FAMILY COURT OF NOVA SCOTIA
Citation: *R.C. v. A.L.*, 2021 NSFC 01

Date: 2021-01-12
Docket: 109662
Registry: Annapolis Royal

Between:

Raymond Croscup

Applicant

v.

Amanda Lewis

Respondent

Judge:	The Honourable Judge Jean M. Dewolfe
Heard	December 1, 2020, in Kentville, Nova Scotia
Final Written Submissions:	December 8, 2020 for the Applicant December 15, 2020 for the Respondent
Counsel:	David Baker, for the Applicant Rachel Taylor, for the Respondent

By the Court:

[1] This is an application by Raymond Crosup ("R.C."), to vary a Consent Order of this Court issued on December 27, 2019 ("the 2019 Order") so as to reduce child support payable for two children. R.C's evidence is that his income has been significantly reduced from the estimated $85,516.00 at the time of the 2019 Order, due primarily to the COVID-19 pandemic. He initially indicated that his current income was $24,000.00 a year, but has since revised that to an estimated annual income of $51,954.00 for 2020.

[2] Amanda Lewis ("A.L."), the Respondent mother, opposes the variation application, and seeks to impute $160,381.00 annual income to R.C., based on what he could earn given his skill set and experience.

[3] The matter proceeded on a modified "document only" process. Both parties filed extensive affidavits and financial disclosure. Two pre-trials were held prior to the hearing to discuss process and evidence. A.L.'s affidavit was amended prior to the hearing so as to address evidentiary concerns raised by R.C.'s counsel.

[4] Cross-examination by video was offered, but counsel agreed that a telephone appearance would be sufficient. The parties appeared with counsel on December 1,

2020 by telephone, and were affirmed remotely. Both parties were cross-examined. Counsel agreed to provide written submissions which were received on December 8, 2020 (Applicant), and December 14, 2020 (Respondent).

Evidence – Applicant

[5] R.C. has worked in Northern Alberta for many years. He is an ironworker and is part of a union. R.C. testified that he usually has only worked for several months each year since 2017. In 2020, he worked for part of January and February, and earned approximately $30,000.00. He expected to receive more employment in April and September as is usually the case. However, due to COVID and a decline in oil prices and demand, this did not occur. Instead, R.C. claimed EI, and then CERB and CRB benefits. He currently receives $450.00 per week on CRB, approximately the same amount as his EI benefit. CERB was slightly higher at $500.00 a week for approximately three months.

[6] R.C. submitted a letter from his Union, attached to his September 8, 2020 affidavit, which was admitted by counsel. This letter indicated that even prior to COVID there had been a “significant decline” in the industrial work picture for Northern Alberta over the last 3 years, and that manhours for the Union had

decreased by 60%. This letter also indicated that the fall shutdown season had been pushed to the spring of 2021.

[7] R.C. testified that he worked full time until 2016, the year following the parties' separation. Since that time he has worked periodically, usually for one to two month periods, three times a year. He has then collected EI benefits for the rest of the year. In 2016, R.C.'s income was $147,859.00. His income was $80,323.00 in 2017, $90,263.00 in 2018 and $91,915.00 in 2019.

[8] R.C. testified that his cost of travel to work and living expenses in Alberta are covered when he works. He is unionized and "bids" on jobs. He worked for several weeks in January/February 2020 and was expecting another one-two month period of employment in April 2020, according to his usual work pattern. However, due to a COVID related shutdown this did not happen. He had then hoped to receive employment in September 2020 according to his usual work pattern. This too did not occur due to the continuation of the COVID shutdown.

[9] In June 2020, R.C. stopped paying his child support. He tried to obtain assistance through the "COVID-19 Pilot Project" but A.L. did not participate. He then commenced this application to vary in September 2020.

[10] During the summer of 2020, R.C. worked for several weeks doing construction for his father but was not paid. He has not explored the possibility of other or additional work. He testified that his father does similar work to him at the Halifax Shipyard, but he was not willing to work for a lower wage than he could eventually obtain in Alberta. He explained that if he were to try to work in Nova Scotia he would have to apprentice and join another union. He also was not interested in looking for jobs in Alberta which would not cover his travel and lodging costs as this would reduce his income. He admitted that given the slowdown in his field in Alberta he might have to "think" about other job opportunities, but he had not done so to this point. He also had not explored opportunities for supplementary work. e.g. construction related.

[11] R.C. testified that in 2019 his rate of pay was between $42.50 and $106.00 per hour, and that he often worked 13.5 hour days which involved payment of overtime and a higher hourly rate.

[12] R.C. lives in a four-bedroom home (tax assessed at $385,000.00, mortgage of $280,289.00) with his grandfather. He does not charge his grandfather rent. He owns two other homes as well. One is vacant, but had been rented to his brother in the past. R.C. testified that he pays the mortgage on this home (approximately $200.00 per month) and is "holding" it for his brother. He also owns a home which

he has “gutted” and has been renovating (including installation of 36 windows). He also owns two vacant acreages, one in Alberta which is for sale (one acre) and one in Nova Scotia (40 acres), as well as three Dodge trucks (one running), a motorcycle, and $16,000.00 worth of shares.

[13] In short, his evidence is that he has done nothing to reduce his expenses or increase his income since February 2020 except apply to reduce his child support. He has cashed in some RRSP’s and has run up his line of credit (although there is was no evidence as to by how much) in order to meet his expenses.

Evidence – Respondent

[14] A.L. testified that she has been the primary caregiver of the children, although in June, July, and August she and R.C. shared the children week-on/week-off. A.L. currently works part-time and earns an estimated annual income of $30,524.00. She has worked full time hours on occasion (e.g. to cover a maternity leave) and when she did so her income was approximately $39,559.00 annually. She had worked from home since March 2020, but anticipated going back to her workplace in January 2021.

[15] When working part-time, A.L. works 8:30 am to 1:30 pm, and only requires childcare for approximately 1.5 days per month during the school year. She also

requires childcare for the weeks during the summer when the children are in her care (at least 4). Her daily cost is $40.00 (no tax deduction). One of the children has needs which make it appropriate to have in-home care. These costs, of course, increased due to the need for after school care ($20.00 per day) when she worked full time.

[16] A.L. testified that in February 2020 she provided receipts totalling in excess of $700.00 for the children's child care and activities to R.C. Although R.C. had agreed to pay 73% of all childcare and special expenses in the 2019 Order, he refused to pay in February 2020, citing "downsizing" at his employment. A.L. reluctantly agreed not to collect on the receipts she had submitted.

[17] A.L. says she is tired of R.C.'s continual efforts to pay less child support. He originally agreed to $2,000.00 per month in 2016 when they separated, then $1,500.00 per month after she registered their agreement with the Court in 2018, and then $1,199.00 per month in the 2019 Order. She indicated that R.C. has chosen to work less than full time since their separation. Since 2017, R.C. has repeatedly told her there is "no work" in Alberta, and she has responded that he should find somewhere else to work if that is the case.

[18] A.L. provided examples of various employment opportunities in Nova Scotia and Alberta for which she believed R.C. to be qualified.

[19] A.L. resides with her spouse, who is unable to work, in a home which is tax assessed at $91,300.00 with a $40,500.00 mortgage. They have had to sell a vehicle since R.C. stopped making his child support payments.

Issues and Analysis

Material Change in circumstance

[20] This is a variation application, and as such R.C. must show a material change in circumstance pursuant to s.37(1) of the *Parenting and Support Act* (the "*Act*") and s.14 of the *Nova Scotia Child Support Guidelines* (the "*Guidelines*").

[21] I am satisfied that R.C. has proven that his income is substantially lower than it was when the 2019 Order was made and that is a material change in circumstances.

Change in Child Support – Imputing Income

[22] R.C. seeks to reduce child support retroactively based on his 2020 total estimated income of $52,000.00, and prospectively based on a projected income of $24,000.00 a year (from government benefits only).

[23] A.L.'s position is that R.C. is intentionally underemployed in that he has chosen, since 2017, to work less than half the year in Alberta. She argues that if he worked full time eight months of the year at an average hourly rate of $74.50 per hour (an average of his lowest and highest rates in 2019), he could earn $160,380.80. She seeks to have the Court impute this income to R.C.

[24] A.L. agreed to set R.C.'s income at $85,516.00 per year at the time of the 2019 Order, based on her understanding that R.C. had reduced his months of work in Alberta.

[25] A.L. argues that R.C.'s reduction in work since 2017 is voluntary. However, the uncontroverted evidence of R.C. as set out in the letter from his Union is that the volume of available work has been decreasing since 2017. Therefore, this Court cannot speculate on whether R.C. could possibly have made more diligent efforts to obtain additional work during the period of 2017 to 2019.

[26] This Court accepts R.C.'s evidence that his work in Alberta has been put on hold since March 2020 due to the COVID-19 pandemic.

[27] A.L. also argues that the Court should impute income to R.C. because:

a. he has known that his work was “drying up” in Alberta and he has made no efforts to find other work in Alberta or Nova Scotia prior to the COVID-19 pandemic.

b. there have been job openings for individuals with R.C.’s skill set in Nova Scotia and Alberta since March 2020 but he has failed apply or follow up on these jobs.

c. R.C. has failed to supplement his CERB/EI/CRB income by seeking paid construction work.

[28] This Court’s authority to impute income is S.19(1)(a) of the *Guidelines* which provides:

> 19(1)(a) The Court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
>
> > 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;

[29] R.C.’s unemployment does not arise due to the needs of the child, education or health.

[30] When imputing income on the basis of intentional unemployment or underemployment, the Court must consider what is reasonable in the circumstances, taking into consideration such factors as age, experience, skills, availability of work, freedom to relocate and other obligations: *Smith v. Helpii*, 2011 NSCA 65 (in quoting the decision of Wilson, J. in *Gould v. Julian*, 2010 NSSC 123).

[31] *Standing v. MacInnis*, 2020 NSSC 304, a recent post-COVID decision is factually dissimilar from the instant case in that the Applicant had quit his job in Alberta before the onset of the pandemic. However, Forgeron, J. in that decision reviewed a useful summary of the law relating to imputing income as set out in *Parsons v. Parsons*, 2012 NSCC 239, para 32 (in part):

> [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:
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> 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.
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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.
>
> 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; **MacGillivary v. Ross**, 2008 NSSC 339.
>
> 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; **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; and **Duffy v. Duffy,** 2009 NLCA 48.
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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.

[32] A.L. accepted R.C.'s decision to work less than eight months of the year at the time of the 2019 Order. There is no evidence that R.C.'s income would have dropped if the COVID pandemic had not occurred.

[33] The Court finds that R.C.'s actions in not seeking additional or alternate employment to June 2020 were reasonable. He intended to go back to his employment. No one knew how long the pandemic shutdown would continue. In fact, R.C. paid full child support until June 2020 on this basis.

[34] However, after June 2020, when it was clear that his income would suffer significantly due to the pandemic shutdown, R.C. took no reasonable steps to increase his income or reduce his expenses.

[35] R.C. has amassed significant assets, which while not appraised for market value, would appear to hold significant equity due to his investment of time and money. He has also financially supported his extended family with free rent (grandfather), paying his brother's mortgage and not renting the property he has been "holding" for his brother, and travelling to his father's to perform construction work free of charge.

[36] Despite his comments to A.L. in February 2020 that there was "no work" in Alberta pre-COVID, and the information contained in his Union's letter, R.C. made NO attempts to find temporary or additional work or to change his employment. His explanation is that he is hoping to continue to work minimally in Alberta, at no cost to himself and earn $85,000.00 to $95,000.00 per year. Given the evidence he himself presented, he admitted that he may now have to "think" about looking for other employment.

[37] The Court must exercise its power under S.19 with reasonableness. As a unionized worker, R.C. would need time to make an employment shift given the

changes in his employment availability pre-COVID, and the ongoing impact of the COVID pandemic. However, it is not acceptable or reasonable for R.C. to seek to significantly reduce his child support without making any attempts at mitigation.

[38] The Court will permit R.C. to reduce his child support payable based on his 2020 estimated income of $51,954.19 commencing June 1, 2020. This will continue to and including June 1, 2021 at which time his payments will be set based on an imputed income of $85,515.00. This will give R.C. time to reorganize his finances and make employment adjustments.

[39] R.C. is a relatively young father (age 40) with significant assets, and training experience. He has no health issues or additional family obligations beyond his two children. It is unreasonable to expect his former partner who is earning $30,000.00-$39,000.00 per year to shoulder a disproportionate share of the cost of raising these children. Extended family obligations and lifestyle choices must come second to the needs of minor children.

S.7 Expense: Child Care

[40] A.L. seeks a proportionate sharing of her child care expenses. Her Statement of Extraordinary Expenses and Statement of Expenses indicates that her estimated child care cost is $193.33 per month, assuming she is working part-time and needs

full-time summer care for a portion of the summer. This depends on whether R.C. is working or is able to take care of the children for four weeks as he did in July/August 2020. Assuming that he is able to do so, I will accept the $193.33 per month amount. R.C.'s share will be as follows:

- Child care to February 2020 forgiven by A.L.
- March 1, 2020 to June 1, 2020: 74% x 193.33 = 143.00/month (rounded)
- July 1, 2020 to June 1, 2021: 63% x 193.33 = $122.00/month (rounded)
- July 1, 2021 onwards: 74% x 193.33 = $143.00/month (rounded)

[41] I cannot speculate on A.L.'s childcare costs and income in the future should she obtain full time employment. She may make an application to vary should that occur.

[42] R.C. must provide confirmation of any employment during 2021 to A.L. forthwith. Child support may be adjusted at the end of 2021 based on R.C.'s actual income if it exceeds $85,515.00.

[43] All other provisions of the 2019 Order will continue in effect.

[44] I will hear the parties on costs.

[45] Counsel for the Applicant will draft the order.

Dewolfe, Jean, JFC