

FAMILY COURT OF NOVA SCOTIA

Citation: Tibbo v. Creaser, 2010 NSFC 20

Date: 2010 08 03

Docket: FLBMCA-052659

Registry: Bridgewater

Between:

Wendy Rachel Theresa Tibbo

Applicant

v.

Daniel Ernest Creaser

Respondent

Judge:

The Honourable Judge William J. Dyer

Heard:

May 12, 2010, in Bridgewater, Nova Scotia

Counsel:

Johnette M. Royer, for the Applicant

Daniel Creaser, the Respondent, self-represented

By the Court:

Background

[1] In early June, 2009, Wendy Tibbo (“the mother”) made an application against Daniel Creaser (“the father”) to resolve the parenting arrangements for their three children, all of whom are under six years old, and to determine financial support. (The mother also has primary care and custody of a disabled teenage son from another relationship. The father is not responsible for this child’s support.)

[2] The parties had cohabited in a common law relationship. They separated once before and were involved in legal proceedings. They reconciled and then separated for the final time in April, 2009.

[3] An interim hearing was scheduled for early October, 2009. The mother and her counsel attended; the father did not. The hearing went ahead in his absence. Under the **Maintenance and Custody Act (MCA)**, I awarded interim custody such that the children would live primarily with their mother, subject to reasonable access by their father. Based on the available evidence, I determined the father’s annual income for **Child Maintenance Guidelines (CMG)** purposes to be approximately \$42,000, imposed an interim child support award, and ordered a review which was subsequently scheduled for mid-January, 2010. It was then determined there was a need for updated financial disclosure from the father.

[4] At a March 1, 2010 court appearance, the parties confirmed settlement of the outstanding parenting issues. It was cemented with an order. Child support was left for hearing and decision.

[5] Not for the first time, the father was encouraged to consult with a lawyer because the level of current child support proposed by the mother’s counsel was unacceptable to him and because it was anticipated the court would have to consider all of the prevailing financial circumstances - including those pre-dating and those following the interim order.

Special/Extraordinary Expenses [CMG sections 6; and 7(1)(b) and (c)]

[6] The mother adopted affidavits previously filed and authored a new one in response to what the father wrote. Much of that evidence was centered on the parenting issues which were ultimately settled.

[7] Considerable attention was devoted to a claim for help with the cost of the children’s medications. The mother’s belief, based in part on discussions with the father, was that a family

health plan *via* his employer had been available, at least until recently. (There was no evidence and there were no submissions about the potential tax treatment insofar as the father is concerned.) One child of the relationship reportedly has asthma and needs medication. The other two children use inhalers, as need be, but have not been clinically diagnosed as having asthma.

[8] When the case started, the mother asked that the father be ordered to continue coverage or be ordered to assume all of the associated costs because she has very limited income. (Her principal sources of income are child tax benefits, universal child care benefits, and support due and payable by the father. Her “Line 150” income in 2008 was less than \$4,000.)

[9] Asked about the current cost of the children’s medications, she estimated them at about \$280 per month, or \$3,360 annually. She said the 2009 costs were about \$3,700. However, she provided no receipts, prescriptions, or medical reports to support their necessity or the quantum.

[10] Events overtook the parties because there was courtroom testimony to the effect that the mother had applied for benefits for the children under the provincial Pharmacare Program. She was unable to specify the potential coverage and was waiting for more information regarding qualification and benefits. So, by agreement, the mother was permitted to later obtain, and to provide to the court and to the father, a statement from the Program. I find that the document (since received) confirms coverage for all of the children, effective April 1, 2010, and that there will be no “family deductible” and no “family copayment”. There was no elaboration on the extent of the benefits. There were no post-hearing submissions on the subject. A reasonable inference is that the current cost of the children’s medications will be covered under this program. In the result, I determine that the mother’s section 7 claim has become moot and no order compelling coverage from the father or a monetary equivalent is needed at this time.

Basic Child Support

[11] The mother is supposed to receive regular support from the father. According to her, support from the father has been sporadic and unpredictable. I accept this testimony. It is supported by a statement from the Maintenance Enforcement Program (MEP). As of March 3, 2010 the father was in arrears to the extent of \$4,044, plus fees of \$238.75. Total demonstrated credits for payment were only \$988 since last October. So saying, the mother acknowledged in testimony that more recently she has been receiving \$388 every two weeks from MEP as a result of garnishee action.

[12] The mother’s evidence was that the father had not provided her with much, if anything, for the children’s benefit beyond that which has been collected by garnishee. She conceded that small amounts were spent by him for children’s clothing and sundries. (Neither she nor the

father quantified the value.) The father made no serious effort to explain the payment history.

[13] The father submitted a handwritten affidavit in mid-March, 2010. I will only highlight those aspects touching on child maintenance. At one stage he offered to pay \$600 monthly by projecting a 2010 income of about \$30,000. (He later retreated from this position.)

[14] The father's \$30,000 figure is less than the \$42,000 I had projected for 2009 and which led to the first interim order for payments of \$798 monthly. It is also less than his actual 2009 income as evidenced by his T-4's and other information showing total employment and employment insurance income of approximately \$36,300. A copy of his 2009 personal income tax return was not provided.

[15] The father had been ordered, on an interim basis, to maintain his children on his health plan through his employment as long as the plan was available. In his affidavit, he wrote that this was costing him \$135.46 monthly - whether he was actually working with his regular, seasonal employer or not. His 2009 T-4 does **not** reference medical insurance premiums [discussed before] – just Canada Pension Plan and Employment Insurance premiums.

[16] The father received some early 2010 income from employment insurance (e.i.) - \$447 weekly (gross). The stated maximum number of benefit weeks was 54. However, starting May 1, 2010, the father's e.i. benefits stopped coincidental with the start of work at a local greenhouse. His wages are \$9.20 hourly for 40 hours weekly. He estimated his total 2010 income would fall in the range of \$23,000. This is at least \$7,000 less than he had estimated earlier this year. It would attract Table support of about \$454 monthly. The mother wants more.

Agreement Regarding 2009 Support

[17] At the conclusion of the hearing, the parties agreed that the father's 2009 basic child support obligation should be retroactively varied, based on an annual disclosed income of about \$36,300, to \$704 monthly, and that the ongoing garnishee through MEP should be amended to reflect this. Accordingly, I approved an Order authorizing the agreed changes to cover the period of June 1, 2009 through December 31, 2009.

[18] Pending release of this decision, the parties also agreed (and I ordered) that current support should continue at the rate of \$600 monthly starting effective January 1, 2010. As mentioned, that is the amount a \$30,000 annual-wage earner should pay as basic support for three children. MEP's Record of Payments will presumably have already been adjusted to reflect what the parties agreed upon.

[19] Given the history of the proceedings, the father is fortunate the mother gave some concessions. I am not sure that he appreciated this - because he persisted in casting himself in the role of a victim, and steadfastly argued he could not and would not pay any more support for his three young children than might be imposed on a minimum wage earner.

1 **The Father's 2010 Income**

[20] The mother seeks a higher, imputed income in 2010 for **CMG** purposes – that is, higher than the father's current minimum wages plus estimated e.i. benefits.

[21] The father recounted that he worked seasonally for a construction company for the last two years. That work took him to various locations, including Cape Breton much of last year where he was part of a bridge construction crew. Previous to that, he was employed for about four years at an industry in Lunenburg.

[22] Although the father has no advanced education or training, I find he has a well-established employment record. His income was about \$27,800 in 2006; \$31,100 in 2007; and \$41,250 in 2008, and \$36,300 in 2009. The last two years figures reflect his income (including e.i. benefits) when he was doing bridge work.

[23] As noted, the father has taken a job locally. He said he did so because he intends to seek primary care of the children and he believes that his prospects (in court) will be better if he is living and working full-time near the children. But, as at the hearing, the father had not filed an application to vary the parenting arrangements (which he had agreed to quite recently, on the record). And, he has filed nothing since.

[24] The father insisted he accepted work for the minimum wage when nothing else could be found. He stated he recently checked with his former employer to determine if there was any "bridge work" available locally and was informed there was none. When asked if he would accept a job if the company offered him one later this year, he stated that acceptance would depend on the job location. He claimed that he remains on their "call list". There is no corroboration for any of this. With respect, I receive with caution and skepticism the father's evidence about what was potentially available to him before he gave his notice and also regarding his prospects, if he really wanted to, and if he was willing, to go back with the former employer.

[25] When pressed, the father conceded he has not actively sought an alternate type of work, or a better paying job; and he does not expect anything else to surface in the foreseeable future. He expressed no plans to improve his skills, or to upgrade his education.

[26] The father is in good health, although he said he now takes some type of medication to reduce anxiety and stress. No medical reports or receipts were provided. He confirmed that

medical insurance coverage for all concerned ceased at the end of April when he signaled that he would not be returning to work with the company. He asserted there was continuous insurance coverage for the children until April - despite cessation of seasonal work in December, 2009. For some reason this was not clearly communicated to the mother. Fortunately, the Pharmacare Program will pick up where he left off.

[27] The father rents a house in the local area. He said he pays “rent” of \$300 monthly. However, that money goes to his common-law partner who owns the property which they both occupy. She is not employed outside the home. Nobody else lives in the home. I find the so-called rent is intended as a contribution to recurring, common expenses such as power, telephone, cable, etc. Very little was otherwise disclosed about the couple’s circumstances.

[28] About a year ago, the father submitted Financial Statements. He did not update them although there was ample opportunity to do so. Against income, he showed expenses of over \$2,800 monthly – before child support. I observe there was no mention of “rent” in the Statements. Motor vehicle related expenses alone were shown at about \$830 monthly. Medical insurance coverage premiums were twice stated at \$135.46 monthly – total \$270.92 – when the lower figure was clearly applicable. The reliability of his past Statements is further eroded if one tries to reconcile several other budgeted items with his tax returns – such as income tax and Canada Pension Plan. In the result, I do not accept the implication that he was (or still is) running an \$800 monthly household budget deficit.

[29] Ms. Royer, on behalf of the mother urged the court to attribute to the father an income higher than he is currently earning on the basis that he is under-employed. The suggested level is about \$36,300 – that is, the same as his actual, total 2009 income.

[30] In support of this argument, counsel highlighted the father’s demonstrated income history, his reluctance to pay unless under garnishee, and episodic threats of litigation over the parenting regime followed by inaction. Although the stated rationale for his choices is to enhance his litigation prospects, it was submitted that this masks his true motive - which is to minimize his support obligations.

Discussion/Decision

[31] Under the **MCA**, every parent is under an obligation to financially support her or his children who are under the age of majority, unless there is a lawful excuse for not doing so.

[32] The mother has primary care of the children. She wants and expects the father to contribute a fair and adequate amount to their support.

[33] Whether the mother's or the father's positions prevail, it is difficult to imagine how the real-life needs of three children can be met from such modest amounts. This is an issue the father managed to side-step as he repeatedly emphasized his own plight. If the family was still living under the same roof, I find it is highly unlikely he would deliberately choose to decrease household income. More likely, he would do what is necessary to sustain, if not improve, the family's income and prospects.

The husband's legal responsibilities are connected to his income and a proper application of the **CMG**. Under section 3 of the **CMG**, the amount of child support is normally the amount set out in the applicable Table, plus the amount, if any, determined under **CMG** section 7.

[34] As mentioned, the mother's position is that the father made a conscious choice not to go back to work with the company which had offered him regular seasonal work for at least a couple of years, albeit often away from the local area.

[35] There was no evidence about the father's (past) work or travel schedules, accommodations, living or travel expenses, the impact on parenting times, etc. for those times when he was working away from home. However, from judicial experience, I cannot say his experience is unique. Many seasonally employed individuals (whether working on highway crews, at sea, in the woods, with heavy construction or industrial firms, etc.) find themselves away from home longer than they would prefer in order to earn a living. Such is life in difficult economic times.

[36] Although the father's stated motive is to be more available as a parent and to ready himself for litigation, from the mother's perspective he is just trying to reduce or minimize his financial obligations. Whether that is an accurate assessment or not, I do observe that during those months (in the past) when the father was not working, he would have had opportunities for more parenting time than some others might. Again, this is not unique to the family.

[37] The relevant sections of the **CMG** follow:

15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

Agreement

(2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

Calculation of annual income

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

Pattern of income

17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the 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.

Imputing income

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; ... [My emphasis.]**

[38] Income imputation was considered by Justice Forgeron in several decisions: 2008 **Marshall v. Marshall**, 2008 NSSC 11; **Crane v. Crane**, 2008 NSSC 330; and **MacGillivray v. Ross**, 2008 NSSC 339. I note her reference to **Montgomery v Montgomery**, 2000 NSCA 2 (CA), in which it was held that an intention to deprive the other spouse of child support need not be present in order to impute income, and that it is sufficient if the payor has made an unjustifiable choice to be underemployed or unemployed. Certainly, in situations where there is credible evidence of deliberate deprivation and bad faith, this may work against payors when the court exercises its discretion.

[39] In **Marshall**, special emphasis was placed on a payor's earning capacity having regard to age, education, work skills and work history. Justice Forgeron also adopted several principles stated in **Hanson v. Hanson**, [1999] B.C.J. No. 2532. Among them, these will be found: 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 or defence for a person liable to support a child to say he or she is unemployed and does not intend to seek work, or that his or her potential to earn income is irrelevant. When imputing income, on the basis of intentional under-employment, the court must consider what is reasonable under the circumstances. And, as a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[40] In the present case, I find that the mother has met the burden of proof as the party who challenges reliance on the father's recent pay information. Looking at the evidence as a whole, I find the father left a normally secure seasonal job (paying considerably more than the minimum wage) for reasons of personal preference or convenience. The notion that his decisions have been made to advance the children's interests (not his own) incidental to pending litigation is betrayed by his inaction on that front. And, I conclude there is no other good cause or reason, demonstrated by him, which could possibly sustain an order for a significant reduction in support that would otherwise be payable.

[41] There is some evidence, at least by implication, to suggest the father's choices were geared toward reducing his child support responsibilities but a definitive finding is unnecessary. I conclude the father's arbitrary notice to his customary employer was ill-conceived and unwarranted in the circumstances.

[42] I find that the father is intentionally unemployed within the meaning of the **CMG**. Giving credit where credit is due, he has taken a paying job in lieu of continued dependence on e.i. benefits. Nonetheless, I find the father's self-induced income drop cannot be justified. I do not propose to condone or reward his conduct by awarding him the relief he seeks. I impute to him approximately the same income that he earned in 2009 - \$36,000.

[43] Effective January 1, 2010 and continuing on the first day of each and every month thereafter, unless and until otherwise ordered by a court of competent jurisdiction, the father shall pay the Table amount of \$699 monthly. The father shall receive credit, of course, for any amounts paid by him through MEP under the last interim order for \$600 monthly.

[44] The terms and conditions of the previous orders shall continue in full force, except as may be necessary to give effect to this decision.

[45] Order accordingly.

Dyer, J.F.C.