FAMILY COURT OF NOVA SCOTIA
Citation: M.V. v. S.V., 2009 NSFC 24

Date: 20091116
Docket: FLBMCA-043076
Registry: Bridgewater

Between:

M.V.

Applicant

v.

S.V.

Respondent

Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on December 18, 2009.

Judge: The Honourable Judge William J. Dyer

Heard: October 21, 2009, at Bridgewater, Nova Scotia

Counsel: Joshua Bryson, for the Applicant

By the Court:

Background

[1] M.V. (the wife) started an application under the **Maintenance and Custody Act** (**MCA**) against S.V. (the husband) in early July, 2007 to deal with the issues of custody, access, and child maintenance in the wake of their separation in May, 2007.

[2] At the outset, the parenting issues were contentious. The husband was paying no support. He hired an experienced family law lawyer, but ended her retainer in late September. By mid-October, 2007, he had retained new counsel; and by the end of that month, he had countered with his own application for custody and support.

[3] There are two children - a daughter, who is 12 years old; and a son, who is 10. Faced with competing parenting plans, a barrage of affidavits, and the prospect of a lengthy contested hearing, the parties agreed to a Custody and Access Assessment. The Assessment was received in mid-July, 2008. (It was not entered as an exhibit during the current hearing.) After some delay, the court was presented (in late November, 2008) with a consent order finalizing the parenting arrangements. By virtue of that order, the parents have joint custody; and the children live primarily with their mother. The father's parenting times were specified. The order was silent on the subject of child support.

[4] In late January, 2009 the wife retained new counsel. The file languished until mid July, 2009 when she sought to finalize child support. On July 24, 2009 the husband discharged his (second) lawyer; and he gave written notice to the court and to the wife that he intended to represent himself. In late August, a hearing date of October 21st was set. The husband, who was already under financial disclosure orders, was ordered to file and serve additional information. He did not attend the hearing. The case went ahead in his absence.

Issues

[5] To be decided is the amount of child support the husband should pay; the effective date of the support order, if imposed; and court costs.

The Evidence

[6] M.V. submitted an affidavit and testified. Her uncontradicted evidence was that the parties were married in late October, 2000, that they cohabited until their separation in May, 2007; and that no money has been paid or received for the children's benefit (except for a token $70 in cash on one occasion). She said there has not been a final division of matrimonial assets by agreement or by court

decision. There may be litigation over her legal interest in the former matrimonial residence and other assets.

[7] Through his former lawyers and by his documents, the husband has steadfastly maintained he has no income and is therefore not obliged to pay child support. The wife believes the husband is intentionally unemployed, that he may be receiving some cash income but not reporting it, and that he has deliberately withdrawn from the workforce to avoid his financial responsibilities to the children. According to the wife, he told her more than once she would "never see a penny in support"; and that he invoked the words " too bad, so sad", or words to that effect, in relation to support.

[8] The wife's evidence was that about two months after the separation, the husband injured a fingertip and left his job. It was an accidental injury, unrelated to his employment. Her understanding is that he may have lost the tip of one finger while using a wood-splitter at home. She recalled seeing him with a bandaged finger at one stage. However, there was no direct discussion between the spouses about the injury. She thought he would be returning to his regular employment after a brief time. He did not do so.

[9] The wife wrote that the husband is physically able to work given the (fortunately) minor nature of his September, 2007 accidental injury, that he continues to do routine chores around his residence, and that he is able to engage in recreational activities. To her observation, he has never shown any condition or physical disabilities.

[10] Regarding the husband's work history, the wife's evidence was that the husband worked full-time when they were together. With the exception of an injured ankle in or about 1997 (when the husband was off for a couple of months), he was generally in good health and enjoyed a good income. She asserted that before the separation, the husband made no complaints about his general state of health or any specific problems. According to her, he was able to perform routine household chores and he enjoyed an active outdoor recreational life which included fishing, hunting, etcetera.

[11] As later discussed, within the husband's documents there was mention of back problems he may have been experiencing. The wife stated she had no

knowledge of this until it surfaced during the proceedings; and she testified that he worked throughout 2005 and 2006, with an increasing income. She saw no changes in his physical condition and could not recall him disclosing any complaints or concerns before the separation.

[12] Since the consent order, according to the wife, the husband has continued to exercise access to the children, albeit it on an irregular basis and not as specified in the order. Based on information provided by the children after their visits and advertisements appearing at a local store, the wife also believes that the husband has been breeding Chihuahua puppies and selling them (for $800 each).

[13] Regarding the husband's present circumstances, the wife's evidence was that he lives in a mini home on property owned by one or both of his parents. The home has the usual amenities and services such as power, heat, water, and telephone, plus satellite and internet services. The husband reportedly has a truck and is licenced to drive. She understands the husband has a female companion who is employed outside the home and has an income, that the couple have a young child, and that the three of them live in the home.

[14] The wife thinks the husband has a recreational vehicle which was purchased for about $10,000 nine years ago, plus a boat and motor. There is some corroboration for the wife's beliefs within the husband's 2007 Financial Statement (which filed with the court). It mentions payments for two vehicles (about $1,230 monthly) and debt payments for a four-wheeler and satellite. Unstated was whether the debt payments he claimed in his budget were being made and, if so, how that was being done if he had no income. There is some evidence that he still has the assets.

[15] The wife is now approximately 30 years old; the husband is about 37. He attended a local community college and is qualified to perform heavy duty farm equipment repairs and, according to her, he has had a lot of on-the-job training through his most recent employer.

[16] I find that **S.V.** last worked September 7, 2007. He submitted an affidavit in early September, 2009 [after the hearing date was set] declaring that he had no income from any source in 2009.

[17] In 2008, the only income disclosed in his tax return was from the Universal Child Care Benefit ($400). (That year, he noted that he was "living common-law".) His 2007 Notice of Assessment provides a line 150 total income of $35,930 from employment. After he left his job, he submitted a Statement of Financial Information showing no current income, against expenses of about $4,300 monthly which the wife touched on in her evidence. Appended to his Statement was an Income Tax Summary for 2006 showing total income of $51,046. This compares with 2005 total income of $45,789; and 2004 income of $44,703.

[18] W.L. is a co-owner and operator of a successful, award-winning company which continues to thrive in the forestry industry despite the economic doom and gloom prevalent in many rural communities. The company is recognized as a technological leader and innovator, which may account for its sound reputation and longevity.

[19] Her evidence was that the husband worked for her logging company for about seven years. She characterized him as an excellent employee before he left on his own initiative, in September, 2007. Asked to rank the husband on a scale of 1 to 10, she assigned him a ranking of 8. She confirmed that the husband worked mainly as a harvester operator, although he could do other work - such as heavy equipment maintenance. The log harvester is a "high-tech" unit which is controlled from a computerized "touch pad". I infer that intelligence, observation and some manual dexterity would be the principal attributes needed to work the harvester. The job does not appear to be physically demanding by comparison to traditional (non-mechanized) work.

[20] W.L. said the husband was trained "in-house" . It took about 2,000 hours. She noted that he brought an extensive knowledge of forestry to the job which enhanced his credentials and value to their operation.

[21] W.L. was informed of the husband's accident and understood that he had sustained an injury to one or more of his fingertips. As mentioned, the harvester which he had been operating utilizes a control panel that is manipulated with the fingers. Based on what she was told about the injury, she understood and believed that the husband would be away from work for a brief time but that he would return. He did not; and she learned this from his co-workers - not directly from him.

[22] According to W.L., no other injuries or conditions were disclosed to her at any time during the seven years the husband was associated with her company. A Separation Certificate was sent to him at the end of October, 2007.

[23] W.L. stated they were surprised and very disappointed that the husband chose not to return. Importantly, for our purposes, I accept her evidence that the husband could have returned to the position which was paying over $50,000 annually. Indeed, she stressed that his position has never been filled.

[24] W.L. also corroborated from the company records that the husband's income in 2007 until his day of departure was almost $36,000, and that his 2006 income was almost $50,500. She added that the husband's pay rates and hours worked were approximately the same in 2006 as they were in the months of 2007 just preceding his departure.

[25] W.L. concluded by saying that she did not think it was her responsibility to pursue the husband and to try to get him back on the job - "he is a grown man".

[26] A.W. is a lifelong friend of the husband. His evidence did not add much to the case except to corroborate the wife's assertion that the husband has occasionally gone hunting with others and that he has been observed cutting firewood with his father on his father's property. When shown an advertisement photograph of an individual holding puppies for sale, Mr. W. stated a belief that the dogs were being held by the husband. He believes that the animals were sold a year or so ago. The advertised price was $800 for each dog.

[27] V.W. and her husband have a small forestry operation and farm. She knows the husband and his parents. In 2007, she said that the husband brought some brush to her business for processing and ultimate sale as Christmas wreaths. She observed the husband offload bales of brush and pile the bales on pallets. In 2008, she contacted the husband and invited him to help load a Christmas tree truck at an hourly rate of $10 per hour. However, according to her, the husband declined the opportunity.

Medical evidence

[28] The husband's last lawyer submitted a two paragraph medical report from the husband's personal physician. (The doctor did not testify.) It is reproduced here for ease of reference:

> S.V. has been a patient in this practice for 10 years. During that time he has had several injuries including an ankle sprain and more recently (2007) an injury to his right index finger from a wood splitter.
>
> He has also had intermittent episodes of back pain, which he feels are flared by his occupation. Xrays of his low back show early arthritic changes in his left lower spine/pelvis. He feels he is unable to continue to work at his trade due to this problem. He continues to be able to do general work around his home, because he can control the amount of time he spends at any particular activity. He was last seen in this office with back pain in 2005.

[29] I find that the husband self-disclosed intermittent episodes of back pain which he attributed to his occupation, that there is some evidence of early arthritic changes, and that he told his doctor he felt he would be unable to continue his work. But, I observe that the doctor did not express any medical opinion about these disclosures. Importantly, the last time that the husband consulted his physician regarding the concerns was in 2005. I find there is no evidence that the husband consulted his physician about his back after 2005. This is consistent with the wife's evidence that he worked full-time that year, and during 2006; and that he also worked full-time in 2007, until he injured his finger (not his back).

[30] In regard to the finger, the physician did not describe or specify the injury, or state a diagnosis, or mention the prescribed treatment (if any), or give the outcome. I observe that the physician did not refer the husband to any specialists for further investigation or treatment. Accordingly, in the absence of any contrary evidence, I infer the injury was not serious and did not have any long term employment implications.

[31] I find no evidence that the husband applied for government disability benefits, workers compensation, or income assistance at any government level in connection with his 2007 accident or any chronic health problems. And there is no evidence that he applied at any material time for Employment Insurance Benefits.

Discussion/Decision

[32] 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. The wife has primary care of the children and, understandably, expected that the husband, as the non-custodial parent, would contribute financially. The children's financial needs have not abated since the case started. The husband's obligations are tethered to his income and application of the **CMG**.

[33] Under **CMG** section 3, the amount of child support is usually the amount set out in the applicable Table, plus the amount, if any, determined under **CMG** section 7. Apparently, the husband's position is that his income has been, and continues to be, far below the income threshold for payment.

[34] The wife's position is that her spouse is carrying through on his promise that she would never see any child support and that he made a deliberate choice to withdraw from the workforce so as to avoid any and all responsibility for the financial well-being of his children.

[35] 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**.]

[36] Income imputation is a topic which attracted the attention of Justice Forgeron last year in several decisions: 2008 **Marshall v. Marshall**, 2008 NSSC 11; **Crane v. Crane,** 2008 NSSC 330; and **MacGillivary v. Ross**, 2008 NSSC 339. Her thorough analysis of the relevant case law need not be restated. I note her reference to **Montgomery v Montgomery**, 2000 NSCA 2 (CA), in which 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. In situations where there is credible evidence of deliberate deprivation and bad faith, this will obviously militate against the payor when the court exercises its discretion.

[37] Where health issues surface, a three-step analysis was endorsed, as formulated in **Drygala v. Pauli**, 2002 CarswellOnt 3228 (CA) at para 23. The questions to be addressed include: Whether a (payor) parent is intentionally under-employed or unemployed? If so, whether this is caused by the health needs of the parent? And, if not, what is the appropriate income to be imputed?

[38] In **Marshall**, the court placed special emphasis on a payor's earning capacity having regard to age, education, work skills and work history. Justice Forgeron also adopted, as do I, a series of principles stated in **Hanson v. Hanson**, [1999] B.C.J. No. 2532. Among them, several deserve mention: 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.

[39] In the present case, I find that the wife has met the burden of proof that falls on her as the party who challenges reliance on the husband's personal income tax returns. In looking at the evidence as a whole, I find the husband left a secure, well-paying job for reasons unrelated to his health, immediate or chronic. I reject any suggestion that he has been unable to find or sustain employment since then for health reasons. He did not put forward any evidence to otherwise explain his unilateral decision to quit his $50,000 per annum job which, ironically, is still open at his last employer. So, I also conclude there was (and is) no other good cause or reason, unrelated to health, which could possibly sustain a "lawful excuse" defence under the **MCA**.

[40] Moreover, there are strong indicia that his choices (ie., to leave his job, and not seek any form of alternate employment or income replacement) were geared toward avoiding child support.

[41] In short, I conclude the husband's departure from his work was unnecessary and unwarranted in the circumstances, and that he is intentionally unemployed within the meaning of the **CMG**. I find the husband's self-induced income drop from more than $50,000 annually to virtually "no income" cannot be justified on the evidence or in law, and that his conduct should not be condoned or rewarded by relieving him of all responsibility.

[42] Although there is more than enough evidence to impute higher incomes for the intervening years, the wife invited the court to fix the husband's income at $40,000 for each of 2007 [effective July 1st], 2008, and 2009. I will respect that submission.

[43] I note the wife's claim is not for "retroactive" support - rather it is for "current" support effective, as of the start of proceedings. The issue had not been resolved by negotiations or by court ruling. Therefore, **S. (D.B.) v. G. (S.R.)**, 2006 37 (S.C.C.) does not pertain.

[44] Employing an imputed annual income of $40,000, I order that the husband pay to the wife for the benefit of the two children the monthly sum of $579

pursuant to the **CMG** and the Nova Scotia Tables, due and payable the first day of each month, starting effective July 1, 2007, continuing on the first day of each and every month thereafter, unless and until otherwise ordered by a court of competent jurisdiction. So that the wife may enter a Judgment (which I authorize), I calculate the amount due and payable by the husband as at September 30, 2009 to be $15,633.00 ($579 x 27 months). (A Certificate of Judgment may be obtained and recorded in the Land Registry.) And, I order that support for the benefit of both children shall continue at the rate of $579 monthly, effective October 1, 2009.

[45] I order the husband to provide the wife with true copies of his personal income tax returns by the first day of June each year, starting in 2010, and with true copies of his Notices of Assessment when received from the CCRA. When the husband returns to employment, he shall immediately give the wife written notice, (including proof of his wages and benefits).

Costs

[46] In support of a request for substantial court costs, counsel for the wife submitted a Memorandum which included reference to my decision in **M. (D.) v. A. (S.)**, 2009 NSFC 5 which dealt with the subject in the Family Court setting. Invoking one's past rulings to sustain a current one is tempting. However, the Supreme Court decision of Justice Beryl MacDonald in **Arab v. Izsak**, 2009 NSSC 275 is a more recent, comprehensive analysis. She wrote:

> I have reviewed the Civil Procedure Rules and several decisions commenting on costs, including *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (T.D.*); Campbell v. Jones et al.* (2001), 197 N.S.R. (2d) 212 (T.D.); *Grant v. Grant* (2000) , 200 N.S.R. (2d) 173 (T.D.); *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.); *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (T.D.); *Kennedy-Dowell v. Dowell* 2002 CarswellNS 487; *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.)); *Jachimowicz v. Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.D.).
>
> Several principles emerge from the Rules and the case law.
>
> 1. Costs are in the discretion of the Court.
> 2. A successful party is generally entitled to a cost award.

3. A decision not to award costs must be for a "very good reason" and be based on principle.
4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to a otherwise successful party or to reduce a cost award.
5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".
6. The ability of a party to pay a cost award is a factor that can be considered; but as noted by Judge Dyer in *M.C.Q. v. P.L.T. 2005 NSFC 27*: "Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *Muir v. Lipon*, 2004 BCSC 65]."
7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
8. In the first analysis the "amount involved", required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".
9. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of $20,000 in order to determine the "amount involved" .
10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.
11. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.
12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties position at trial and the ultimate decision of the court.

[47] Counsel also referred to **Civil Procedure Rule 77** and related **Tariffs**, and the **Family Court Rules**. I discussed their import in the **M. (D.)** case and will not repeat my comments.

[48] In the present case, the wife was put to the strict proof of her case because the issues involved and the remedies sought did not easily lend themselves to summary judgment. That the husband would not attend the hearing was unknown beforehand. Therefore, the wife and her counsel were anticipating a contest and prepared themselves accordingly.

[49] The hearing consumed about a half-day; it was preceded by a chambers appearance when outstanding disclosure and process issues were addressed by court order. The wife's application was supported by affidavit and oral evidence. Several witnesses (who testified) were under subpoena.

[50] Counsel for the wife submitted pre-hearing and post-hearing legal memoranda, both of which were helpful.

[51] The wife was entirely successful.

[52] The wife made a written offer to settle the case about three months before it was set for hearing. It was rejected by the husband. The final award exceeds the amount the wife was prepared to accept in settlement.

[53] Although unnecessary, strictly speaking, to sustain the rulings about his income, I have already noted evidence of bad faith and the husband's steadfast resistence to contributing to his children's support. Underscoring the husband's degree of interest and concern, was his failure to attend the hearing.

[54] The wife has established disbursements of $408.97, inclusive of HST, which I find to be reasonable in the circumstances. The solicitor/client fees are unstated. That her fees may be subsidized in whole or in part by the Legal Aid program does not preclude, in my opinion, a costs award when sought and when appropriate.

[55] I exercise my discretion and order that the husband pay to the wife forthwith costs of $2,000 plus her disbursements which I fix at $408.97. Judgment may be entered for $2,408.97 in court costs. This is in addition to the child support award.

[56] Payment of child support and costs shall be through the Maintenance Enforcement Program.

[57] Mr. Bryson shall submit an order as soon as convenient.

Dyer, J.F.C.