

FAMILY COURT OF NOVA SCOTIA

Citation: S.R.C. v. D.C., 2013 NSFC 21

Date: 20131030

Docket: FCMCA-085166

Registry: Yarmouth

Between:

S.R.C.

Applicant

v.

D.C.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge John D. Comeau, JFC

Heard: October 3, 2013 at Comeauville, Nova Scotia

Counsel: Gregory Barro, Esq. for the Applicant
Oliver Janson, Esq., for the Respondent

Introduction / The Application:

[1] This is an application to vary brought by S.R.C. who is the father of A., born February [...], 1998 and the husband of the Respondent D.C. The parties were married on August 27, 1988.

[2] The Applicant is seeking to reduce the amount of child maintenance payable for the child A. to \$350 a month payable on the 1st of each month, effective April 1, 2013. He is also requesting a termination of spousal support. Spousal support was agreed to in the amount of \$1,100 commencing May 1, 2012 indefinitely.

**Issues: Application to vary
 Child support and Spousal support**

[3] The parties agree there is a change in circumstances since the separation agreement was entered into on May 24, 2012. This agreement was registered under section 52 of the *Maintenance and Custody Act* and is a court order as per the provisions of section 52(3).

[4] There are two children of the marriage. In addition to A. referred to above, the Applicant father has primary care of N., born March [...], 1996. Both parents have reasonable access to the children.

[5] At the time of the parties entering into the separation agreement, the Respondent mother/wife, did not have any income and the Applicant father's annual income was \$65,285.07 and guideline amount was agreed to be \$600 a month, starting the 1st of May, 2012 and thereafter the 1st day of each and every month thereafter. The Respondent mother/wife was to enroll in Maintenance Enforcement.

Change in circumstances:

[6] There is agreement that there is a change in circumstances in that the Respondent is now employed. The Applicant has presented evidence which he says shows a change in his annual income, although this change is in dispute.

FINANCIAL INFORMATION

Financial Circumstances of the Parties

[7] The Applicant father/husband is a building contractor who works for a limited company. He is paid both in an hourly rate and dividends from the Company when there is extra money to pay out. He is a 50% owner of the shares in the Company. The company also owns and operates rental properties. His most current income supplied to the court shows gross pay of \$19,550 from January 5, 2013 to June 1, 2013.

[8] The standard court form for financial disclosure sets out salary or wages of \$3,715.42 per month (annually \$44,585.12) with expenses totalling monthly \$5,191.12. This includes \$600 child support and \$1,100 spousal support.

[9] The financial statements of the Company to December 21, 2012 and 2011 show dividends paid out as follows:

2011 - \$2,180	} Applicant owns 50% of the Company
2012 - \$28,180	

[10] The Company's bottom line (a loss) is comparable for both 2012 and 2011. The financial statement was prepared for tax purposes as well as the shareholders. There is no amortization claimed for 2012 which would make the figures more realistic (or liquid) to determine whether there are any earnings that should be credited to the Applicant. The Company has minimal retained earnings of \$3,000.

[11] To lend to a historical view of his income in contracting, the Applicant's income tax assessments for 2008, 2009 are as follows:

2008 - \$61,034
2009 - \$65,732
2010 - \$82,024
2011 - \$65,285.07

[12] This year (2011) shows dividends of \$1,089.90 which were grossed up 25% for tax purposes to \$1,362.38 actual income \$65,012.59.

2012 - \$44,585.14

[13] This year (2012) shows dividends of \$18,974.75 which evidence discloses are grossed up 25% = \$14,231.06 actual ; actual 2012 income - \$39,841.45

[14] The Respondent started work for an insurance company July 3, 2012. Her financial information is based on income tax returns as follows:

2008 - \$3,815

2009 - (\$5,152)

2010 - \$2,030

Most current 2012 - \$25,072.37

THE LAW:

[15] This is an application to vary pursuant to Section 37 of the *Maintenance and Custody Act*:

“37(1) The Court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.”

[16] It agreed that there is a change in circumstances to provide the Court with jurisdiction to vary the separation agreement (order). The Respondent is now gainfully employed.

Determination of Annual Income:

[17] It is necessary to determine the Applicant’s annual income for child support and spousal support purposes. The child support guidelines are helpful in this exercise:

“15(1) Subject to subsection (2) (agreement of the parties) a spouse’s annual income is determined by the court in accordance with section 16 to 20.

16. Subject to Section 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 Customs and Revenue Agency and is adjusted in accordance with Schedule III.

[18] This Court in *R.S.N. v. D.L.B.*, 2009 NSFC 6 (Can LII) made the following observations:

"In *Lavergne v. Lavergne* 2007 ABCA 169 (CanLII), (2007) 40 R.F.L. (6th) 239 the Alberta Court of Appeal clarified what total income means in the plain wording of s. 16 of the Guidelines:

Legislation Provisions

'The *Guidelines* have provisions regarding income and income information. The relevant provisions are set out in the appendix to these reasons. Section 16 directs that annual income, the basis upon which child support is payable, is determined "using the sources of income set out under the heading 'Total Income' in the T1 General form issued by Canada Customs and Revenue Agency." There is no reference in s. 16 to any years to be considered.

[15] The appellant's suggestion, that "total income" means the amount identified in line 150 of the payor's individual tax return, does not tract the plain wording of s. 16. The sources stipulated under the heading of "total income" in the prescribed T1 Form for the purpose of the *Income Tax Act* include commissions, pensions and disability benefits, employment insurance, dividends, interest, partnership income, rental income, taxable capital gains, support payments, registered retirement savings plan receipts and self-employment income. Line 150, in contrast, permits credits to reduce the amounts when arriving at a total."

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."

Income information used must be the most current:

2(3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

Section 16 of the Guidelines is silent on the period for which the determination of annual income is to be made and whether annual income is the income of the past taxation year, estimated annual income for the current year, or an estimate of likely future annual: (see *Lavergne*, supra)."

The Court in *Lavergne* supra concluded:

While using the amount identified at line 150 of the payor's individual tax return is a certain and simple means to determine annual income, it will not always be fair (as referred to in s. 17). Thus, the *Guidelines* provide alternative methods to determine income where the provisions of s. 16 would not result in a fair determination. These methods are to fulfill the objectives stated in s. 1(a), that the *Guidelines* are intended to ensure that children "continue to benefit from the financial means of both spouses after separation" The use of the past year's income tax return, without subsequent adjustment to reflect the actual income, is inconsistent with the *Guidelines*' multi-step approach to determining income and with the general discretion granted to the court to specify annual income for the purposes of calculating child support obligations. While the *Guidelines* method is more complicated than relying only on historical income information, it better fulfills the objective that children should continue to benefit from the financial means of both parents after separation by providing them with those benefits on a more timely basis."

[19] In *Lee v. Lee*, (1998) 165 D.L.R. (4th) 610 the Newfoundland Court of

Appeal held:

That annual income is determined by looking at projected future income of the payor and not historical income except to make a fair prediction of future income where there is a trend of increasing or decreasing income. (Words used in *Lavergne* in referring to this case.)

[20] The Newfoundland Court of Appeal observed at page 4 of *Lee* supra:

“Support must be paid out of the future income of the payor-spouse. The underlying rationale is still ability to pay. In the sense, the process of setting child support is a prospective one. In engaging in that predictive exercise, however, historical data is obviously important and usually provides the best forecast of current ability to pay.

The Court of Appeal of Alberta in *Lavergne supra* referred to the decision of the Supreme Court of Canada in *D.B.S.* [2006] 2. S.C.R. 231, 31 R.F.C. (6th):

The Supreme Court of Canada’s most recent decision on child support, *D.B.S.*, does not address this issue directly. However, the decision is clear that other than retroactive awards, child support is prospective and that where the payor’s income levels increase or decrease, so will contributions to the child’s needs, just as if the family had remained together. This objective, to provide for the children as if the family had remained together, implies that the children should benefit from, or be deprived of, income at current, not past, levels.”

[21] In *Dillon v. Dillon*, 2005 NSCA 166 (CanLII), 2005 NSCA 166, the Court determined that the calculation of income for child support calculation purposes is fact dependant...

[22] Although the decision deals with calculation of income for the purposes of child support, its principles can be applied to the calculation of income for the purposes of spousal support. The Court must determine what is fair under the particular circumstances of the case before it (see *Campbell v. Campbell*, 2012 NSCA 86 (CanLII)).

Income Averaging:

[23] Counsel for the Respondent asks the Court to average the Respondent's income as per the child support guidelines.

“1.(10 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.”

[24] It is difficult to apply this section when one considers annual income is prospective. The exercise may be more of a forwarding averaging. In the end what the Court is looking for is the most current income.

[25] In the case before the Court, looking at financial disclosure as a whole and considering the nature of the Applicant's business (building contractor) averaging would not be the fairest way to determine annual income.

Spousal Support and the Separation Agreement:

[26] Although section 5 of the *Maintenance and Custody Act* provides that a spouse has an obligation to assume responsibility for her own maintenance, it is subject to certain considerations:

“5 A maintained spouse or common-law partner has an obligation to assume responsibility for his own maintenance unless, considering the ages of the spouses or common-law partners, the duration of the relationship, the nature of the needs of the maintained spouse or common-law partner and the origin of those needs, it would be unreasonable to require the maintained spouse or common-law partner to assume responsibility for his maintenance, and it would be reasonable to require the other spouse or common-law partner to continue to bear this responsibility.”

[27] In addition to this statutory directive, it has to be remembered the Court is dealing with a spousal separation agreement and the two stage approach referred to by the Supreme court of Canada in *Miglin v. Miglin* 2003 SCC 24 (CanLII) is applicable.

Stage 1 - The circumstances of execution and the substance of the agreement.

Stage 2 - As summarized in the case note:

“At the second stage, the court must assess whether the agreement still reflects the original intentions of the parties and the extent to which it is still in substantial compliance with the objectives of the Act. Accordingly, the party seeking to set aside the agreement will need to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned. Some degree of change in the circumstances of the parties is always foreseeable, as agreements are prospective in nature. Parties are presumed to be aware that health, job markets, parental responsibilities, housing market, and values of assets are all subject to change. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the *Act*, that the court may be persuaded to give the agreement little weight.”

[28] The *Act* referred to in *Miglin supra*, is the *Divorce Act*. There has been no argument respecting stage 1, however stage 2 should be considered in the context of section 5 of the *Maintenance and Custody Act* so the current circumstances i.e.

the Respondent being gainfully employed represent “a significant departure from the range of reasonable outcomes anticipated by the parties”.

[29] In *Moge v. Moge* 1992 CanLII 25 (SCC), (1992) 43.R.F.L. (3d) the Supreme Court of Canada discussed self-sufficiency as it relates to marriage. The question will be, as the Respondent now has a job, is she self-sufficient and to what extent?

[30] Justice L. Hevreau Dube in *Moge* refers to the practicality of this goal.

“It is also imperative to realize that the objective of self-sufficiency is tempered by the caveat that it is to be made a goal only “in so far as is practicable.” This qualification militates against the kind of “sink or swim” stance upon which the deemed self-sufficiency model is premised. (See Bailey, at p. 633, and *Droit de la famille - 623*. [1998] R.D.F. 196, (sub nom. *G. (J.Y.) v. G. (R.)* 34 Q.A.C. 97 (C.A.), at pp. 201 - 202 [R.D.F.].)”

Present payments being made by the Applicant:

[31] Evidence is the Applicant arbitrarily dropped the payments for child and spousal support in April, 2013. This was done in accordance to his most current income and the income of the Respondent. The changes he made were \$230 child

support and \$200 spousal support. This is different than that set out in his application respecting child support.

[32] In the decision of *D.B.S. et al* 2006 SCC 37 the Supreme Court of Canada dealt with the issue of retroactivity. They were deciding a number of cases at the same time. The ratio of these cases is summarized in the introduction to the case:

“Parents have an obligation to support their children in a manner commensurate with their income, and this obligation and the children’s concomitant right to support exist independently of any statute or court order ...

While child support orders should provide payor parents with the benefit of predictability, and a degree of certainty in managing their affairs, such an order does not absolve the payor parent - or the recipient parent - of the responsibility or continually ensuring that the children are receiving an appropriate amount of support ...

Similarly, a court may award retroactive support where there has been a previous agreement between the parents. Although such agreements should be given considerable weight, where circumstances have changed and the actual support obligations of the payor parent have not been met, the court may order a retroactive award so long as the applicable statutory regime permits it.”

[33] The Applicant’s annual income is determined based on the fact that he is in a business where income is up and down depending on how much work is obtained. There has been no argument that he may be underemployed in a

purposeful way. There are rental properties that may show a profit in the future but that is for another day.

[34] His most current income that the Court can determine is \$44,585.14. There is no evidence to take a more prospective approach or to average his income.

[35] The Respondent's income is not disputed at \$25,072.37.

Child Support: (Each have custody of a child)

[36] Applicant - \$44,585.14. Table amount for one child is \$373.79 rounded off to \$374 a month.

[37] Respondent - \$25,072.37 table amount for one child is \$206.85 rounded off to \$207.

[38] The Applicant shall pay child support through the Director of Maintenance Enforcement if the Respondent is enrolled in that program in the amount of \$165.15 to the Respondent for the support of A., retroactive to April 1, 2013. If

this calculation results in the Respondent having received extra child support, no repayment or recovery will be made as these funds benefited the child.

Spousal Support:

[39] The Court has considered the provincial scheme in section 5 of the *Maintenance and Custody Act* and applied this to the principles set out in *Miglin supra*, and *Moge supra*. In *Miglin* the Supreme Court of Canada discussed intervening and changing agreements which is now under the provincial scheme a court order. The agreement contemplates a compensatory amount as defined in *Moge supra*. Although the Respondent complied with section 5 considering the salary she has obtained, she has not achieved and may not be able to achieve the self-sufficiency referred to by Justice L'Heureau - Dube in *Moge supra*.

[40] As a result, spousal support is varied to \$500 a month indefinitely, retroactive to April 1, 2013. The Applicant shall pay arrears by December 15, 2013. In arriving at this amount, the Court has looked at the spousal support advisory guidelines and more particularly, section 4 of the *Maintenance and*

Custody Act. The indefinite term of this award is based on the fact the parties have been married for 25 years which, when considered, in light of the spousal support advisory guidelines is applicable.

[41] Another issue before the Court is the arbitrary reduction in child support and spousal support by the Applicant. Because of this, the Court's decision is one of retroactivity. Both *D.B.S.*, *supra* the case concerning child support and *Miglin supra* with respect to agreements for spousal support are applicable.

Conclusion/Decision

[42] The parties agree there is a change in circumstances in that the Respondent is gainfully employed.

[43] Financial disclosure has been fairly and extensively given by both parties.

[44] There are two children of the marriage and because of the shared parenting situation a set off is appropriate (see *Contino v. Leonilli-Contino* [2005] 3 SCR 217).

[45] All issues depended on the respective parties' annual income, which the Court determined and made reference to in this decision.

[46] Counsel for the Respondent shall prepare the order, the provisions of which are referred to earlier with respect to child and spousal support.

John D. Comeau
Judge of the Family Court
of Nova Scotia