SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Burns v. Barrett, 2011 NSSC 9

Date: 2011/01/12
Docket: 1206-03851
Registry: Sydney

Between:

Debbie (Barrett) Burns

Applicant

v.

Darren Barrett

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: December 21, 2010 and December 22, 2010 in Sydney, Nova Scotia

Written Decision: January 12, 2011

Counsel: Debbie (Barrett) Burns, on her own behalf
Darren Barrett, on his own behalf

By the Court:

[1] Debbie Burns and Darren Barrett are former spouses. They have three children, Jacquelyn, Amber, and Jessica. Jacquelyn is no longer a child of the marriage because she is financially independent of her parents. Ms. Burns seeks to retroactively increase child support. Mr. Barrett disputes any retroactive adjustment, and instead suggests that the increase should be effective when the variation application was filed.

[2] The court heard the evidence of the parties on December 22, 2010, and the decision was adjourned for determination.

[3] ***Issues***

[4] The following issues will be resolved in this decision:

a. Should the court entertain a retroactive variation as it relates to Jacquelyn?

b. Should a retroactive child support order issue?

c. What is the appropriate prospective child support order?

[5] ***Analysis***

[6] **Should the court entertain a retroactive variation as it relates to Jacquelyn?**

[7] Ms. Burns filed a variation application on March 29, 2010 and an amended variation application on April 4, 2010. Both parties agree that Jacquelyn became independent in June 2008. The court thus is not in a position to award retroactive child support for Jacquelyn as noted in **S.(D.B.) v. G.(S.R.)** 2006 SCC 37, para. 89, wherein the Supreme Court of Canada held as follows:

> 89 In their analysis of the Guidelines, J.D. Payne and M.A. Payne conclude that the "material time" is the time of the application: Child Support Guidelines in Canada (2004), at p. 44. I would agree. While the determination of whether persons stand "in the place of ... parent[s]" is to be examined with regard to a past

> time, i.e., the time when the family functioned as a unit, this is because a textual and purposive analysis of the Divorce Act leads to this conclusion; but the same cannot be said about the "material time" for child support applications: see Chartier v. Chartier, [1999] 1 S.C.R. 242 (S.C.C.), at paras. 33-37. An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status.

[8] **Should a retroactive child support order issue?**

[9] ***Position of the Parties***

[10] Ms. Burns seeks retroactive child support for two reasons. First, she notes that Mr. Barrett's earnings have substantially increased from that stated in the consent varied order dated October 2006. Further, she states that Mr. Barrett has not incurred the access costs that were contemplated at the time the consent varied ordered issued.

[11] Mr. Barrett opposes a retroactive increase in child support for four reasons. He states that he has consistently paid child support in conformity with the order, and has not acted in a blameworthy fashion. He further notes that Jessica lived with him from September to December 2007. In addition, Mr. Barrett indicates that he provided additional monies directly to the children as his income improved. Finally, Mr. Barrett states that access costs were incurred as contemplated in the 2006 order.

[12] ***Legal Analysis***

[13] In **S. (D.B.) v. G. (S.R.),** ***supra*****,** the Supreme Court of Canada reviewed the four factors to be balanced when determining the appropriateness of a retroactive child support award. The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of an insufficient payment of child support. The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engaged in blameworthy conduct, then a retroactive award is usually appropriate. The third factor to be balanced focuses on the circumstances, past and present of the child, and not of the parent, and includes an examination of the child's standard of living. The fourth

factor requires the court to examine the hardship which may accrue to the non-custodial parent as a result of the non-custodial parent's current financial circumstances and financial obligations, although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct.

[14] In addition to these factors, I must also analyze the impact of access costs. The 2006 maintenance order was below the table amount because of access costs and based upon reasonable arrangements pursuant with s. 17(6.4) of the *Divorce Act*.

[15] *Reasonable excuse:* I am satisfied that there was a reasonable excuse for Ms. Burns' delay in seeking a variation of the child support award. I make this finding for two reasons. First, I accept Ms. Burns' evidence, and reject Mr. Barrett's evidence, as it relates to financial disclosure. Ms. Burns did not become aware of Mr. Barrett's substantial increase in earnings until 2010. My credibility determination is bolstered by the court documents filed. Ms. Burns consistently raised the non-disclosure issue in court documents. This includes the application and intake forms which were filed in April 2010, in which Ms. Burns notes under the box "other" that she was "not receiving income tax as stated in court order". In addition, in her affidavit, filed on August 30, 2010, Ms. Burns reiterated her concern about Mr. Barrett's lack of disclosure.

[16] For his part, Mr. Barrett did not contest this allegation until the day of the hearing. Specifically, Mr. Barrett did not deny the allegation when he filed the response to variation application on July 30, 2010, nor did he deny the allegation in the affidavit which he filed on December 20, 2010.

[17] I also accept the evidence of Ms. Burns when she stated that she sent a letter to Mr. Barrett requesting disclosure in October 2009, after her previous verbal requests for disclosure met without response. I do not believe Mr. Barrett when he states that he did not receive the letter.

[18] Ms. Burns was not aware of the significant increase in the salary of Mr. Barrett until 2010. This lack of disclosure is one of the factors which leads me to conclude that Ms. Burns had a reasonable excuse for the delay.

[19] Second, I further find that Ms. Burns lacked the emotional means to bring an application earlier. Ms. Burns was experiencing significant emotional distress

from 2007 to 2009. Her emotional problems resulted from a number of circumstances, including the following:

a) the burning of her family home,

b) the discovery that her second husband was responsible for the arson,

c) Ms. Burns' separation from her husband,

d) the ongoing investigation with the insurance company and policing authorities,

e) the ongoing family problems arising from the breakdown of her second marriage, and

f) several relocations of the family, and consequential financial difficulties which ensued.

[20] These emotional difficulties coupled with Mr. Barrett's non-disclosure, result in a reasonable excuse being advanced by Ms. Burns for the delay in filing a variation application.

[21] *Conduct of payor parent:* Mr. Barrett engaged in blameworthy conduct. He failed to disclose financial information when under a legal obligation to do so, contrary to page 2 of the consent variation order. This order stipulated that Mr. Barrett was to keep Ms. Burns advised on a timely basis as to any change in his employment or income status. Further, Mr. Barrett was required to supply Ms. Burns with a copy of his income tax return on June 1 of each year. Mr. Barrett neither provided Ms. Burns with timely notification of any increase in his employment income, nor did he supply income tax returns annually.

[22] Further, I find that although Mr. Barrett provided some additional monies to the children in the form "shopping sprees" on an annual basis, these amounts were limited in the context and circumstances of the case. The spending sprees were approximately $500 per child, and on one occasion, was in substitution of Christmas gifts.

[23] Although Mr. Barrett also contributed to the university expenses for Jacquelyn, this factor has no bearing on the retroactive award being considered for the other two dependent children. Further, the amount which Mr. Barrett contributed towards Jacquelyn's s. 7 expenses likely represented what Mr. Barrett would have had to contribute in any event.

[24] *Circumstances of the children:* I find that the children have endured hardship as a result of the inadequate child support that was paid. The children suffered a significant change in lifestyle during this period. Ms. Burns and the children relocated several times because of financial distress. The children's budget was limited because of the lack of appropriate child support and Ms. Burns' financial circumstances.

[25] Although the children's current circumstances have improved considerably, the children nonetheless have a need for retroactive support. Ms. Burns' current income is less than $20,000 per annum, and her common law spouse earns approximately $56,000 per annum, and has other children to support. Neither Amber nor Jessica have enjoyed the financial advantages that they would have received had Mr. Barrett been supporting them in accordance with the *Guidelines*. I further find that Ms. Burns will use the retroactive maintenance for the children.

[26] *Hardship factors relevant to the payor parent*: Despite being advised that this was a factor in the court's overall consideration, Mr. Barrett lead no evidence that a retroactive award would cause him hardship. Mr. Barrett earns an income of approximately $64,000[1] and resides with his partner, who earns a salary of approximately $87,000 and has no dependents. Hardship is not a factor which detracts from a retroactive order.

[27] *Access Costs*: I find that Mr. Barrett did not expend significant resources on access. The 2006 order anticipated access costs to include six weeks of summer access, every second Christmas, every second March Break, and extended access

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[1]Mr. Barrett chose not to disclose updated income information. Income information from the spring of 2010 is the most recent information provided. Year-to-date earnings, inclusive of profit sharing, for a four month period disclose $21,261.73, which if annualized equals $63,785.19.

visits. It was for this reason that Mr. Barrett was not required to pay the *Guideline* amount. The *Guideline* amount would have produced a child support order of $1,108. The order requires the payment of $850, a difference of $258 per month or $3,096 per year.

[28] Mr. Barrett's access expenses were not substantial. Mr. Barrett flew the three children to Ontario in 2006, and he flew two children to Ontario in 2009. For the balance, Mr. Barrett drove to Cape Breton and spent approximately $500 in gas once a year. Other than 2006, the amount which Mr. Barrett spent on access would not justify a reduction in the table amount of child support payable.

[29] ***Decision***

[30] On the balance, I have determined that a retroactive child support award is appropriate. The timing of the retroactive award is affected by three specific variables. First, because Jacquelyn is no longer a child of the marriage, child support can only be payable on a retroactive basis for two children. Second, the last court order was issued on October 24, 2006 and must be given judicial acknowledgment for a reasonable period of time. Third, the child Jessica lived with her father from September to December 2007. Given these factors, the retroactive order is therefore effective January 1, 2008.

[31] Child support is thus due according to the following table:

Year	**Income**	**Table Amount**	**Paid**	**Amount Due**
2008	73,610	1,082	850	2,784
2009	60,789	913	850	756
2010	64,000	958	850	1,296
TOTAL				4,836

[32] I therefore grant a retroactive child support award in the amount $4,836 which will be payable by Mr. Barrett to Ms. Burns. This payment will be made in a lump sum on or before February 15, 2011.

[33] Mr. Barrett requests that any retroactive order be payable to the children directly, or placed in a trust account on behalf of the children. I deny this request because there is no evidence to suggest that Ms. Burns has not properly looked after the needs of the children in the context of her limited financial circumstances. Ms. Burns is competent and capable of directing how child support should be spent. The court is satisfied that Ms. Burns will use the retroactive child support for the needs of the dependent children.

[34] **What is the appropriate prospective child support order?**

[35] Mr. Barrett's current income is $64,000. Child support for two children results in a monthly payment of $958 effective January 1, 2011, and continuing on the first day of every month thereafter unless varied by a court of competent jurisdiction.

[36] In the event either Amber or Jessica moves to Ontario to live permanently with Mr. Barrett, child support will have to be adjusted based upon the split custody provisions of the *Guidelines*, and the incomes of the parties at the time.

[37] ***Conclusion***

[38] Retroactive support in the amount of $4,836 will be payable by Mr. Barrett to Ms. Burns no later than February 15, 2011. Ongoing child support in the monthly amount of $958 is also payable. Costs of $1,000 are awarded to Ms. Burns because of Mr. Barrett's failure to comply with his legal obligation to disclose income: **MacLean v. MacLean** 2002 NSSC 5, paras. 19-21. Costs are payable to Ms. Burns no later than February 15, 2011. Disclosure and enforcement requirements will continue as per the previous variation order.

The Honourable Justice Theresa M. Forgeron