IN THE FAMILY COURT OF NOVA SCOTIA
Citation: D.A.M. v. J.A.F., 2008 NSFC 14

Date: April 28, 2008
Docket: FNGMCA-055766
Registry: New Glasgow

Between:

D.A.M.

Applicant

v.

J.A.F.

Respondent

DECISION ON IMPUTING OF INCOME TO MR. F.

Revised decision: The text of the original decision has been corrected May 23, 2008 and replaces the previously distributed decision.

Judge:	The Honourable Judge Anne S. Derrick
Heard:	By Written Submissions
Written decision:	April 28, 2008
Counsel:	Chris Boyd, counsel for the Applicant Raymond O'Blenis, counsel for the Respondent

By the Court:

[1] On February 12, 2008 at a docket appearance in New Glasgow Family Court, the parties agreed to an Interim Order dealing with joint custody, day-to-day care and control, access and child support for B.K.M. born July 9, 2000.

[2] Child support was set at $368.00 monthly, payable by Mr. F. in two monthly installments of $184, based on Mr. F.'s current annual income of approximately $42,314.00. The parties agreed in the Interim Order that Mr. F.'s 2007 income was made up of $34,054.00 earned from fishing and $8,260.00 from Employment Insurance for a total income of $42,314.00. It was acknowledged that Mr. F., as an Aboriginal person, is exempt from paying any federal or provincial income tax on his fishing income.

[3] It was agreed that Ms. M. had until March 14, 2008 to make submissions to the Court as to whether Mr. F. should be imputed income due to his tax-exempt status as an Aboriginal person. In the absence of such submissions, the Interim Order was to be made final on March 14, 2008.

[4] Ms. M.'s submissions dated March 12, 2008 were received by the Court on March 13. Counsel were advised in an email from the Court on March 27, 2008 that: "In light of Mr. Boyd's submissions, I will be determining what the final Order should reflect as Mr. F's income for the purpose of fixing child support for B. Before doing that I want to know if Mr. O'Blenis wishes to make any submissions on Mr. F.'s behalf..." On April 9, 2008, Mr. O'Blenis indicated he had instructions from Mr. F. to respond to Mr. Boyd's submissions. Submissions were subsequently received from Mr. O'Blenis on April 21, 2008 in the form of a written brief with attached cases.

[5] Mr. Boyd's submissions on behalf of Ms. M. are quite straightforward: that Mr. F.'s income from fishing should be grossed-up for the purposes of determining child support. Mr. Boyd submits that Mr. F. "makes a healthy middle-class income, the bulk of which is tax exempt due to his Aboriginal status. There is no evidence that he has the sort of deductions and expenses that would greatly reduce his tax rate..." Mr. O'Blenis argues "there is nothing in the [*Maintenance and Custody*] *Act* or *Guidelines* that state or imply that [the principal of "grossing up" a tax exempt spouse's income to reflect an approximately equivalent amount of taxable income] also applies to Aboriginal people who have a special status in our Country and have special needs." Mr. O'Blenis advances the case for not "grossing up" Mr. F.'s fishing income on

various grounds including: a Family Court Order made on January 15, 2007 requiring Mr. F. to pay child support for another child did not "gross up" his income; Mr. F.'s tax exemption does not "bring an economic benefit to the status Indian" which is not available to the non-Aboriginal parent and child, "nor does it remedy the economically disadvantaged position of the Aboriginal people in Canada"; due to systemic discrimination, Mr. F.'s income is worth less in his hands than the same income in the hands of a non-Aboriginal person; B., as a child of Aboriginal heritage, enjoys benefits not enjoyed by non-Aboriginal children; Ms. M. receives personal tax credits and exemptions and, in light of this, will not have to pay taxes given her income level.

[6] Mr. O'Blenis also submits that, (1) as Mr. F. only fishes two months of the year, it would be unfair to order Mr. F. to pay child support for the ten months he is on Employment Insurance based on a grossed-up fishing income and, (2) Mr. F.'s income should be reduced by the amount of child support he pays for his second child. Fairness, Mr. O'Blenis argues, requires the Court to take into account Mr. F.'s agreement to assume the full cost of B.'s extraordinary expenses and the benefits B. receives as a member of the Pictou Landing First Nation. In Mr. O'Blenis' submission, the discretion to impute income to Mr. F. by "grossing up" his fishing income should not be exercised in this case.

[7] Under section 19(1)(b) of the *Federal Child Support Guidelines*, the Court may impute such income as it considers appropriate in the circumstances, including where the payor is exempt from paying federal or provincial income tax. The Alberta Court of Appeal in *Dahlgren v. Hodgson (1998), 43 R.F.L. (4th) 176* noted that it is essential to gross-up a non-taxable income to take into account what the income would have been had it been taxed. Observing that "The [Child Support] Guidelines are premised on division of financial responsibility based on gross before tax income", the Court held that the purpose of "grossing up" is to ensure that "the apportionment of responsibility between the parents for child support is based on the same approach for both parents." (*paragraph 5*)

[8] Mr. O'Blenis argues that the *Dahlgren* approach "fails to acknowledge that the payor gets no tax deduction and the payee does not have to include the income as tax income...on the other hand, [the payee] does have the benefit of certain tax credits, such as claiming the child as an equivalent to spouse on her income tax, as well as other child tax credits befitting a non-Aboriginal." In Mr. O'Blenis' view, the *Dahlgren* reasoning would lead to "all types of benefits" enjoyed by Aboriginal people being grossed up, such as the housing and heating which Mr. F. is entitled to

receive from the Pictou Landing Band Council without cost.

[9] I do not agree that *Dahlgren* does anything other than confirm what section 19(1) of the Guidelines provides, that the apportionment of financial responsibility between the parents for child support be based on the same approach for both parents. I am being asked to impute income to Mr. F. due to his tax exempt status: I have not been asked to consider, and I decline to consider, for the purpose of determining his child support obligations, the benefits he is receiving in free housing and heating from the Pictou Landing First Nation. These and the other benefits to which B. is entitled as a child of Aboriginal heritage do not factor into my determination of whether this is an appropriate case to impute income to Mr. F. due to the tax exempt status conferred with respect to his employment income. An argument might be made that Mr. F., because he does not have to pay for housing or heat and can get certain costs associated with his son covered by the Band Council, has greater "financial means" when it comes to assessing "a fair standard of support." The Saskatchewan Court of Queen's Bench has noted that one of the primary objectives of the Guidelines is "to establish a fair standard of support for children that ensures they continue to benefit from the *financial means* of both spouses after separation." (*Merasty v. Merasty, [2000] S.J. No. 341, paragraph 4, citing section 1(a) of the Guidelines - emphasis*

added) However, Ms. M. has confined her application to the issue of Mr. F.'s tax exempt income, and furthermore, the housing and heating benefits provided by Mr. F.'s Band Council are benefits Mr. F. will directly share with his son during access visits. While it is to be remembered that the definition of income under the *Guidelines* is very broad, I am not prepared to factor in these particular benefits in addressing the issue of Mr. F.'s income for child support purposes.

[10] The Child Support Guidelines approach of dividing financial responsibility based on gross before tax income has been adopted by Canadian courts in respect of Aboriginal child support payors with tax-exempt income. *Merasty* cited *Dahlgren* with approval and, referring to several cases, held that section 19(1)(b) has been used "specifically" to gross-up the income of Aboriginal payors who are exempt from paying income taxes. (*paragraph 4*) Consistent treatment of children in similar circumstances is one of the objectives of the Guidelines. (*section 1(d)*) Using the software package, ChildView, the Court grossed-up Mr. Merasty's annual income of $42,287.00 to $61,996.00. In that case, Ms. Merasty had an annual income of $25,000.00 and would have been entitled to the tax credits and exemptions that Mr. O'Blenis has indicated will be claimed by Ms. M.

[11] Mr. O'Blenis submits that the facts here are different from those in *Merasty*. I do not see how that is the case. *Merasty* is directly on point. I am not persuaded that the fact that Mr. F. fishes only two months a year makes any difference to the issue of whether income should be imputed or not where that income is tax exempt. Mr. F.'s income, from fishing and Employment Insurance, represents his annual income. When he earns it is immaterial. The fact that Mr. F. chooses to only work for two months a year or cannot find other employment during the balance of the year does not change the fact that in those two months spent fishing he earns a relatively good income that is tax exempt. As for the issue of other benefits and tax credits available to B. and Ms. M., which Mr. O'Blenis cites as distinguishing this case from *Merasty*, I have already dealt with this.

[12] Mr. O'Blenis' arguments in support of Mr. F. not having income imputed to him include the submission that Mr. F.'s earnings are "worth less in his hands" because of systemic discrimination. The systemic discrimination to which Aboriginal people in this country have been, and continue to be, subjected, is a well documented and shameful legacy. However, Mr. O'Blenis does not offer any support for the statement that Mr. F.'s income has less earning power because he is an Aboriginal person. Furthermore, B., as a child of Aboriginal heritage, who will have to contend

with the hard reality of systemic discrimination, should not be denied a benefit that is available to him through the legitimate imputation of income to his father.

[13] In the submissions filed on behalf of Ms. M., Mr. Boyd noted that he had identified from a Quicklaw search fourteen cases where a payor's tax exempt income was grossed-up, frequently through the use of software packages such as ChildView or DivorceMate. In only one of the cases *[P.W.Q. v. G.C.B., [2005] A.J. No. 441 (Alta. Q.B.)*], did the Court decide against grossing-up upon determining that the payor's ultimate tax liability would have been minimal due to his low income and multiple deductions. The Court in *P.W.Q.* held that: "...it is reasonable to assume that even if the Applicant father did have to pay income tax, which he does not given his Aboriginal status, that his taxation reality would still be that he would not be subject to any income tax." (*paragraph 45*)

[14] As recognized in *Dahlgren*, given Parliament's definition of "income" in the *Child Support Guidelines*, "it is fair and appropriate to take into account many forms of income, or benefits, or compensation, or attributed income, etc. that would not otherwise be treated as taxable income under the *Income Tax Act*." This broad definition plainly captures tax exempt income. It is not clear to me why Mr. O'Blenis

states that the Guidelines do not "warrant or stipulate that additional income should be imputed pursuant to s. 19(1)(b) on the bases (sic) that the payor is exempt from paying federal and provincial taxes." He says that if that were the objective and purpose of the Guidelines, "it would have set that out in clear and unambiguous language." The language of section 19(1)(b) is clear and unambiguous and contemplates the imputing of income in such circumstances as Mr. F.'s.

[15] In dealing with tax-exempt income, I find that it is fair and appropriate to assess what Mr. F. would need to earn from fishing in order to achieve an after-tax net fishing income of $31,511.00. (In using this figure, I am accepting Mr. O'Blenis' submissions regarding Mr. F.'s 2007 fishing revenues and expenses once boat hauling, fuel, equipment, maintenance/repair and the labour costs of two helpers have been taken into account.) Grossing-up tax-exempt income is consistent with Parliament's broad definition of income for the purpose of determining child support payments. As noted, numerous other courts have reached this same conclusion and I am persuaded it is entirely appropriate to do so in this case. As Mr. Boyd has observed in his submissions, Mr. F. makes a good income which is tax-exempt. There is no evidence that his situation is anything like that of the payor in *P.W.Q.* whose deductions and expenses greatly reduced his tax rate.

[16] In reaching my conclusion in this case and making the necessary calculations, I have not taken into account the child support payments being made by Mr. F. for his second child. This issue was raised for the first time by Mr. O'Blenis in his April 21 submissions and Mr. Boyd has not had any opportunity to address it. It remains open to Mr. F. to bring that issue forward to be dealt with at a subsequent hearing on the basis of undue hardship. I will also say at this juncture that I do not consider the fact that Mr. F.'s fishing income was not grossed up in the calculation of his other child support obligation to be relevant to my assessment. I do not even know if the issue was raised in respect of that other Order.

[17] According to the "gross-up calculator" in the ChildView software program, Mr. F.'s fishing income would be $ 40,394.00 to generate after tax income of $31,511.00. I am imputing that additional income of $8,883.00 to him. With his Employment Insurance income of $8,260.00, I find Mr. F.'s annual income for the purposes of the Child Support Guidelines to be $48,654.00 which obliges him to pay, for the support of B., the amount of $424.00 per month.

[18] The Final Order will therefore reflect that Mr. F.'s current annual income is $48,654.00, being made up of fishing income of $31,511.00, imputed income of

$8,883.00, and Employment Insurance Income of $8,260.00 and that Mr. F. shall pay as support for B., in accordance with the Child Support Guidelines, the sum of $424.00 monthly, payable in two monthly installments of $212.00 on the 15th and end of each month, commencing May 15, 2008.

[19] I am asking Mr. Boyd to draft the Final Order and have it sent to me to be initialled. I have attached Mr. Boyd's list of fourteen cases to this decision as Appendix 1.

Anne S. Derrick

Judge of the Family Court of Nova Scotia