FAMILY COURT OF NOVA SCOTIA
Citation: *P.M. v. R.S.*, 2016 NSFC 23

Date: 2016-09-23
Docket: Pictou No. FPICMCA 59291
Registry: Pictou

Between:

P.M.

Applicant

v.

R.S.

Respondent

Judge:	The Honourable Judge Timothy G. Daley
Heard	August 9, 2016, in Pictou, Nova Scotia
Decision:	September 14, 2016
Counsel:	Shawn MacLaughlin, for the Applicant Steven Hayward, for the Respondent

Background and Issues

[1] P.M. and R.S. are married but have been separated for many years. They have two children together, K.S. who is 17 years old and C.S. who is 14 years old.

[2] R.S. has not paid any child maintenance since February 5, 2016. He said that he is unable to work as a result of an injury to his shoulder and collarbone suffered in September of 2013 and is only in receipt of a modest social assistance allowance each month. He seeks to have his child maintenance obligation suspended until he is able to return to work.

[3] P.M. says income should be imputed to R.S. as he is able to work.

[4] The issues for determination by this court are as follows:

1. Should income be imputed to R.S.?

2. If so, what income should be imputed to him?

3. What amount of child maintenance, if any, should be paid by R.S. to P.M.?

Issues Withdrawn or Settled

[5] P.M. was originally seeking, in part, that R.S. contribute to a number of special or extraordinary expenses pursuant to section 7 of the Child Maintenance Guidelines, NS Reg. 58/98 as amended. She has withdrawn all of those claims with the exception of braces for C.S. The parties have agreed that they will each pay one half of the total expense for braces for C.S. and that will be included in an order in this matter.

Procedural History

[6] P.M. filed a notice of variation application with this court dated January 7, 2016 which was issued on January 15, 2016. In that notice she was seeking a retroactive and prospective review of child maintenance and seeking contribution to certain special or extraordinary expenses for the children.

[7] R.S. stopped working on January 25, 2016 after being placed off work by his family physician on that date. His last child maintenance payment was made February 5, 2016.

[8] R.S. filed a notice of variation application dated and issued on February 18, 2016 in which he sought the suspension of his child maintenance obligation until he could return to work. Another similar notice was filed by him on May 13, 2016.

[9] Over the years the parties have brought many applications before this court dealing with issues including custody, access and child maintenance. The most recent consent order was issued March 30, 2016, after these applications were filed. That order, among other provisions, requires R.S. to pay child maintenance to P.M. for both children in the amount of $507.65 per month based on an annual income in 2015 of $35,203.69. It also orders him to pay a retroactive child maintenance amount of $1,889.40 for the period January 1, 2013 to December 31, 2015 based on his recent disclosure of his income for 2013, 2014 and 2015.

Should income be imputed to R.S.?

[10] In determining whether R.S. should have income imputed to him as requested by P.M., I must look to section 19 of the Child Maintenance Guidelines as follows:

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

[11] Base on this section I find I must apply a three part test as follows:

(1) Is R.S. intentionally unemployed or underemployed?; and

(2) If he is intentionally unemployed or underemployed, is this due to a reasonable health need?

(3) If not, what amount of income should be imputed to him?

[12] A helpful summary respecting the analysis to be undertaken in applying this test is that of Forgeron J. in the decision of *Parsons v. Parsons*, 2012 NSSC 239 when she wrote:

[32] 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:

> a) The discretionary authority found in s.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 (CANLII).
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> 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 (CANLII).
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> 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 (CANLII); *MacGillivary v. Ross*, 2008 NSSC 339 (CANLII).
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> 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 (CANLII); *Van Gool v. Van Gool*, (1998), 1998 CANLII 5650 (BC CA), 113 B.C.A.C. 200; *Hanson v. Hanson*, 1999 CANLII 6307 (BC SC), [1999] B.C.J. No. 2532 (S.C.); *Saunders-Roberts v. Roberts*, 2002 NWTSC 11 (CANLII); and *Duffy v. Duffy*, 2009 NLCA 48 (CANLII).
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> 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 (CANLII).

[33] In *Smith v. Helppi* 2011 NSCA 65 (CANLII), "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 (CANLII). "Oland J.A." states as follows:

> 16. 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 (CANLII), 2010 NSSC 123 (N.S.S.C.), where Wilson J. stated:
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> > 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 CANLII 6307 (BC SC), [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". ...
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> 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.
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> 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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> 33. 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.

[13] In *MacGillivary v. Ross* 2008 NSSC 339, Forgeron J. adopted the reasoning in the Alberta decision of *Mitansky v. Mitansky* [2000] A.J. No. 179 (QB) as follows:

[25] Section 19 (1) (a) of the Guidelines contemplates a three step analysis: *Drygala v. Pauli* 2002 CANLII 41868 (ON CA), 2002 CarswellOnt 3228 (CA) at para 23. The three steps are as follows:

> a) Is the parent intentionally under-employed or unemployed?
>
> b) If so, is this caused by the health needs of the parent?
>
> c) If no, what is the appropriate income to be imputed?

[26] Ms. MacGillivary has proven the first branch of the test; Mr. Ross admits that he is under-employed.

[27] In the second branch of the test, the evidentiary onus rests upon Mr. Ross. He must prove that health problems compromise his ability to work. Mr. Ross is the person with access to the requisite, relevant information: *Drygala v. Pauli*, *supra* at para 41 and *Mitansky v. Mitansky* [2000] A.J. No.179 (QB) at para. 33. In *Mitansky v. Mitansky* , *supra*, Smith J states that such a parent must show a meaningful link connecting the parent's health needs to the inability to work at para 33:

> Section 19(1) (a) specifically allows for intentional under-employment for health needs. Health needs are asserted by the father. The mother refutes the assertions. In my view, where long standing health needs are asserted as a reason for under-employment, the person asserting must bear an evidentiary burden of meaningfully linking the health needs to the inability to work. That information is solely within the power of that person to assert. An assertion without more will not be sufficient proof where, as here, there is a long standing history of the same health concern coupled with an historical ability to work despite that health concern. In other words, while the proving party has the usual civil onus, the other party may be assigned an evidentiary onus in some circumstances.

[28] In Mitansky v. Mitansky, supra, the court held that the father did not link his health needs to an inability to work above $10,000 per annum. The court held that despite the father's serious heart condition, he could earn an income of $25,000 per annum.

[14] I will now apply the three part test to the evidence in this matter.

1. Is R.S. intentionally unemployed or underemployed?

[15] R.S. is normally employed seasonally as a snowplow driver. In the off-season he collects employment insurance. This has been his employment and income pattern for the last eight years. His income for 2015 was $35,450.29.

[16] R.S.'s evidence was that he applied for Canada Pension Plan disability benefits after being placed off work by his family physician in January of 2016 but was denied. He was in receipt of a social assistance payment of $720 per month which was recently increased and now receives $760 per month. In addition, he receives $139 quarterly HST rebate.

[17] I find that the evidence is clear that R.S. is intentionally unemployed. He is not working and his income is considerably reduced from when he was employed.

2. If he is intentionally unemployed or underemployed, is this due to a reasonable health need?

[18] R.S. claimed that that he is unable to work due to pain he suffers in his right shoulder resulting from an injury. He said that he was driving his son's a dirt bike in September 2013 when he fell off, drove his right shoulder into the ground and dislocated that shoulder, pulling his collarbone out of the clavicle joint. He said an x-ray initially revealed no broken bones. He was given pain medication and he returned to work in the winter of 2013-14. He did not, he said, appreciate the extent of his injury.

[19] He said that he endured pain in the shoulder, elbow and chest over the two and one half years, seeing his doctor intermittently about this. He worked the seasons of 2013-2014, 2014-2015 and the first half of the 2015-2016 season.

[20] R.S. said that in January 2016 he pulled the cartilage in his chest when shoveling snow. He said that subsequent x-rays revealed the collarbone out of the clavicle joint and he was told that he will need surgery to have it repaired. He was told by his family physician, Dr. Rivera, not to return to work.

[21] He said that he was referred to a surgeon who declined to see him and referred him to another surgeon in Halifax. He continues to wait for a consult with that second surgeon. He said he is taking pain medication and has not returned to work since January 2016.

[22] R.S.'s family physician, Dr. Emmanuel Rivera, testified that he found that R.S.'s collarbone and clavicle had been damaged and that there was a fracture. In his report letter of May 30, 2016 he said that R.S.'s collarbone was broken. He confirmed R.S.'s delay in seeing a surgeon, but R.S. has now received a referral from a surgeon in Halifax and is on a waiting list.

[23] Dr. Rivera said that he treated R.S. with pain medication. Physiotherapy was not appropriate as there was a broken bone. He sees R.S. monthly for pain management.

[24] Dr. Rivera placed R.S. off work in January 2016 after R.S. told him that he tried to go to work but the pain was unbearable. Dr. Rivera agreed that this was based on the subjective reporting of R.S. though he did indicate that he had conducted range of motion testing and based on R.S.'s reports of pain, concluded that he was very restricted. In his report letter, Dr. Rivera wrote:

> I don't think this man is able to work at the moment; any physical activity that involves movement of the collarbone aggravates the pain. His mental issue also adds up to the problem. If there is a work available that doesn't involve physical activity or good mental focus/concentration and I think he should be able to work.

[25] In cross-examination, Dr. Rivera confirmed that he diagnosed R.S. with an addiction to cannabis, advised him to stop using it, and explained the consequences and side effects. R.S.'s evidence was that he used cannabis for pain control and felt it helped him somewhat with that pain.

[26] Dr. Rivera also confirmed that pain medication had been prescribed for R.S. and had been increased to a more powerful medication in January 2016. Overall, it was clear that the issue for R.S. is one of pain. In other words, it was Dr. Rivera's opinion that R.S. could not work because of his pain experience. Dr. Rivera confirmed that physical activity such as carrying water, wood or driving a vehicle would not cause any further damage to R.S.'s shoulder or clavicle.

]27] It was R.S.'s evidence that he lives in a rural area in a home that has wood heat and requires water to be hauled from a well. He claims that he cannot haul the wood or water anymore and his girlfriend must do this for them. He said that though he can drive his vehicle with an automatic transmission, his girlfriend must shift it into gear and that she normally drives. At work, he had help after his initial

injury with any heavy work on his plow vehicle but does admit that he was able to drive the vehicle for two seasons after his initial injury.

[28] In determining the issue of whether R.S. has met his burden to prove, on a balance of probabilities, that he is underemployed due to a reasonable health need, his credibility is a factor I must consider. In assessing credibility I keep in mind the comments of Forgeron J. in the decision of *Baker-Warren v. Denault* 2009 NSSC 59 when she noted

> [18] For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon* 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization: *R. v. R.E.M.* 2008 SCC 51, para. 49.
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> [19] With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
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> > a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283 (S.C.);
> > b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
> > c) Did the witness have a motive to deceive?
> > d) Did the witness have the ability to observe the factual matters about which he/she testified?
> > e) Did the witness have a sufficient power of recollection to provide the court with an accurate account?
> > f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney* [1952] 2 D.L.R. 354;
> > g) Was there an internal consistency and logical flow to the evidence?
> > h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased? and
> > i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?
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> [20] I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R v. Norman*, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in *Re: Novak Estate, supra*, at para 37:
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> > There is no principle of law that requires a trier of fact to believe or

> disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1996] 2 S.C.R. 291 at 93 and *R. v. J.H.*, [2005] O.J. No. 39, *supra*).
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> **[21]** Ultimately, I have considered the totality of the evidence in making credibility determinations. I have thoroughly reviewed the *viva voce* and documentary evidence in conjunction with the submissions of counsel, and the applicable legislation and case law.

[29] There are a number of issues of concern when analyzing R.S.'s evidence and credibility. First, there is the issue of the timing of R.S.'s application. P.M.'s notice of variation application was signed by her in January 7, 2016 and issued by the court on January 15, 2016. R.S. was then placed off work on January 25, 2016 and has not returned since. While certainly not determinative, this raises the issue of motive in the remedy he seeks.

[30] Second, R.S. originally said in his affidavit that he was injured in September 2014. It was only on cross-examination that he agreed that he was injured in September 2013 as confirmed in the medical material filed from his physician. R.S. then testified that he worked as a snowplow operator for two full seasons and for approximately one half of the next season until he was placed off work. This change in his evidence is material as it means he was working for an additional year with his injury.

[31] Third, R.S. said that in January 2016 he injured the cartilage in his chest while shoveling snow. He said this led him to see Dr. Rivera at which time he was placed off work. Yet there is nothing in the medical information provided from his family physician nor in the evidence of Dr. Rivera to confirm that he was examined for this shoveling injury. As well, there is nothing in the evidence of Dr. Rivera to suggest that his opinion that R.S. is disabled is in any way connected with the alleged shoveling injury.

[32] Further, the fact that R.S. said that he was shoveling at all contradicts his position that his shoulder pain was so great that he could not work and cannot carry water or wood, drive his vehicle regularly or shift the vehicle into gear.

[33] Forth, it is relevant that over many years R.S. has both failed to pay his child support, resulting in garnishee of his wages, and has failed to disclose his income tax returns annually as required, including for the tax years 2013 and 2014. In those years, his income increased substantially but he avoided that disclosure,

suggesting a history whereby he is not inclined to pay his support obligations in a timely way nor to have his obligations reviewed as required.

[34] In light of this evidence, I do not find R.S.'s evidence credible respecting his limitations and his claim that he cannot work. Therefore, I do not find that R.S. has met his evidentiary burden to establish that his unemployment is due to a reasonable health need.

[35] By his own evidence, R.S. was able to work as a snowplow operator for 2 1/2 years after his shoulder injury. From the evidence, it is clear that that injury has not materially changed in all that time. The evidence of Dr. Rivera is that current treatment is for pain management only.

[36] While I certainly accept that R.S. has experienced an injury to his shoulder, I find that it is probable that his attending at his family physician's office for assessment in January of 2016 and his application for suspension of child support was motivated by the application made to this court by P.M.

3. If not, what amount of income should be imputed to him?

[37] In determining what income should be imputed to R.S., I must look at what is reasonable in all of the circumstances. In doing so, I take into account his pattern of employment and amount of income over the last number of years. I do so because he has been employed as a snowplow driver for eight years and was able to do that work for 2 1/2 seasons after he suffered his injury in 2013.

[38] From R.S.'s filings, it is clear that his income in 2013 was $35,248, his income in 2014 was $35,207, and his income in 2015 was $35,450.29. There is a significant consistency in his income.

[39] R.S. pays union dues which in 2015 were $246.60. He is entitled to deduct these in determining the appropriate income for consideration under the Guidelines. His income for purposes of determining child maintenance is therefore $35,203.69.

[40] Based on this income, I find that R.S. will pay to P.M. child maintenance in the amount of $507.65 commencing the first day of January 2016 and continuing on the first day of each month thereafter.

Summary

[41] R.S. shall have income imputed to him in the amount of 35,203.69 and as a result he shall pay child maintenance to P.M. in the amount of $507.65 per month commencing the first day of January 2016 and continuing on the first day of each month thereafter. The child maintenance amount shall be payable through the Maintenance Enforcement Program.

[42] The parties shall share equally in the braces expenses for C.R. and if one pays such expense, either full or as a month installment, the other shall reimburse the paying party forthwith upon proof of payment being provided.

[43] R.S. shall provide to P.M. a complete copy of his full income tax return annually on or before June 1 of each year, whether that return is filed or not. So long as special or extraordinary expenses are being paid P.M. shall provide to R.S. a complete copy of her full income tax return annually on or before June 1 of each year, whether that return is filed or not.

[44] R.S. will immediately notify P.M. of any changes in his employment or income including particulars of any such change.

[45] Given the findings made, if parties wish to be heard on costs, they may provide the court with written submissions within two weeks after which I will provide a further written decision.

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Daley, J.