FAMILY COURT OF NOVA SCOTIA
Citation: T.C. v. A.M., 2014 NSFC 26

Date: 2014-06-08
Docket: FKMCA-083988
Registry: Kentville, N.S.

Between:

T. C.

Applicant

v.

A.M.

Respondent

Judge:	The Honourable Judge Marci Lin Melvin
Heard	May 27, 2014, in Kentville, Nova Scotia
Final Written	June 8, 2014
Counsel:	Donald Fraser, for the Applicant, T. C. Anita Hudak, for the Respondent, A.M.

By the Court:

[1] INTRODUCTION

[2] The Applicant made application to the court for joint custody with primary care of the children and reasonable parenting times to the Respondent on December 10th, 2012. By the time both parties had legal counsel, the situation had changed, and the parties agreed to an interim without prejudice order that the Applicant would be the one having limited parenting time. This was on February 28, 2013. The parties appeared with counsel several times after that, always maintaining the parties were working towards a resolution. On February 3, 2014, the Court was advised by counsel that the parties had reached an agreement: the parties would have joint custody with the Respondent having primary care, the Applicant would have specified parenting time, transportation would be shared, the child was not to be removed from the province for relocation purposes, and they would share the child's medical and educational expenses. Counsel indicated the only issue not resolved was that of child support.

[3] It is to be noted that Respondent counsel neither made application for child support, nor filed a reply, a response or an Affidavit to the Applicant's original application. However, counsel for the Applicant, did not object to the matter proceeding without the relevant documentation being filed and the Court determined, in this particular instance, given the length of time this matter has been before the Court and the obvious acquiescence of the Applicant, that a further delay would not be in the best interests of the children, and allowed the matter to proceed without the documentation being filed. Effectively it was a verbal application consented to by the parties in the best interests of the children.

[4] ISSUES

1. Is the Applicant deliberately under-employed?
2. If so, at what amount should his income be imputed?

[5] ANALYSIS OF THE EVIDENCE

[6] **T**he Respondent testified that she has had care of the two children since two weeks after the parties separated, the Applicant has never paid her child support, and has not provided her with any financial information until the day of the hearing. She testified that she saw him the weekend before and he told her he

wasn't calling the children because he was "…working like crazy." She further testified that the Applicant had told her he was working in a pizza shop, doing yard-work, at one point dropped the kids back with her because he was going to buy a car, and recently purchased approximately $200.00 worth of clothing for the children. She also testified the Applicant had texted her he would rather go on welfare than pay child support.

[7] Counsel for the Applicant objected, saying if there were copies of these texts, he wanted to see them. Respondent counsel effectively argued that texting has become the latest version of "coffee shop conversation in the olden days…" Furthermore, she did have copies of the texts, which she provided to Applicant counsel and the Court. Again Mr. Fraser objected saying it was "…trial by ambush."

[8] The weight to be afforded to the copies of the texts is significant. The Court agrees with Respondent counsel, Ms. Hudak, and takes judicial notice of the use of texting as a prevalent form of communication. Provided the parties admit and agree they were texting one another – and they did – it is little different than one party testifying that the other party told her something while "… at a coffee shop…" to use Ms. Hudak's analogy. It was not trial by ambush, as counsel for both parties seemed to have a tacit agreement that neither need file anything with the Court. And that goes for Mr. Fraser's client's limited financial information as well.

The Applicant's texts include the comment:

> ***"…I will not be paying too [sic] much child support period besides most likely on the paper and if you think you can go for more I'll say fuck you and quit work and you will get nothing because I'll sit home on welfare and if your man has got all this education he might know when you're [sic] on welfare that the judge will not make you pay child support period" …***

[9] The Applicant testified that he had worked twenty hour weeks in the winter months when it was busier but now only ten hour weeks, doing clean up at Burnside Pizza. He filed limited financial information with the Court that included a printout from the Department of Community Services indicating he received $1,236.00 a month for personal, shelter, and transportation expenses. His testimony was that this amount included his girlfriend who resided with him, but

there is no indication on the printout that this is accurate. He also filed a typed sheet, which he did not sign, but says his boss signed stating he works ten hours a day at $10.40 per hour. The Respondent's counsel did not object to this, although the Court has concerns about its authenticity. He did not file a Notice of Assessment or any documentation that would confirm an annual income. There is no formal record of a payment receipt from Burnside Pizza.

[10] The Applicant has elementary school education. His counsel argues the Applicant has little hope in finding employment doing more than he is presently doing as a result, and he has a history of receiving social assistance.

[11] In cross-examination the Applicant admitted to having told the Respondent he was working in another pizza shop "…just to be a smart ass…", and further admitted he had told the Respondent he was working "full tilt" but full tilt did not mean full time. He said he did odd jobs for his boss for "cigarette money." His evidence is that his employer or his employer's son took him to Toronto, and all expenses were paid. His evidence is also that he received a birthday present - from the people he worked with – in the amount of $500.00.

[12] There was some convoluted explanation that he wanted to get back with the Respondent so he was trying to make her believe he was doing better than he was. This begs the question, as the evidence is that both he, and the Respondent are presently living with other people.

[13] **THE LAW**

[14] The Child Support Guidelines afford authority to the Court to determine if a payor is underemployed.

> **19.** (1) The Court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (*a*) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[15] In **Burke v. Burke**, 2005 NSSF 11, Coady, J., refers to MacDonald and Wilton, Child Support Guidelines and Practice (Toronto, Carswell 2004):

> ***"… it is explained that in order to be found intentionally unemployed or underemployed, it is not necessary that there is a finding that the payor has the intention to evade responsibilities for child support. What is essential is that the payor establish, on a balance of probabilities, that a present employment decision is reasonable. If it is not reasonable then the Court should impute income."***

[16] The Court must look at what is reasonable under the circumstances: ***"The age, education, experience, skills and health of the payor are factors to be considered in addition to such matters as the availability of work, the freedom to relocate and other obligations."*** **(Donovan v. Donovan (2000), 190 D.L.R. 4th 696 (C.A.)**

[17] **DELIBERATION**

The findings of the Court are as follows:

The Applicant payor father is a young man with limited formal education.

The Applicant has the ability and the availability to work and has been working at least for one Pizza place in HRM; he is working more hours than he claims, or he has the ability to work more hours than he claims; he threatened the Respondent with quitting his job and going on social assistance so he would not have to pay child support; it was not reasonable for the Applicant to have been only working ten hours per week. The Court does not accept the Applicant's argument that he was trying to impress the Respondent by pretending to be working long hours - he most likely was. The Applicant's evidence is that he is working two hours a day, five days a week. Even if the Court accepted the evidence that he is only given ten hours a week cleaning at Burnside Pizza, he is apparently well thought of by his employer: taking him on an all-expense paid trip to Toronto, giving him $500.00 for his birthday, and having him do odd jobs at their home. With a little effort and perhaps even a reference from his current employer, he could find similar employment at other places in the same area.

[18] **CONCLUSION**

[19] The Court has considered all of the evidence. The Applicant payor has not established on a balance of probabilities that his present employment decision is

reasonable. The Court finds the Applicant is underemployed and imputes the Applicant's income at $13,754.60 per annum ordering him to pay child support in the amount of $150.00 per month commencing July 2, 2014, and continuing on the 1st day of each month thereafter. The Applicant is to file his notice of assessment for 2013 forthwith and forward a copy each year to the Maintenance Enforcement Program by June 1, of each year.

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Marci Lin Melvin, J.F.C.

June 8, 2014