IN THE FAMILY COURT OF NOVA SCOTIA
Citation: *J.Z. v. H.I.*, 2001 NSFC 29

Date: 20010916
Docket: 95FLB-79 /FLBMCA-018099
Registry: Bridgewater

Between:

J.Z.

Applicant

v.

H.I.

Respondent

Revised decision: Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on November 13, 2009.

Judge: The Honourable Judge William J. Dyer

Heard: September 6, 2001, in Lunenburg, Nova Scotia

Counsel: Johnette M. Royer, for the Applicant
Mary Jane McGinty, for the Respondent

By the Court:

[1] Under section 37 of the **Maintenance and Custody Act (MCA)** J.Z. seeks review and variation of the basic child support obligations of H.I. She also wants help with one child's dental expenses under section 7 of the **Child Maintenance Guidelines (CMG)**.

[2] By virtue of a l995 Family Court order, H.I. was adjudged to be the father of D.Z. (d.o.b. October l5, 1989) and S.Z. (d.o.b. June 27, 1988); and J.Z. was awarded sole custody of the children subject to reasonable access by H.I. Only notional child support was established because H.I.'s income was then only about $492 monthly. H.I. was also ordered to immediately notify J.Z. of any change in his financial circumstances or in his employment status.

[3] On December 1, 1997, a consensual variation order that established child support at $75 monthly for the two children, starting January 1, l998. The other terms and conditions of the 1995 order were confirmed as being in full force and effect. The order has not been varied since then.

[4] A review of the file discloses H.I. sought to decrease or rescind his support obligations in late 1998. H.I.'s obligation to the child of another party (B.C.) was reviewed at the same time in a contested, consolidated Family Court hearing on February 2, 1999. (H.I. had been paying $37.50 monthly for B.C.'s child.) In the result, the court dismissed both of H.I.'s variation applications upon finding that his income had not changed significantly from December, 1997 when it was postulated to be about **$10,764** annually.

[5] H.I.'s income now appears to have been higher than originally thought. According to Canada Customs and Revenue Agency records, his total 1997 income was actually **$13,645**. It decreased slightly to **$12,473** in 1998.

[6] Subject as follows, H.I.'s reported 1999 total income was **$15,137**; 2000 total income was **$16,143**.

J.Z.'s Circumstances

[7] In her hand-written original application J.Z. referred to the disclosure clause in the 1995 order. In her affidavit she stated she saw a newspaper advertisement placed by H.I.'s employer suggesting higher wages and benefits than she understood H.I. was previously entitled to. In testimony, J.Z. confirmed H.I.'s failure to disclose any changes in his financial circumstances until these proceedings were pending and she explained her need to rely on third party sources regarding his circumstances.

[8] Both children are still under J.Z.'s care. D.Z. is 12 years old; S.Z. is now 13 years old. The youngest is in grade 6; the eldest in grade 7.

[9] In her affidavit J.Z. stated she is not employed outside the home and that she is a full-time home maker. She cohabits with a carpenter whose income was reportedly in the $18,000 range in 2000. He has two dependent children. And, she

has two other children who are financially independent for the purposes of this proceeding.

[10] Her evidence was that H.I. had been enjoying access to the children at his Halifax residence, usually one weekend per month. J.Z. shared the cost of bus tickets with him to facilitate access from her residence in Bridgewater at a cost of about $24 monthly which she said was paid out of child support received from H.I. J.Z.'s evidence was that H.I. suspended his access in April, 2001 when she started review proceedings.

[11] In regard to the children's dental needs, neither J.Z. or her common-law spouse have any health plan or coverage. She tendered fee estimates for dental work said to be needed by D.Z. (The dentist did not testify). The estimates includes reference to possible referral to a specialist for root canal and related work. The suggested cost is $1,000 or more. Another treatment option appears to be a combination extractions and restorations with costs ranging up to $400 or more.

[12] J.Z.'s testimony regarding the dental work was somewhat vague, but she suggested treatment in one form or another had to be done within a year and that she has been unable to commit to the dental work without some assurance of financial assistance from H.I. I accept that testimony. She said she learned of the need for dental work early in March and asked H.I. for help later in the month. Her evidence

was that he refused assistance, citing inability to pay. She seeks from him a contribution of 50% of the costs.

[13] J.Z. said she asked H.I. in the past for help with the purchase of school supplies but he gave her no money. Rather, she said, he used to make some purchases the value of which she was unable to fix. He has given no direct or indirect assistance for the current school year.

[14] J.Z. said she has not been given any extra money for children's clothing or other needs, but admitted she made no formal demands. She agreed the children have returned occasionally from access with clothing, etc., but asserts it was generally second-hand.

H.I.'s Circumstances

[15] H.I. lives in a rented house at Halifax with a common-law spouse. He has been employed for several years as a personal care worker.

[16] He did not provide copies of his complete tax returns, but demonstrated his income history between 1997 and 2000 with summaries from the Canada Customs and Revenue Agency.

[17] Referring to the discrepancy between 1997 income he disclosed to the court with that disclosed to the Agency, H.I.'s evidence was that he did not compare his pay statements (used for court) with his year-end T-4 slips. At paragraph 7 of his

affidavit, H.I. asserted that he never considered the changes in his financial position to be "significant". He suggested any total income increases resulted from increased hours rather than increased pay rates, and that he did not know his total earnings until after each year end. He did not otherwise explain why he did not disclose the improvements when he did become aware of them, year-end or otherwise.

[18] H.I. said he has paid child support as ordered through 1998 and subsequent years. (This is not disputed by J.Z.) H.I. conceded he did not hesitate to seek downward variation in late 1998 when he became temporarily unemployed. (As noted earlier, his application was unsuccessful.)

[19] H.I. said he received retroactive pay in March 2001. He claims it was unexpected and that he is still unclear as to why this happened. Exhibit "D" to his affidavit is a payment summary from his employer. The summary covers the period April 1, 1999 until October 31, 2000 and indicates a gross entitlement of $10,324.70 from which income tax, Canada Pension Plan and employment insurance were deducted. H.I. confirmed he received a net cheque of $7,l63.23. He acknowledged he did not immediately disclose these facts to J.Z. even though legal proceedings were underway by then, including notice of a retroactive claim. The employer characterized the money as a first installment. There was reference

to an expected second installment to cover November, 2000 until new hourly rates were finalized in 2001. H.I. confirmed receipt of this extra retroactive pay and said his cheque was for about $5,000. No other particulars were given. No pay statement was filed. In testimony, H.I. said the amount was "net" of similar deductions taken from the first payment (income tax, e.i., and c.p.p.). He said he negotiated the second cheque in late May or early June. H.I. said he used his retroactive wages to pay bills and debts.

[20] H.I.'s evidence was that his spouse was unemployed due to lay off from June, 1999 until June, 2000. She then reportedly worked for about a year and was again laid off. She has been in receipt of employment benefits since August, 2001 and receives $462 bi-weekly. She has been receiving spousal support of $250 monthly which is expected to end in September. (No tax returns or other proof of income for the spouse were filed.)

[21] H.I. said he has nothing left from the extra money he received. He said his Visa bill is back up over $2,000 but did not elaborate why. Aside from debt payments, H.I. said he only bought new eyeglasses and a small boat engine. He did not otherwise explain or account for his spending of the two retroactive pay packages.

[22] At paragraph 11 (a) of his affidavit, H.I. purports to give some insight into his personal history and challenges with addictions. Most, if not all of this brief history pre-dates the last relevant court order. Giving credit where credit is due, this background does not assist in application of **Guidelines**. And, with respect, H.I.'s personal observations about J.Z.'s lifestyle are irrelevant to the legal issues at hand. (In court, his counsel explained the context and apologized.)

[23] H.I. stated he is prepared to pay current support in accordance with the **CMG,** but asserted he cannot afford to help with dental expenses and pay retroactive support. (The parties were unable to agree on determination of his income.)

[24] H.I. said he has no significant assets, but said he is almost debt free. He owns an older vehicle which attracts payments of $245 monthly. The loan will soon be paid off. His stated desire is to remain debt free. H.I.'s evidence was that he hates his job and that he finds it stressful and depressing.

[25] H.I. submitted a household budget which did not include his spouse's employment insurance income. His current total monthly income is about $1,980 against expenses of about $2,218 and he claims a budget deficit. H.I. achieved this by excluding his spouse's income while including her expenses. Suffice it to say, her income should have been be included or her expenses subtracted. (In passing, I also note expenditures for cigarettes are over $200 monthly.)

[26] Inadvertently, the budget did not show payment of any child support for D.Z., S.Z., or any other child. This was corrected in testimony to show support under the two current orders.

[27] At the hearing, H.I. introduced an employer's letter indicating he works 90 hours semi-monthly at an hourly rate of $11 since May 1, 2001. (Previously his hourly rate was $7) The same letter confirms there is a company health/dental plan that extends benefits only to employees. Accordingly, H.I. said he is unable to obtain coverages for any of his children.

[28] In testimony, H.I. acknowledged he has bought no school supplies this year for the children and gave nothing to S.Z. for his birthday. He said, in the past, he bought large volumes of Christmas gifts for the children; bought many of their school supplies, and provided some clothing (albeit some "used"). He did not place a value on these contributions.

[29] H.I. conceded he has been bitter and mad at J.Z. whom he alleges has been drunkenly harassing him by telephone. He clearly resents the proceedings and strongly resists the retroactive support claim. As a consequence, he admitted he had suspended access and balked any extra financial help. In court, he said he was sorry.

Discussion/Decision

The Legal Framework

[30] Section 37 of the **MCA** gives the court authority to vary existing maintenance orders "where there has been a change in circumstances since the making of the order or the last variation order". Use of the word "may" in this section means variation is discretionary. That discretion must be exercised judicially. Variation may be prospective or retroactive. And, when making a variation the court must apply section l0 of the **MCA**. Section l0 and section 2(4) invoke the **CMG**.

[31] The court (and the parties) should not lose sight of the **Guidelines'** objectives:

> "(a) To establish a fair standard of maintenance for children that ensures that they benefit from the financial means of both parents:
>
> (b) to reduce conflict and tension between parents by making the calculation of child maintenance orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of parents and children who are in similar circumstances."

[32] The so-called presumptive rule [section 3(1)] is that the amount of child support is the applicable table amount having regard to the payer's income plus the amount(s) determined under section 7 of the **CMG** (if any).

[33] This is not a case involving shared or split custody. Nor has H.I. entered an undue hardship defence under section 10.

Retroactive variation

[34] This is an application to vary; entitlement to child support is not an issue.

[35] On the evidence, I am satisfied that H.I.'s income circumstances have materially improved since the time of the original order and the review (at his behest) in February, 1999.

[36] I was not asked to decide if there could be a valid claim that pre-dates the last hearing that H.I. initiated and which did not involve a cross-application for upward variation by J.Z. J.Z. seeks limited retroactive child support, effective as of April 1, 1999 which is the effective date of H.I.'s retroactive pay increases.

[37] In exercising my discretion to make a retroactive award under section 37 of the **MCA**, I have considered several principles which emerge from reported cases and which appear to be as applicable to variation cases as to originating applications:

1. The award should benefit the children and not simply be a windfall to the payee.

I am satisfied the application is intended to benefit (and will benefit) the children who have ongoing financial needs and that it is not a scheme by J.Z. to derive personal windfall benefits.

2. There must be a corresponding ability to pay on the part of the non-custodial parent and some encroachment by the custodial parent on her capital or some incurrence of debt to meet the children's expenses during the retroactive period.

I am satisfied that H.I. could have paid higher levels of support from his gradually improving income and that he could have allocated or reserved a portion of his lump sum receipts for the benefit of his children. I find he has the ability the pay the amounts he should have paid before now and that "repayment" may be structured by direct negotiation, by an arrangement approved under the Maintenance Enforcement Program, or by further court order. I am satisfied the current order of $75 monthly for D.Z. and S.Z. has been providing very limited benefit against the children's actual needs. Indeed, $24 monthly of that sum was going to facilitate the H.I.'s access. To the extent child support has been underfunded, I find the shortfalls were subsidized by J.Z. and her partner from their own modest resources.

4. There must be some evidence that the payer parent has failed to meet her/his responsibilities to the family.

A proper application of the **Guidelines** in light of H.I.'s now known income leaves no doubt that he has failed to adequately contribute to his children's support. Legal action has become necessary to enforce disclosure and payment. H.I. has not been making significant financial contributions "outside" of the court orders that have benefitted the children in the intervening years.

5. The payee should not have delayed unduly in pursuing his or her legal remedies.

I find the children should not suffer because J.Z. did not make formal demands or requests for disclosure [under section 25 of the **CMG**]. H.I. has been under a disclosure order since 1995. J.Z. was entitled to expect compliance. Her resort third party sources (which triggered the variation request) was reasonable in the circumstances. She pursued her court application diligently.

6. In cases of payer fraud, deception or deliberate misinformation with respect to financial capacity, courts are more likely to favourably consider retroactive awards.

As discussed elsewhere, I find that H.I.'s financial capacity was not promptly or fully disclosed by conscious decision on his part and that such conduct should not produce a result detrimental to the children's interests.

7. *The doctrine of laches does not apply to child support. The court should take a realistic view of all of the circumstances.*

Delay is not a factor except in regard to H.I.'s conduct.

[38] H.I. knew or ought to have known that his child support obligations, in large measure, would be tethered to his income. It was for that very reason he was ordered as long ago as 1995 to disclose changes in his financial circumstances or employment status.

[39] And, H.I. is no stranger to the **Guidelines**. There have been several court appearances resulting in court orders. He has participated in at least one other contested variation hearing during which his circumstances and the **CMG** were the subject of judicial consideration and decision.

[40] Having regard to the stated objectives of the legislation, I conclude it would be unfair and unjust to permit H.I. to escape responsibility for payment. I do not accept the circuitous argument that he cannot and should not pay because he has already spent all of his increased salary, including the large retroactive amounts received this year. He knew he had court-imposed child maintenance responsibilities. He should have ear-marked portions of his increasing salary or otherwise taken steps to ensure his obligations could be met. It was irresponsible and provocative for H.I. to recently spend over $l2,000 in net retroactive pay without any regard for his children's support. To forgive, in whole or in part, any accumulation of support arrears in the circumstances would be to condone his conduct. H.I. could have avoided this entire predicament by the simple expediencies of disclosing income changes as they occurred and by periodically adjusting the support level. Upon receipt of his retroactive pay he should have disclosed and set aside money before considering other expenditures.

[41] In the circumstances, I propose to determine H.I.'s income retroactively and to award payment of the "arrears", in full, effective as of April 1, 1999.

Income Determination

[42] I have directed my attention to sections 15 - 20 of the **CMG** regarding income determination. Generally, a payer-parent's income is determined by reference to "Total Income" as disclosed in her/his T1 General Tax form (adjusted in accordance with Schedule III).

[43] Under section 17(1) [recently amended], where a court thinks determination of annual income (under section 16) would not provide the fairest determination of the income it may have regard to that spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years. And, under section 19 there is a non-exhaustive list of circumstances in which the court may impute income.

Treatment of Retroactive Pay

[44] Unique to the present case is H.I.'s receipt in the 2001 tax year of two instalments of pay retroactive to April 1, 1999 and his failure to fully disclose the particulars, notably regarding the second instalment.

[45] I conclude H.I. was not diligent in securing from his employer for the second recent instalment the same basic information supplied regarding the first (i.e. total hours; total pay; and deductions for income tax, c.p.p. and e.i.). Knowing the case was heading for trial, he had from (at least) June 1, 2001 until September 6, 2001 to secure and disclose to his counsel, to J.Z.'s counsel, and to the court this relatively simple information; yet he failed to do so. I infer this information would be readily available on request.

[46] As noted earlier, the first instalment was about $10,325 (gross). Source deductions totalled $3,161.47 or about 30.6 % of the total which I round up to 31 %.

[47] If H.I.'s evidence is accepted a face value, the second instalment was about $5,000 (net). I conclude this amount should be "grossed up" to arrive at a total income pre-tax amount. The **CMG** and applicable tables are premised on pre-tax, not post-tax, income figures. Subject as follows, I therefore impute to H.I. second instalment income of $6,550 ($5,000 x 131 %) and I find the total retroactive pay to be approximately $16,875.

[48] Counsel were agreed that the retroactive pay will have to be reported by H.I. for income tax purposes in his 2001 personal tax return. (No tax calculations were filed.)

[49] Counsels' submissions are that H.I.'s annual salary now totals about $23,760, if projected to the year-end. Combined retroactive and current income would therefore produce a total 2001 income amount of about $40,632 which will fall back to $23,760 next year.

[50] The simplest approach to determining H.I.'s income for **Guidelines'** purposes is to adopt $40,632 as a non-recurring total for 2001, and independently review 1999 and 2000 income. By this method, current income is temporarily skewed upward but past income is lower than would otherwise be the case.

[51] An alternate approach would be to "spread" the retroactive pay over the past and current years thereby decreasing current income but increasing past income more than would otherwise be the case.

[52] It was J.Z.'s counsel who conceded there may be some advantage to H.I., mathematically, if the second approach is adopted. The averaging method apparently would result in a somewhat lower total recovery for the children.

[53] H.I.'s counsel implores the court to extend to him, as a payer, any perceived advantage so as to reduce the potential payment burden. Any disadvantage to the children as beneficiaries was not addressed. (J.Z. could apparently "live with" with either calculation method but this should not bind the children.)

[54] I conclude that perceived mathematical advantage, alone, to one party or the other is insufficient to determine the outcome. No cases were cited to support the proposition that payers should be given advantage over a payees or beneficiaries, everything else being equal.

[55] I am not persuaded that H.I. comes to the court entirely in good faith or with "clean hands", legally speaking. Yet, he seeks every advantage.

[56] I reiterate that H.I.'s consistent refusal to give timely and full financial disclosure does not reflect well on him. Lump sums aside, there is a history of deliberate non-disclosure. Non-disclosure has led to delay in reviews. Delay has led to higher values for the "arrears" and some remaining uncertainty about current income. Once H.I.'s income became known, J.Z. easily established a *prima facie* case that child support has been underfunded since at least April, 1999. That retroactive pay has created another "arrears dilemma" is of H.I.'s doing, not J.Z.'s or the children's; he is the one who spent the money.

[57] The court's discretion must be exercised in light of all the circumstances and the objectives of the **CMG**. In exercising my discretion, I see no reason to treat current income for **Guidelines**' purposes any differently than it is expected to be treated for income tax purposes, and I decline to do so.

Application of the Tables

[58] Another issue is how to apply the tables, given that H.I. has two children from his relationship with J.Z. and one by another woman to whom he currently pays $37.50 monthly. There is no application to vary by the other mother before the court.

[59] One approach is to directly apply the appropriate table amount for two children, without regard to the third child. Another approach (suggested by H.I.'s counsel) is to determine the table amount for three children and then allocate 2/3 to the children in this proceeding.

[60] I adopt the first method or approach. The prevailing support orders (for J.Z.'s children and the other child) arose from consolidated hearings when the court had the benefit of evidence and/or submissions regarding both family units. The present application is not joined with any other application to vary (by H.I. or by the mother on behalf of the other child). H.I. has not advanced an undue hardship case under section l0(2)© of the **CMG**.

[61] The legislation contemplates some payers' circumstances might warrant special consideration. For example, there is a formula for split custody (section 8) and there are factors to be weighed for shared custody (section 9). The legislature chose to limit those special rules to support of children of the same parents.

[62] To apply the total table amounts for three children in the present case implies there is or should automatically be a nexus between the child support levels in the two households, with different mothers/payees, one of whom is not a party to the proceedings. I do not accept this proposition. Absent an undue hardship case by the payer or some other relevant **CMG** provision, in my opinion there is no reason not to apply the plain words of section 3(1) calling for "the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the parent against whom the order is sought." (Emphasis added).

[63] In the result, I determine H.I.'s total income, the table amounts for the two children, and the amounts due and payable as follows:

	Income	Table amt.	Amt. Due
Apr. 1, l999 to Dec. 31, 1999 (9 mons.)	$15,137	$232	$2,088
Jan. 1, 2000 to Dec. 31, 2000 (12 mons.)	$16,143	$241	$2,892
Jan.1, 2001 to Aug. 31, 2001 (8 mons.)	$40,632*	$561	$4,488
Total due and payable as of Aug. 31, 2001			$9,468
Aug. 31, 2001 to Dec. 31, 2001	**	$561	
Jan 1, 2002	$23,760	$341	

*Projected total 2001 income
**Using projected income

[64] H.I. shall be credited with all sums paid by him during the relevant time frame and which I determine to have been at the rate of $75 monthly from April, 1999 until

August, 2001, inclusive. Those credits total $2175 (29 mons. x $75) against the total due and payable of $9468. The balance of retroactive child support due and payable is therefore $7293 to the end of August. Current support shall continue at $561 monthly from September until year-end. Effective January 1, 2002, I order that payments shall reduce to $341 monthly.

Section 7 Claim (Dental expenses)

[65] Regarding the dental expense claim, I have directed my attention to sections 6 and 7 of the **CMG**. An award under section 7 is discretionary having regard to the factors set out in subsection 1. On the evidence, a claim lies under section 7(1)©. I am satisfied H.I. should contribute taking into account the necessity having regard to the child's interests and the reasonableness of the proposed expenditures and the means of the respective parents. Indeed, H.I. does not seriously challenge entitlement. Rather, concerns were expressed about verification of need, cost and payment method.

[66] Under section 7(1)(2), H.I. should be assuming the bulk of any needed expenses. However, J.Z. would be satisfied with a contribution of 50 %. This may be related to her expectation that H.I. will have to make a proposal to her or to the Maintenance Enforcement Program to deal with support arrears. [Assuming that is so, priority will have to be given to basic current support and to the dental work

which I have found to be necessary.] There is no evidence about the tax relief, if any, available to H.I. under section 7(1)(3). J.Z. has no taxable income at this time so no benefits accrue to her. Neither party has dental insurance coverage. There is no evidence of available subsidies or other assistance. It is not entirely clear which treatment course will be followed as there may be a referral to an orthodontist. However, the least costly option is in the $400 range which would confine H.I.'s responsibility to about $200.

[67] I am aware of the November 1, 2000 amendment to section 7(1) of the **CMG** which allows the parents and the court to estimate cost in situations where exact amounts cannot be determined. There is insufficient evidence to fix a clear estimate other than just noted.

[68] Drawing upon a remedy crafted by Daley, J.F.C. in **Nilsson-White v. White** [l998] N. S. J. No. 329, I order that H.I. shall pay 50 % of the costs of necessary dental work for D.Z. as set forth in the dentist's letter filed with the court on the following conditions. J.Z. shall obtain and provide to H.I. an independent opinion verifying the best treatment option and a second estimate for uninsured professional services from an dentist or specialist who is not associated with D.Z.'s present dentist. The parties shall cooperate in the final selection of a dental professional and treatment plan, failing which J.Z. may decide. (H.I.'s contribution shall relate

only those costs that are not covered by government or prepaid insurance.) Payment by H.I. is due and payable on the presentation by J.Z. of the independent verification and the final selection. By written agreement between the parties, H.I. may directly pay the professional(s).

Other Issues

[69] I order that the parties annually exchange copies of their personal income tax by May 31st, and their Notices of Assessment (or Reassessment) upon receipt from the Canada Customs and Revenue Agency, starting in 2002.

[70] There is some uncertainty surrounding H.I.'s second retroactive pay cheque. I therefore order that there be an accounting between the parties by May 31, 2002 in regard to the 2001 table amount based on H.I.'s total income as disclosed in his 2000 tax return. The difference (if any) in the amounts due and payable by him pursuant to this decision shall be adjusted retrospectively, upward or downward, as required.

[71] J.Z. does not seek court costs; none are awarded. Counsel for J.Z. shall submit an appropriate order.

Dyer, J.F.C.