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.