SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Armour v. Sorhaindo, 2011 NSSC 33

Date: 20110120
Docket: SFHOTH042647
Registry: Halifax

Between:

Camille Armour

Applicant

v.

Mark Sorhaindo

Respondent

Judge: The Honourable Justice Moira C. Legere Sers

Heard: November 2, 2010 in Halifax, Nova Scotia

Counsel: John Shanks for the applicant
Peter Crowther for the respondent

By the Court:

[1] This decision responds to the motion for costs concerning two separate applications:

- A contempt application which proceeded by way of Interlocutory Notice (ex parte application) dated March 16, 2010.
- A variation application sent to the court on March 18, 2010.

[2] Preparation time, including the filing of affidavits and briefs, was not avoided by the agreement reached between the parties. The substantive issues were settled very shortly before the court date.

[3] Except for the application for leave, the contempt application and the variation application were scheduled and argued at the same time.

[4] The applicant seeks court direction on three issues:

1. A finding of civil contempt and costs.
2. Costs relating to the variation application.
3. Payment schedule for arrears.

[5] I will deal with the issues in the same order.

Contempt

[6] In the Corollary Relief Judgement registered January 26, 2006, the respondent was to provide proof of appointment of irrevocable beneficiaries and trustee with respect to an insurance policy.

[7] Paragraph nine of the order, resulting from an application under the *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1989, c.388, contains the following clause:

> The court orders that the Respondent will deliver to the Petitioner verification that he has changed the beneficiary upon the Life of Barbados term life insurance policy no (*deleted for privacy reasons*.) upon his life to the extent of $1,000,000 (E.C.) and that he has irrevocable (sic) designated the Petitioner upon the policy of insurance in trust for the children of the marriage. The Respondent shall maintain the policy

> of insurance upon his life for so long as he has an obligation to provide support for either of the children of the marriage.

[8] A July 17, 2007 consent variation order provided as follows:

> Mark Andrew Sorhaindo shall forthwith provide Camille Lillian Armour with proof that their children (J.A.S.) and (A.C.A.S.) have been made irrevocable beneficiaries and that Camille Lillian Armour has been irrevocably appointed as Trustee under life insurance policy No. (*deleted for privacy reasons*) with BMO Life in the amount of $1,000,000 in the life of Mark Andrew Sorhaindo.

[9] Through sheer omission and lack of due diligence the respondent failed to make the requests and demand the changes, in the manner prescribed by the order, in a timely fashion. The letters provided over the years did not meet the specifications of the Corollary Relief Judgement or the consent variation order.

[10] Finally, shortly before the November appearance, the appropriate irrevocable designation of a beneficiary was provided by the respondent with confirmation that the applicant was the trustee.

[11] There is no doubt, with due diligence, this aspect of the Corollary Relief Judgment could have been addressed.

[12] The applicant was required to obtain counsel to obtain the documentation required. This resulted in legal costs and disbursements.

[13] This contempt application necessitated two court appearances, one on April 28, 2010 and the second on November 2, 2010. The applicant was not required to come to Nova Scotia and did not appear in person.

[14] The contempt application could have been settled by compliance with the provision to provide verification of irrevocable beneficiary and trustee.

[15] After reviewing the evidence and hearing the submissions in this matter, having the benefit of affidavits from both parties as well as submissions from counsel, I am satisfied that the respondent was in contempt of the court order.

[16] There were numerous requests to abide by the order and provide proof of irrevocable beneficiary and trustee; there is clear evidence to support the fact that this was not done.

[17] The evidence offered by the respondent failed to show that he proceeded with due diligence and in a reasonable fashion to pursue reasonable means of ensuring that he was in compliance with the court order.

[18] I have insufficient evidence to conclude that the difficulties encountered by the respondent were outside the respondent’s control. I cannot conclude all reasonable measures were taken to comply with the court order.

[19] There is an absence of evidence that would allow me to conclude that the respondent was unable to comply with the court order given his difficulties with the insurance company.

[20] In accordance with the authority contained in **T.G. Industries Limited v. Williams**, 2001 NSCA 105: "the core element of civil contempt is failure to obey a court order of which the alleged contemnor is aware."

[21] There is no requirement to prove intent (**Blackman v. CIBC Wood Gundy Financial Services Inc.**, 2009 NSSC 416). Murphy, J. stated: "[the contemnor's] motive is irrelevant. It is contempt even when a party fails to exercise proper diligence." (Paragraph 48 of the Plaintiff's Brief)

[22] I conclude that the respondent simply failed to exercise due diligence, did not consider it a priority and failed to take reasonable measures to ensure that he was in compliance.

[23] Further, he failed to provide information to suggest that compliance was not possible or was difficult to achieve. This may have provided him with an explanation for his breach.

[24] The court is entitled to consider this as civil contempt and to consider remedies.

[25] In this case, the remedies would include costs and expenses such as the court deems just (CPR Rule 55.09).

[26] Other remedies as outlined in CPR 55.05(1) and 55.09(2) are not merited in this case.

Application to Vary

[27] The applicant requested her variation application and contempt hearing be heard at the same time to avoid multiple appearances.

[28] At the time of the divorce, the applicant had been employed with the same company since November 2003. In 2007 she earned $67,772.24; in 2008 $87,571.72 and in 2009 $109,809.05.

[29] As of the date of her application in March 2010, she remained employed. However, as of May 4, 2010 her employment was terminated. Her income statement notes a continuation of $5,960.00 per month ending November 4, 2010 with EI benefits to begin thereafter.

[30] The respondent was earning $20,000.00 in 2000 in training as an orthopaedic surgeon. The parties had been married for just under four years and separated in 1998. They divorced in Ontario on June 16, 2000.

[31] The mother and the two oldest children remain in Ontario and the respondent relocated to Nova Scotia where he has established himself with a second family including two children of this current relationship.

[32] **The July 17, 2007** consent variation order adjusted for changes in circumstances including the increase in the respondent's income to $163,000.00 in 2006. The order contains the following preliminary clauses as an explanation for the decision of the mother to accept a reduced amount of child support and describes the event which should trigger a change:

> **AND WHEREAS** there has been a change in circumstances, namely, that the annual income of the Respondent has increased from $20,000 per year (in and around 2000) to $163,000 (in 2005);
>
> **AND WHEREAS** the Applicant intends to move with the children to her own residence once the outstanding amounts owed by the Respondent in child support

> arrears, child care expenses and equalization are paid, and the Respondent begins to pay increased child support in accordance with the appropriate level for his income;
>
> **AND WHEREAS** the Applicant has agreed to accept monthly child support payments from the Respondent below the amount prescribed in the Federal Child Support Guidelines until such time as the Applicant and her children move out of her parents home, at which the Respondent agrees to pay the Applicant increased support in accordance with the Federal Child Support Guidelines;
>
> **NOW UPON MOTION IT IS HEREBY ORDERED THAT:**
>
> 1. *Not applicable.*
>
> 2. Mark Andrew Sorhaindo shall pay Camille Lillian Amour the sum of $17,680.00 on or before June 6, 2007 in satisfaction of the claim for child support arrears.
>
> 3. Commencing on June 28, 2007, and continuing on the 28th day of each and every month thereafter until Camille Lillian Amour moves out of her parent's home, Mark Andrew Sorhaindo shall pay Camille Lillian Armour the sum of $1,800.00 in child support.
>
> 4. *Clause regarding annual disclosure.*
>
> 5. The amount of child support paid pursuant to paragraph 3 of this Consent Variation Order <u>shall be varied as of the date that Camille Lillian Armour moves out of her parent's home</u>, based on the total income disclosed on Mark Andrew Sorhaindo's previous year's income tax return. (My emphasis)

[33] In the original divorce judgment dated February 1, 2002, $43,299.52 was owing, inclusive of outstanding arrears of child support, child care expenses and an equalization payment. This was to be paid in addition to ongoing child support amounts of $285.00 per month, to be paid by way of 36 monthly instalments in the amount of $2,202.76 commencing August 1, 2002.

[34] By 2006, the full amount remained outstanding. The respondent had failed to make any payments toward this. Legal action was taken and an execution order served on the respondent's employer. His wages were garnished to satisfy the judgement entirely.

[35] The agreement contained an annual reporting clause.

[36] In 2007 the respondent earned $191,213.00 and in 2008 $218,619.91 and in 2009 $243,946.49.

[37] On January 8, 2009, a letter was sent by the applicant's lawyer to counsel for the respondent advising that the applicant had purchased her own residence and would be moving out of her parents' home **at the end of February 2009.** It was known to the parties that the mother had moved into the parents' home upon separation.

[38] The applicant requested an increase in child support payments in accordance with the amended consent order. The triggering date was **February 27, 2009**.

[39] As the respondent's income was now in excess of $150,000.00 counsel for the respondent argues that his client's interpretation of section 4(b) of the Child Support Guidelines would allow consideration for access costs and for the condition, means and circumstances of the parties. At the time the applicant's income circumstances were greatly improved.

[40] The position that the respondent assumed by not responding to the request for an increase and making an arbitrary decision as to what amounts ought to be paid, was done at his peril.

[41] Placing the onus on the applicant to make an application does not fulfill the respondent's obligation in accordance with his duties as described by the Supreme Court of Canada in **D.B.S. v. S.R.G.**; **L.J.W. v. T.A.R.**; **Henry v. Henry**; **Hiemstra v. Hiemstra**, [2006] 2 S.C.R. 231, 2006 SCC 37 or in accordance with his obligations under the contract.

[42] In paragraph 54 of this case Basterache, J. states as follows:

> In summary, then, parents have an obligation to support their children in a way that is commensurate with their income. This parental obligation, like the children's concomitant right to support, exists independently of any statute or court order. To the extent the federal regime has eschewed a purely need-based analysis, this free-standing obligation has come to imply that the total amount of child support owed will generally fluctuate based on the payor parent's income. Thus, under the federal scheme, a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children.

[43] The lump sum arrears that arose was preventable.

[44] By letter of October 9, 2009, the respondent asked to have his access costs and other considerations included in a determination of the appropriate child support. He had a legitimate right to pursue a decision that considered his access costs pursuant to the Child Support Guidelines.

[45] At that time it was evident the matter would have to be resolved, if not by agreement then by court application. That application was commenced in March 2010.

[46] The respondent has two children with the applicant and two young children with his current partner.

[47] The respondent makes significant effort to ensure that all of his children have an opportunity to spend time together. He maintains contact with his children in Ontario. The cost is significant.

[48] In paragraph 27 of his affidavit, the respondent estimated the cost for access in 2010 through to the Thanksgiving weekend to be in excess of $14,000.00 or $1,400.00 per month. Given the nature of his work, that is, contractual, these access visits would impact on any portion of his salary received as a result of his self-employment.

[49] The respondent made what appears to be a reasonable request for a reduction of approximately $250.00 per month "to account for some of the significant expenses he has outlined below."

[50] This request may have resulted in a court addressing his access costs in the determination of child support. The applicant's circumstances in 2007, 2008, and 2009 were increasing significantly although, at the time of the hearing she had lost her job.

[51] Notwithstanding his desire to have access costs factor into the ultimate award, in the end the respondent agreed to average his income in accordance with the applicant’s wish resulting in a higher average income than his current income reflects. The child support guidelines were applied retroactively to arrive at a statement of

arrears and a currently monthly amount. The final agreement did not account for his access costs.

[52] I make no determination as to the validity of each and every access disbursement given the matter was not litigated before the court. It would be fair to conclude in principle that it is critical that these parents do what they can to encourage and continue any significant contact between the father and the children.

[53] That principle ought to be elevated above the conflict and dispute between the parties and remain the focus of their attention to require both parties to make whatever modifications or amendments are necessary in their lifestyles to ensure that the children remain in connection with their biological father.

[54] Having addressed the issue of variation, the parties arrived at an agreement in advance of the court hearing. They agreed upon an average income over the last three years of $224,494.40 to calculate child support. I have no evidence as to why his income decreased and whether this is outside his control.

[55] The respondent agrees to pay the applicant the sum of $16,687.80 in satisfaction of arrears and child support that have accrued between the dates of February 28, 2009 and October 28, 2010.

[56] In addition, the monthly child support award payable by the respondent to the applicant is $2,747.34 commencing the 28th day of month and continuing thereafter until further order of the court or agreement of the parties.

[57] An offer of settlement was made by letter of October 21, 2010 which proposed an offer based on the respondent's then current income rather than the average of the last three years and a slight reduction to reflect access costs.

[58] The parties were close to settlement, although the applicant insisted on full child support arrears at a full table amount without regard to access costs. Ultimately the respondent agreed.

Payment schedule

[59] The applicant asks that payments be made as follows:

$8,343.50 by the December 1, 2010
$4,171.75 on March 1, 2011 and June 1, 2011

Fees

[60] Between January 1, 2009 and September 30, 2010 the applicant was billed legal fees totalling $13,273.03, not including HST or disbursements.

[61] The total claim for disbursements including trip cancellation costs invoiced to the applicant and incurred by her is $1,442.12.

[62] In the itemization of the costs and billing for the applicant, between January 1, 2009 and October 2010 four billings occurred: on April 28, 2009; November 30, 2009; July 29, 2010 and October 20, 2010.

[63] A final bill may have been sent as a result of preparation and appearance for the November 2, 2010 hearing and settlement discussions.

[64] There is some overlap in the presentation of evidence with respect to the contempt and with respect to the variation application and the argument as to costs.

[65] I cannot distinguish in the billing between those costs associated with the contempt application and those respecting the variation.

[66] For that period of time, the disbursements claimed are $643.85 together with an additional disbursement claimed by the applicant directly in the amount of $798.27.

[67] Of the $798.27 claimed by the applicant, one is the result of the costs associated with the hotel reservation for $354.72 for two nights and the car rental for $195.89 for a total cash equivalent of $550.61. Fees associated with flight cancellation are $247.66.

[68] The applicant sought a variation. There was legitimate dispute as to the amount of child support that ought to be paid. There was no certainty as to the amount that would have been awarded given that the respondent had a legitimate request to have his access costs considered.

[69] The applicant is asking for costs on the variation application, that being $7,000.00. She is further asking for disbursements of $643.85 and the disbursements presented by the applicant in the amount of $798.27.

[70] Included in this is the cost of the applicant's stay in the Westin Hotel at $354.72, car rental at $195.89 for a total cash of $550.61. The applicant argues she incurred $247.66 for flight cancellation and seeks to have $798.27. She seeks to be compensated for the loss of points she used to reserve the hotel room, etc. due to the settlement.

[71] I have no proof of the Westin Nova Scotia charge or the Avis car rental charges.

[72] I disallow her request for disbursements.

[73] The applicant's costs are deductible; the respondent's are not.

[74] The argument of counsel on her behalf is that this was a matter that could have been settled well in advance such that her costs for attending at court would not have been incurred.

Time for payment

[75] The respondent is asking to extend the time for repayment due to the following factors:

1. He is in arrears of his tax installments and must attend to this immediately;

2. He has two children in his current marriage;

3. The lump sum arrears as well as the increase in his child support payments will directly affect his ability to access his children.

4. He has reduced income to $210,000.00 for this current year.

[76] The respondent indicates that he has made efforts to comply. I have dealt with that previously.

[77] I do not have sufficient circumstances to allow me to draw any conclusions about the reduction in his income.

[78] The fact that he has lump sum arrears to pay was a matter that could have been addressed in a timely fashion in advance of the need to make an application to vary.

[79] The fact that he is in arrears in his tax instalment is a matter within the control of the respondent.

[80] Child support is the primary responsibility of the parent in advance of other creditors.

[81] The access costs are the most concerning aspect to his request for delayed payment.

[82] It would be contrary to the best interests of the children in principle if the respondent was unable to exercise access with his children due to his financial obligations.

[83] The agreement entered into was an agreement entered into on the advice of counsel having considered all their options. Were the matter litigated, the access costs was a live issue. Clearly these are significant. Access between the father and the children is to be encouraged.

[84] With respect to the contempt application, it is clear that the respondent did not abide by the contract and I find him in contempt and impose reasonable costs associated with the initial application for leave and subsequent preparation before the court on the contempt issue.

[85] The respondent must understand that he is obliged to abide by court orders, seek to have them varied or pay the costs. Inaction and failure to respond are simply not options. Costs of $1,500.00 are assessed for that issue.

[86] With respect to the variation application, clearly the agreement favours the applicant's position. There was a delay and failure to respond in a timely fashion. There was an agreement shortly before the proceedings; that agreement might have been reached earlier, as early as October 18th, had there been some movement between

the parties. Certainly the issues presented in the variation application were not complex.

[87] The applicant in this proceeding made no concessions.

[88] Counsel wishes me to review the decisions respecting substantial indemnification of costs, recognizing that the $7,000.00 would be less than half of the final bill.

[89] The threat of substantial indemnification of costs as suggested by the applicant's counsel ought to be weighed in family matters with the right of parties to access justice so as not to make access to justice cost prohibitive to either party.

[90] Substantial indemnification in this case practically may result in reduced access between the father and the first two children given the increase in his payment, his current obligations, his obligations to pay arrears and his tax bill.

[91] Putting the issues in perspective: in total, the time spent in court was as follows:

April 28, 2010 - 12 minutes
August 30, 2010 - 9 minutes
November 2, 2010 - 1 hr and 11 minutes   **TOTAL:** 1 hr 32 minutes

[92] Considering the evidence and arguments put forward, including the tax implications of the actual costs incurred by the applicant, I order $2,000.00 costs together with disbursements of $643.85 on the application to vary.

[93] Together with the agreed upon arrears of $16,687.80 and the monthly payments of $2,747.34, total costs, therefore, are as follows:

Contempt application	$1,500.00
Application to vary	$2,000.00
Plus disbursements	$ 643.85

[94] The disbursements put forward by the applicant have not been proven sufficiently to include them in the award.

[95] With respect to the payment of the outstanding arrears, I adopt the following schedule requiring

50% by February 15, 2011;
25% by April 15, 2011; and
Final payment by June 30, 2011.

[96] Counsel for the applicant shall draft the order.

Legere Sers, J.

January 20, 2011
Halifax, Nova Scotia