

SUPREME COURT OF NOVA SCOTIA

Citation: Martin v. Burke, 2011 NSSC 6

Date: 20110111

Docket: SPD 046695

1205-002587

Registry: Pictou

Between:

Tammy (Burke) Martin

Applicant

v.

James Burke

Respondent

Judge:

The Honourable Chief Justice Joseph P. Kennedy

Heard:

September 20th, 2010, in Pictou, Nova Scotia

Counsel:

Roseanne M. Skoke, for the Applicant
James Burke, Self-Represented

By the Court:

[1] This is an application was brought by Tammy (Burke) Martin (the Applicant) before this Court sitting in Pictou.

[2] The parties were divorced September 27, 2006 with one child of the marriage, Haley Ann Burke, who was born April 2, 2003 (7 years of age).

[3] The Corollary Relief Judgment issued September 27, 2006 gave custody to the Applicant. James Burke (the Respondent father) was ordered to pay child support in the amount of \$66.46 each week, based upon his income at the time of separation. He was to provide the Applicant with his income tax return yearly and child support was to reflect the income shown therein according to the guidelines.

[4] Further, the Order set out that the Respondent would be responsible to pay \$130.00 every two weeks as his share of a \$18,303.66 matrimonial debt with the Bank of Commerce until "the balance was paid in full".

[5] The Applicant says that things have not worked out the way the Corollary Relief Judgment directed. She says that the Respondent has not provided her with his yearly income tax returns as he was required to do.

[6] Therefore, there has been no change in the child support provided between the Relief Order of September 2006 until Justice MacLellan of this Court ordered an interim increase to \$348.00 per month on August 15, 2010, which reflected an income of \$45,000.00 per year at that time.

[7] As a result, the Applicant seeks by court Order:

- (a) to have child support increased to reflect the Respondent's current income;
- (b) to receive retroactive support from the date of the Corollary Relief Order (September 27, 2006) that reflects the father's income since that date;
- (c) to have payment of arrears enforced;
- (d) to receive the Respondent's income tax returns on or about the 1st day of June of each year commencing June 1st, 2011;
- (e) to receive the lump sum of \$9,150.00 being the Respondent's unpaid share of the matrimonial debt - the Bank of Commerce loan.

[8] Firstly, as to the current level of child support, I am satisfied that the Respondent (as per his income tax statement of April 2010) has income of \$40,000.00 - which I find results in support of \$348.00 under the guidelines. I so order.

[9] I further order that the Respondent's income tax returns will be provided to the Applicant (as directed by the Corollary Relief Order) on or before June 1st of every year.

[10] Central to this matter is the issue of retroactive child support.

[11] The Applicant's position is that she is owed \$13,911.92. The Respondent admits "I have missed some payments but not to the amount accused".

[12] He says that he has not been given receipts for payment he has made, nor has he made a record to support these payments.

[13] Simply stated, the Respondent has consistently ignored an Order of this Court that was made to address the welfare of his child.

[14] Significant to the issue of retroactivity is the existence of "blameworthy behaviour" on the part of the payor.

[15] The Supreme Court of Canada in *D.B.S. v. S.R.G.* [2006] 2 S.C.R. 231 said at paras. 106 and 107:

106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" -- rather than their "right to an appropriate amount of support" -- were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments . . .

107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such [page279] conduct . . .

[16] I find that the Respondent, by ignoring his child support obligations has exhibited behaviour that is "blameworthy" as characterized in the *D.B.S.* case.

[17] As a result, I find that retroactive support is payable in this matter - the question remains, when should it begin - how much?

[18] In *D.B.S.*, Justice Bastarache says at para. 123:

123 . . . it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.

124 The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances -- including an increase in income that one would expect to alter the amount of child support payable -- is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

125 The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

[19] I share the inclination of Justice Bastarache that a party, as "blameworthy" as I have found the father/Respondent to be in this matter, should not be permitted to obtain advantage by disregarding a court Order.

[20] I find that he properly will be responsible for the entire retroactive support sought by the mother/Applicant. I accept the mother/Applicant's calculations as to the amount of support owing being in total \$13,911.82 (less the payments made in 2010). This amount is broken down as shown in the following chart:

Taxation Year	Taxable Income	Child Support Payable	Child Support Ordered (June 1, 2006 Order)	Annual amount due by June 1, 2006 Order	Amount actually paid	Arrears from 2006 Order	Income Adjustment of Child Support Per month	Arrears From Income Adjustment (for the year)	Total Arrears
2007	60,105.99	\$523.00	66.46/ week or 287.99/ month	3,455.92	\$450.00	\$3,005.92	\$235.01	\$2,820.12	\$5,826.04
2008	32,913.00	\$291.00	\$287.99	3,455.92	0	\$3452.92	none	none	\$3455.92
2009	29,262.56	\$260.00	\$287.99	3462.92	\$870.00	\$2592.92	27.99	(335.88) credit	\$2257.04
2010	40,000.00	\$348.00	\$287.99	2015.93	0	2015.93	61.01	357.07 (Jan-July)	2372.82
							TOTAL ARREARS		\$13,911.82

[21] As previously indicated, since the chart was created the Respondent/father has made some payments in 2010. These are to be credited towards the retroactive arrears.

[22] As to the matrimonial debt, the Corollary Relief Order was clear.

[23] The Respondent was to pay \$130.00 every two weeks towards the outstanding loan at the Commerce Bank. He did not do so. The Applicant retired the loan with the help of her subsequent spouse.

[24] I accept that the amount of \$9,150.00 is owed by the Respondent to the Applicant to address his share of that debt and I order that he pay that amount to the Applicant forthwith.

[25] The Applicant shall have costs of \$1,000.00.

Joseph P. Kennedy
Chief Justice