FAMILY COURT OF NOVA SCOTIA
Citation: *D.B.C. v. T.D.J.*, 2014 NSFC 14

Date: 2014 09 11
Docket: FBWMCA No. 048475
Registry: Bridgewater

Between:

D. B. C.

Applicant

v.

T. D. J.

Respondent

Editorial Notice: Identifying information has been removed in this electronic version of the judgment.

Judge: The Honourable Judge William J. Dyer

Heard: June 11, 2014, in Bridgewater, Nova Scotia

Counsel: Linda Rankin, for the Applicant
Shawn D'Arcy, for the Respondent

By the Court:

[1] D. C. ("C.") and T. J. ("J.") were a couple for about nine years before they separated in mid-2006.

[2] They are the parents of three children ranging in age from nine to 15 years old. In early 2007, the parties agreed to an order which provided (among other things) that the parents would have joint custody of the children, that the mother would have primary care, and that the father would have reasonable access. Child support was established at $365 monthly based on the father's estimated annual income of between $15,000 and $20,000, at the time. Both parents were then unemployed.

[3] The father's support obligation was varied by consent in late 2008 to $214 per month, retroactively. Because the father was then in receipt of income assistance, child support payments were suspended as of January 1st, 2008. The father was ordered to notify the mother within ten days of becoming gainfully (re)employed and any changes in employment or his financial circumstances.

[4] Later, in mid-October, 2010, a consent order confirmed that the father had actually overpaid his child support and was entitled to a credit. The upshot was that the father was thereafter not required to pay child support to the mother for the benefit of the children, his overpayment credit was to be applied to future support, and the father was once again obliged to "within ten days of becoming gainfully employed notify D. B. C. of any change in employment or financial circumstances from such employment". Additionally, the father was required to annually provide true copies of his personal Income Tax Returns and Notices of Assessment.

[5] The mother started an application for further review and adjustment of child support in early November of 2013. In an affidavit filed at the outset, she alleged that the father had not complied with the notification requirements of the last (and prior) orders. Specifically, she wrote that she did not get notice that the father had returned to work and that he had not provided his tax returns or Notices of Assessment. When she finally did get information in 2011, she said he gave her a cheque for $413 in early June, 2012 and explained (to her) that he had deducted his already earned credit of $311.36 from the otherwise due amount.

[6] C. said the father paid child support for the months of July, August and September, 2012 at the rate of $626 monthly which is the Table amount for an

annual income of $32,000. (This was approximately his Line 150 income that year.) However, she said she received no support in October, 2012 and only $200 in November of 2012.

[7] Somewhat confusingly, the mother had asked for retroactive consideration "for the last two years" – "retroactively to December, 2012, or commencing at the date of the application on November 5, 2013". I took her application to mean she was constraining her retroactive review request to a start date of December 2012 – because (as will appear) the evidence was that the last support payment was in November.

[8] All of this reduces her demands for child support to $626 retroactively for December 2012, plus retroactive imputed income for 2013 and 2014 at levels higher than the father is prepared to concede. The thrust of the submissions on behalf of the mother was to the effect that the court should review the father's employment and income history, and retroactively impute to him a significantly higher income than reflected in his tax returns and order support commensurate with that income.

[9] For his part, the father presented evidence that his Line 150 income history is as follows: 2010 - $8,434; 2011 - $31,667; 2012 – $32,025; 2013 - $1,548. He also led evidence of very little income for 2014 (so far).

[10] C. explained that she did not immediately apply to vary the last order because she was "hopeful" that the respondent would continue to pay voluntarily. However, as alluded to already, she said the father did not pay her anything after November, 2012.

[11] The court's authority to retroactively review and recalculate (if warranted) in the circumstances was not challenged on behalf of the father. During testimony, the mother insisted that in the intervening years she had little knowledge of the father's personal or financial circumstances, but she outlined as best she could her understanding of his employment history. She asserted that the father is cohabiting with a "girlfriend" upon whose bank account the last support payment was drawn. The girlfriend was not asked to testify (by either party).

[12] In a disjointed and sometimes confusing outline of his circumstances, the father put forward both affidavit evidence and oral testimony tending to support his position that the court should not impute income to him over and above the figures dictated by his Line 150 history, whether retroactively or prospectively. The

hearing might have been less cumbersome if written summaries of his employment history and job-seeking efforts were introduced.

[13] In an affidavit, the father broadly asserted that he has always paid support based on his earnings. Specifically, he claimed that whenever his income changed he adjusted and paid support according to the **Guidelines** and Tables**.** For example, he said he did inform the mother when his income improved in 2012, and that is why he adjusted his payments upward that year. He also informed her when he lost his employment the same year. But, admittedly, when those events occurred, he did not seek to vary the last order or seek approval of the payment changes.

[14] The father admitted to past abuse of alcohol and said that it affects his memory to this day. He wrote that his past "alcohol consumption" problems resulted in loss of his driving privileges "for life", and that he has not regained the right to drive.

[15] With the consent of the mother's lawyer, the father was permitted to file with the court an Abstract from Service Nova Scotia which (among other things) confirms that he has had licence suspensions dating back to at least 2004 following convictions under the *Criminal Code* and *Motor Vehicle Act* for a variety of offences. The abstract corroborates that in 2007 his privilege of obtaining a driver's licence was revoked "permanent" [sic]. There is no elaboration in the abstract, nor was there any credible evidence, directed to the issue of the circumstances (if any) under which he could gain restoration of his driving privileges. However, the father vaguely claimed he has been trying to obtain information regarding possible licence restoration. He added that he was generally aware that there may be a "Pardon" option available - for at least one of the charges - but he claimed there is financial expense involved and that he cannot afford to move ahead at this time. He did not specify the potential cost.

[16] The father wrote that he has a grade 9 education and no additional formal training. He said that he found school difficult and that he required "specialized help". He broadly referred to needing the assistance of a speech therapist and special education teacher while attending school. The father said he left school after grade nine following the death of his father. At that point, he said he had to work and support his mother and younger siblings. He claimed that he found it easier to find and hold manual labour jobs and that he has generally been able to maintain steady employment. The mother did not challenge this account.

[17] Over the years, the father said he has worked mainly as a manual labourer, often for short bursts of time. For example, he said that in 2012 he found work on a fishing boat. Although he enjoyed the experience and would like to fish again, the work was short-lived – through no fault of his. He acknowledged that the fishing industry has provided him with the highest paying job that he has ever held, keeping in mind his limited education and training.

[18] After his most recent layoff, the father said he received employment insurance benefits. However, they ended in January, 2013. This was complicated when the government later claimed that the benefits had been overpaid. When the father could not meet a repayment demand, his employment insurance benefits were stopped.

[19] The father's explanation regarding the overpayment did not make a lot of sense to me. He seemed to imply that one (or more) of his employers was/were at least partly to blame. However, there was no evidence from the employer(s) to support this contention and he apparently did not appeal the government's decision. It appears the overpayments occurred in two of his most recent "higher income years" (2011 and 2012) when he had both employment income and employment insurance benefits' income. His Line 150 income for those years has not been reassessed by the Canada Revenue Agency, on his request or otherwise. And, I suppose to his credit, he does not seek imputation of a lower income for those years for child support purposes.

[20] At the hearing, the father said he is still trying to find work - particularly on fishing vessels in his area. However, he has been unsuccessful. He claimed that he attends at the local wharf when fishing begins so that the various captains know that he is ready, willing and able to work. Thus far, there have been no calls.

[21] The father said he has also put his "name into other local businesses such as car sales lots". However, he again claimed that local businesses are not hiring because, according to him, they are in financial difficulty following the closure of a major local employer, the Bowater's paper manufacturing plant. Additionally, he said he applied for work at a local lumber mill. Unfortunately, the mill, according to him, has had two major layoffs since 2012, one of which was as recent as May, 2014. He stated he has applied for work elsewhere, including a local fish plant. Again, insofar as the fish plant is concerned, his hopes were dashed when the plant went into bankruptcy and closed. J.'s mother works at a local fast food restaurant and he stated he has even applied for work at the same place - but without success.

[22] Moreover, the father says when he applied for public assistance benefits, his claim was denied. He said he was informed that if he reimbursed employment insurance benefits overpayment, his regular benefits would resume and there would be no need for public assistance. The result is that he is disqualified from receiving any benefits from both levels of government.

[23] With the consent of the mother's lawyer, the father introduced a "Notice of Debt" document from Human Resources and Skills Development Canada. That document speaks to the money he owes because "you misrepresented your earnings. This caused an overpayment." Although there is no explanation in the document, it indicates that the total amount of overpaid benefits was $3,500 plus $700 for a total of $4,200. Additionally, a "penalty established causing an overpayment" of $2,100 was imposed. The result? His total current indebtedness to the Federal Government is $6,300.

[24] Regarding the overpayment, the father stated that at one stage he owed the government over $12,000, much of which was recovered by garnishee. (The Notice of Debt does not mention $12,000.) The father stated that the garnishee was attaching $150 bi-weekly from any income he may be receiving. He said he informed C. of his difficulties surrounding employment insurance benefits and informed her of the garnishee. Indeed, he said he thought they had agreed to a revised support figure of $200 monthly at one point because of his circumstances.

[25] Currently, the father said he resides in rural Queens County with his mother and that he relies on her for financial support. His mother did not testify. He generally expressed a desire to return to school and thought that if he became eligible for income assistance that that would help his career path. When his application for assistance was declined, he said he was not in a position to return to school.

[26] During testimony, the father flatly denied that he is living with his girlfriend (W.O.) and insisted that he is now residing with his mother who, for all practical purposes, is covering his ordinary living expenses. He conceded that access transitions do involve his girlfriend who has a vehicle. She works locally and is able to walk to and from her workplace. The transition arrangements are consensual (he said), and intended to reduce the potential conflict between him and C..

[27] Again, more broadly speaking, the father said he has generally worked in the past and does not like being unemployed. He has resorted to doing odd jobs in the

local area for minimum amounts of money. He repeatedly said that most potential employers require him to be licensed to drive a motor vehicle. So, for example when one fisherman for whom he worked recently relocated from the Liverpool area to Lunenburg, he was unable to follow the employer.

[28] Asked if he had thought about looking and relocating further afield to improve his employment prospects, J. said he had but that he was in no financial position to pay relocation expenses. Relying on discussions with others about work in one of the Western provinces, he said he has learned that the cost of living there is "unreal" and that any benefits to be gained would be lost with the much higher cost of living.

[29] Because he is unable to afford a computer, J. said that the opportunity to do "on-line job searching" is negligible.

[30] J. was carefully cross-examined regarding the sources of his 2011 income. He was unable to clearly break out employment insurance income from employment income. He tinkers with old cars and trucks because he has an interest in motor vehicle mechanics. However, he denied receiving any significant income from such work. J. admitted to driving off-road motor vehicles as alleged by the mother, but claimed that no licence is necessary to drive them.

[31] In brief, the father's evidence was to the effect that he is doing everything that he can and should do to meet his obligations to his children and, not surprisingly, resists any push to have additional income attributed to him at this time.

Discussion/Decision

[32] In *MacDonald v. Pink*, 2011 NSSC 421, Justice Theresa Forgeron summarized the key principles to be applied by the court when presented with a submission that income should be imputed to a payor:

> "Section 19 of the Guidelines provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:
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> a. The discretionary authority found in sec. 19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: *Coadic v. Coadic* 2005 NSSC 291.

b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: *Staples v. Callender*, 2010 NSCA 49.

c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: *MacDonald v. MacDonald*, 2010 NSCA 34; *MacGillivary v. Ross*, 2008 NSSC 339.

d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: *Smith v. Helppi* 2011 NSCA 65; *Van Gool v. Van Gool*, [1998] 113 B.C.A.C. 200; *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.); *Saunders-Roberts v. Roberts*, 2002 NWTSC 11; and *Duffy v. Duffy*, 2009 NLCA 48.

e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: *Duffy v. Duffy*, supra; and *Marshall v. Marshall*, 2008 NSSC 11.

In *Smith v. Helppi* 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. in *Gould v. Julian* 2010 NSSC 123. Oland J.A. states as follows:

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 (N.S. S.C.), where Justice Darryl W. Wilson stated:

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:

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.

> 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.
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> 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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> 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.
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> In *Gill v. Hurst* 2011 NSCA 100, Bryson J.A. affirmed the trial judge's decision to impute income where the father's attempt to justify his under-employment for health and educational reasons was rejected: paras. 30 and 31. In addition, Bryson J. held that the trial judge made no error by imputing the "modest sum" of $25,000 to the father."

[33] Looking at the evidence as a whole, I am not persuaded that the father is intentionally unemployed or underemployed as contemplated by the relevant case law. He is constrained by limited education, training and job skills.

[34] Although I cannot judicially notice all of the local employment specifics offered by his counsel (in a pre-hearing brief), I think I can safely judicially notice the notorious recent closures of the nearby paper mill, spin-off layoffs and/or closure of smaller forest products companies, and closure of a large fish plant and a "call centre" - all of which have resulted in many skilled and unskilled workers becoming unemployed. And, unfortunately, my experience is that many parents have found it necessary to apply for review and variation of their support orders and agreements.

[35] That said, I cannot speculate on local unemployment rates (or re-employment rates) following the closures and lay-offs, or make any findings about

the general economic outlook and prospects. In the same vein, while it's reasonable to argue (as it was on behalf of the mother) that payors must make every effort to find and maintain regular full or part-time employment, it does not necessarily follow that if she or he is unsuccessful that the minimum wage (or greater) should be and will be imputed, regardless. With respect, rhetorical arguments that anyone can find work at fast food restaurants, service stations and convenience stores "if they really want to" – in good times and bad – in the absence of evidence is still rhetoric and not properly within the purview of judicial notice. It was open to both parties to muster evidence in support of their arguments; but neither did so.

[36] I assess the father's evidence as generally credible. In so doing, I have made allowance for his limited education, some hallmarks of learning disabilities, and also apparent memory problems (albeit self-induced through past substance abuse). With that in mind, I find the father's income disclosure was tardy and incomplete until recently. But, it seems more likely than not the mother had some knowledge of the father's changed work status.

[37] I find that both parents must accept some responsibility for not sooner bringing the case back for enforcement or review, and for a new order to reflect the changed circumstances, particularly in 2011 and 2012. On a positive note, the father did resume child support at an appropriate level for much of 2012.

[38] I find the father cannot be faulted for the most recent layoffs. I find the debacle over employment insurance benefits was very unfortunate and likely unexpected but, on the evidence, I cannot say with any confidence that it was entirely of the father's doing. Nonetheless, the practical result is a large debt and the double-barreled suspension of all potential benefits – at least for now. It is cold comfort that some of the disputed money was likely directed to child support.

[39] At best, I conclude the father is responsible for and shall pay $626 to the mother for the children's benefit (retroactively) for December 2012. Payment shall be made through the Maintenance Enforcement Program. I leave collection to that agency. For 2013, and for 2014 up until the hearing, I determine the father's income to be below the threshold for payment of child support pursuant to the **Guidelines**. Accordingly, no support is due and payable for 2013; and no current (2014) support is ordered at this time.

[40] The father should not be left with the impression that he can shelter himself indefinitely under his mother's roof. The time has come for him to become more

pro-active and to conduct himself more responsibly as a parent who has a legal duty to support his children. The two obvious avenues are license restoration and further education and training. Regarding the first, every effort should be made by him to immediately find out if he is eligible and, if so, to determine the procedure and the cost. Thereafter, every effort should be made to find the money – from family, friends or conventional sources - and start the process. On the father's own evidence, if he is successful, his job prospects should improve immensely and a return to past income levels may follow.

[41] The second option is to explore every reasonable education and training opportunity, and to actively pursue all possible funding sources. Success with the second option does not guarantee employment, but certainly improves the chances. Sitting at home and hoping for the best is not an option, in my opinion.

[42] To that end, I order that the case shall be reviewed in January, 2015 starting with a docket appearance to be scheduled by a Family Court Officer in consultation with counsel. Beforehand, the father shall file and serve a full written summary of his employment searches, license restoration efforts, and education/training (if pursued). I caution him that the outcome achieved by this decision speaks as of the hearing date and should not be taken as any assurance that a similar outcome will be achieved should there be another contest.

[43] No court costs are awarded.

[44] Mr. D'Arcy shall prepare an order the captures the result.

Dyer, J. F. C.