SUPREME COURT OF NOVA SCOTIA

Citation: MacPhee v. O'Leary, 2010 NSSC 124

Date: 20100401
Docket: Tru. No. 1207-001541
Registry: Truro

Between:

Lisa MacPhee

Applicant

v.

Sean O'Leary

Respondent

Revised Decision: The heading "family division" has been removed. This replaces the previously distributed decision.

Judge: The Honourable Justice Arthur J . LeBlanc.

Heard: July 14, December 15, 2009 and February 4, 2010 in Truro, Nova Scotia

Counsel: Ann Levangie, for the Applicant
Peter Lederman, Q.C., for the Respondent

By the Court:

[1] This is an application for child support and retroactive child support by Ms. MacPhee.

[2] Ms. MacPhee and Mr. O'Leary were divorced on June 23, 1999. There were two children of the marriage: Shelby Morgan O'Leary born September 1, 1992 and Mia Beverly O'Leary born January 20, 1994. They remain children of the marriage as of this application.

[3] Mr. O'Leary agreed to pay child support of $257.00 per month, commencing June 1, 1999. He also agreed to supply the petitioner with his income information, including his income tax return and T4s, by May 30 each year. In accordance with the separation agreement, which was incorporated into the Corollary Relief Judgment, the parties agreed to joint custody of the children, with Ms. MacPhee having primary care and Mr. O'Leary having access.

[4] Ms. MacPhee remarried and has one child from this relationship. She and Mr. MacPhee, her second husband, have separated. Ms. MacPhee has custody and primary care of the child of her second marriage, and receives child support of

$300.00 per month. Mr. MacPhee is recovering from a work-related injury. He is living at Ms. MacPhee's home until he returns to full-time work, for financial reasons.

[5] After the divorce, Ms. MacPhee lived in British Columbia for several years with her children. She now lives in Truro. She is not currently in a relationship. Mr. O'Leary is lives with a common-law spouse in Truro. His partner works as a dental technician. Both children of the marriage are in high school. They visit with their father occasionally. The older child has a part time job.

[6] Mrs. O'Leary has worked during the past six or seven years, earning about $9000.00 annually. She stated that she received social assistance occasionally and has had to resort on the food bank to feed her children and herself. Since 1999, however, she has not sought additional support from Mr. O'Leary. She stated that she thought that Maintenance Enforcement officials performed this function, and that they would be obtaining whatever information was required from Mr. O'Leary to determine whether an increase in support was appropriate. She said she commenced this application after learning that Mr. O'Leary was earning a higher income and had bought a new motorcycle. She said she had not been aware that

the divorce judgment required him to provide her with his financial information each May.

[7] Ms. MacPhee testified that during and after their relationship Mr. O'Leary was very domineering, and she preferred to avoid confrontations with him, particularly concerning money. It is only when she learned that he was earning a significantly higher income that she decided to act.

[8] Mr. O'Leary had made all child support payments in accordance with the 1999 Order. He is in arrears on the most recent interim order. He said he had not filed the required income information because he had not read the Corollary Relief Judgment. He did not deny receiving a copy of the document. He denied that he did not want to disclose his higher income to Ms. MacPhee, and rejected any suggestion that he had been told that he should do so. He acknowledged that he had purchased a used motorcycle.

[9] Mr. O'Leary alleged that after the divorce, because of the strained relationship between himself and Ms. MacPhee, his mother and grandmother paid for orthodontic and dental work required for both children. He said they paid

approximately $2500. The Corollary Relief Judgment was silent on which party should pay this expense. He claims that he also paid for clothing and eyeglasses for the children, and kept them on his medical and drug plan. He bought them birthday and Christmas gifts.

[10] Mr. O'Leary's income increased significantly between 2002 and 2008. There were marginal increases between 1999 and 2002. The following is a summary of his income between 2002 and 2008:

2002	$25, 431.00
2003	$22, 431.00
2004	$22, 187.00
2005	$28, 375.00
2006	$28, 343.00
2007	$62, 299.00
2008	$82, 442.00

[11] Pursuant to a variation order dated July 28, 2009, Mr. O'Leary was required to pay monthly child support of $651.00, based on an annual income of $45,240.00, commencing August 1, 2009. He was also required to pay a shortfall

of $788.00 for June and July 2009, and $810.00 on account of uninsured dental expenses for the children. The determination of his annual income was based on his employment earnings with Basin Contracting. I am satisfied that these amounts have been paid with the exception of arrears. Going forward, Mr. O'Leary's basic child support obligation is calculated on the basis of a composite income (including Employment Insurance) of $30,000, as of January 1, 2010. Therefore, he is required to pay basic child support for the two children of the marriage of $453.00 on the last day of each and every month.

[12] I am also directing Mr. O'Leary to maintain the two children of the marriage on his medical and dental plan.

[13] The Supreme Court of Canada discussed the principles governing retroactive child support in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, [2006] S.C.J. No. 37 (hereinafter *D.B.S.*). The majority, *per* Bastarache, J., considered several scenarios where a retroactive child support order could be made: where there was a court order for child support already in existence, where there was a previous agreement between the parties and

where there was no previous agreement or order for the payment of child support. The present case falls in the first category. There is an existing court order requiring Mr. O'Leary to pay child support, pursuant to the Corollary Relief Judgment and the 2009 variation order. There are two children of the marriage, as defined in ss. 2(1) and 2(2) of the *Divorce Act*.

[14] The court must also consider the delay by the recipient parent in seeking increased child support. Ms. MacPhee says the delay arose from her mistaken belief that Maintenance Enforcement automatically adjusted child support payments to reflect changes in the payor's income. Her counsel pointed out that this method is followed in various jurisdictions, which I accept as an accurate representation of the situation. However, it is not a justification. There is no basis to believe that Ms. MacPhee was aware of the practices in other jurisdictions; her dealings were with the Nova Scotia Maintenance Enforcement Program.

[15] Ms. MacPhee claimed that discussing financial issues with Mr. O'Leary was always difficult. She felt that he dominated the discussion and demeaned her requests. She preferred not discuss such matters with him at all. She recalled one occasion where he demeaned a request for a small amount to cover the cost of

medication. Mr. O'Leary disputed this characterization, claiming that he got a late phone call and that Ms. MacPhee was not near a drug store.

[16] Mr. O'Leary clearly views this application for child support and retroactive payment as simply a means to extract additional money from him. Based on his demeanour, and my assessment of his credibility, I accept Ms. MacPhee's explanation as to the reasons she was reluctant to advance her request for more child support. In answering questions during cross-examination, Mr. O'Leary refused to answer specific questions. While he may not have read the Corollary Relief Judgment, it was his duty to do so. It is in plain language, consisting of two pages with an attached Separation Agreement. It simply requires Mr. O'Leary to notify Ms. MacPhee of any changes in his income and to provide her with income tax returns and T4s in May of each year, beginning in 2000.

[17] I am satisfied that Mr. O'Leary must have known that the children were in dire need of additional financial support. He was being called upon to cover the cost of school supplies, footwear and clothing, and it must have been obvious to him that there was a genuine need. Ms. MacPhee stated that it was necessary in

some instances to seek social assistance and to rely on the food bank. I accept her evidence on this point.

[18] To award retroactive child support will impose a financial burden on the respondent. He will, in addition to make making larger monthly child support payments, be required to cover the additional payments as required in the order. He could, however, have filed income information as required while his income was increasing. This would have allowed him to increase his child support payments to reflect his higher income over time. Ultimately, although the requirement to pay higher child support may present some hardship to Mr. O'Leary, this does not compare to the hardship suffered by the applicant and the children over the period in question.

[19] It should be clear from the comments above that I do not accept Mr. O'Leary's contention that because he did not read the Corollary Relief Judgment he should be excused from his failure to provide his income information as required. It was his obligation to read the Corollary Relief Judgement. He did not deny receiving a copy. Simply to say "I did not read it" is not enough to avoid a retroactive order being made.

[20] The court is required to consider whether there has been blameworthy conduct by the payor parent. The majority in *D.B.S.* made the following comments about blameworthy conduct (citations omitted):

> 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.... A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support.... And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.
>
> 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 conduct....* [Emphasis added.]

[21] Bastarache, J. later stated that "[n]ot 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" (para. 124). While a payor parent "should be presumed to be acting reasonably" when they

conform to an existing order, the majority added that "this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay" (para. 108). In the circumstances, I am satisfied that Mr. O'Leary's failure to provide financial information as required by the Corollary Relief Judgment amounts to blameworthy conduct.

[22] Mr. O'Leary points out that he set up RESP accounts for the children, in amounts of about $1000.00 each, in 2009. He was uncertain whether they were established prior to, or as a response to, this application. Regardless of the dates and the amounts paid, amounts in addition to basic child support payments are not necessarily a replacement for basic child support. These RESPs will be useful to the children should they attend university or college. But they do not displace his duty to contribute to the children's maintenance in the present.

[23] Mr. O'Leary also submits that he has, over the last several years, paid for birthday gifts, Christmas gifts and dinners for his two children. These amounts are not child support payments. Obviously there is no prohibition against a parent giving gifts or making such extra expenditures. But Mr. O'Leary cannot

appropriate his child support entitlement to extra expenditures of this kind. Ms. MacPhee has primary care of the children. She is entirely responsible for household budgets and it would be, in my opinion, improper for the respondent to make expenditures and simply deduct this from the child support requirements. The majority in *D.B.S.* stated that a payor who pays expenses beyond his or her statutory obligations may be found to have have met an increased support obligation indirectly, but does not have "the right to choose how the money that should be going to child support is to be spent" (para. 109).

[24] I am satisfied that I should order retroactive child support. This determination leads me to consider the length of time for which retroactive child support should be awarded. Initially, Ms. MacPhee sought retroactive support back to 2000; however, at the hearing, the applicant took the position that retroactive support should extend only to 2005. In response, Mr. O'Leary submits that the order should not reach back earlier than 2006. His position is that any increase in income would only have come to the attention of Ms. MacPhee when he was required to supply his income information, by May 1 of the following year. Thus, for instance, an increase in 2005 would have come to her notice on May 1, 2006.

[25] The authority for the respondent’s approach is *Rafuse v. Conrad*, 2002 NSCA 60. In that case, Roscoe, J.A., for the court, rejected the suggestion that support could not be made retoroactive to a time before the application was commenced. She noted, however, that “an order for support is presumed to be correct at the time it was made” (para. 24). She went on:

> 25 A rational corollary of that policy would be that in the absence of any fraud or deception or other reason to set it aside, the order continues to be appropriate for at least some period of time beyond the date it became effective. Here, the previous order dated March 20, 1998, increased the child support to $165.00 per month commencing April 1, 1998. The order of Judge Dyer, under appeal, is also effective April 1, 1998. The increase in maintenance ordered for 1998 was based on an actual income of $29,273, instead of the $20,940 the parties predicted in March. There is no indication that the appellant knew in March that his earnings would substantially escalate later in the year, nor is there any evidence of when in 1998 the appellant's wages did increase. *It is also reasonable to presume that if the March, 1998, order had contained a clause requiring the appellant to report any increase in earnings, that it would have been similar in effect to the clause in the order under appeal, that is, that he provide a copy of his income tax return by May 15th each year. Presumably, any variation order made in May, 1999, as a result of the exchange of financial information would have been prospective in effect*.... [Emphasis added.]

[26] Bastarache, J. made the following comments about the date of retroactivity in *D.B.S.*:

> 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*. [Emphasis added.]

[27] By "effective notice," Bastarache, J. meant "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated." This does not require legal action; rather, "all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling" (para. 121). Bastarache, J. added that, even where effective notice is given, "it will usually be inappropriate to delve too far into the past." Noting that the *Guidelines* (at s. 25(1)(a)) restrict a recipient's request for historical income information to three years, he said, "[i]n general, I believe the same rough guideline can be followed for retroactive awards: 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" (para. 123).

[28] What *D.B.S.* leaves unclear is whether, given a finding of blameworthy conduct, retroactive child support obligations ought to be determined on the basis of income in the year of the material change or as based on the preceding year's

income. This point was addressed by the Alberta Court of Appeal in *Lavergne v. Lavergne*, 2007 ABCA 169. In that case, a payor parent had sustained growth in income over six years from $30,000/yr. to $83,000/yr. Similarly to the present matter, it was held that the payor had engaged in blameworthy conduct by failing to disclose his increased income to the recipient parent and by not adjusting his payments to reflect his increased income. The payor parent sought to have his retroactive payments assessed as of the year preceding each year in which there was a material change in his finances. In rejecting this argument, the Alberta Court of Appeal noted that s.16 of the *Guidelines* (Calculation of annual income) is silent on the period for which the determination of annual income is to be made. Nonetheless, the court held that s. 16 should be read together with s.2(3) of the *Guidelines*. Subsection 2(3) provides that "[w]here, for the purposes of these Guidelines, any amount is determined on the basis of specified information, *the most current information must be used*." [Emphasis in *Lavergne*, para. 17]

[29] The *Lavergne* reasoning was adopted in was adopted by Comeau, C.J. Fam. Ct. in *R.S.N. v. D.L.B.* 2009 NSFC 6. I believe that the same reasoning governs here. Mr. O'Leary experienced a comparable change in his material circumstances

to those of the payor parent in *Lavergne*. Given the guiding principles set out in *D.B.S.* and *Lavergne*, however, I believe that the same reasoning governs here.

[30] As a result, I am satisfied that the proper date from which to calculate retroactive child support is the year of the material change. I also conclude that, in accordance with *D.B.S.*, a four-year period of retroactive support is appropriate.

[31] As to orthodontic expenses, these are expenditures which would ordinarily fall under s. 7 of the *Child Support Guidelines*. The original judgment did not provide for s. 7 expenses. Consequently, any payments made in respect of such expenses are not to be applied against any retroactive child support award. The distinction between the retroactive treatment of basic support and of extraordinary expenses was discussed by the Nova Scotia Court of Appeal in *Selig v. Smith*, 2008 NSCA 54, [2008] N.S.J. No. 250. Roscoe, J.A. said, for the court:

> 25 There is nothing in the *S. (D.B.)* decision which restricts the declared principles regarding retroactivity to basic child support. In para. 90 Justice Bastarache indicates that it will not always be possible for a court to enforce an unfulfilled child support obligation. There is no attempt to distinguish between basic table amounts and s. 7 expenses.
>
> 26 Many cases dealing with this issue have determined that the principles regarding retroactivity expressed in *S. (D.B.)* apply equally to s. 7 expenses. See

> for example: *Heatherington v. Tapping*, [2007] B.C.J. No. 302, 2007 BCSC 209 at para. 20, *Surerus-Mills v. Mills*, [2006] O.J. No. 3839 (Q.L.) (S.C.J.), para. 24 and *J.C.R. v. J.J.R.*, 2006 BCSC 1422, para. 25. I agree with the reasoning expressed in these cases in that respect.

[32] As *D.B.S.* applies equally to extraordinary expenses and basic child support, *Selig* inferentially recognizes that extraordinary and basic child support payments are separate and distinct obligations of the payor parent. As a result, I find that it would not be consistent with *Selig* to consider payments by Mr. O'Leary's mother and grandmother for dental work in determining Mr. O'Leary's obligations for retroactive basic child support. I also refer to *Wawin v. Wawin*, 2008 NSSC 316.

[33] It appears that Mr. O'Leary's mother and grandmother assisted in the payment of the orthodontic expenses which were in fact payments that Mr. O'Leary had agreed to pay. There is no evidence to establish that he paid all of the expenses. In addition, there is evidence, that Ms. MacPhee paid portions of the orthodontic expenses and other s. 7 expenses. In any event and these would be extra expenses and not for basic child-support and is not to be counted as the credits for the basic child-support.

[34] The amount of retroactive child support is as follows, once the actual child support paid has been taken into account:

2005 $1,872.00

2006 $624.00 + $1352 = $1976.00

2007 $7476.00

2008 10, 548.00

Total: $21,872.00

[35] Total amount of $20,000.00 will be paid in 84 equal monthly payments of $260.38. The first payment will be due on June 30, 2010 and monthly payments in an equal will continue thereafter at the last of each month until the amount is fully paid.

J.