SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Young v. Marshall, 2011 NSSC 50

Date: 2011/02/04
Docket: 1206-004432
Registry: Sydney

Between:

Wanda Young

Applicant

v.

Andrew Kenzie James Marshall

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	January 17, 2011, in Sydney, Nova Scotia
Written Decision:	February 4, 2011
Counsel:	Wanda Young, on her own behalf Andrew Kenzie James Marshall, not present

By the Court:

[1] **INTRODUCTION**

[2] Wanda Young and Andrew Marshall are former spouses. They have two children: James, who is 18, and Andre who is 14. Ms. Young seeks to retroactively increase child support. Ms. Young also seeks to impute income to Mr. Marshall. For his part, Mr. Marshall did not participate in the hearing, although he did file limited financial information in July 2009.

[3] The hearing proceeded on January 17, 2011, and the matter was adjourned for decision.

[4] **ISSUES**

[5] The following issues will be determined in this decision:

1. Should income be imputed to Mr. Marshall?
2. What is the appropriate child support award?
3. Should a retroactive child support order issue?

[6] **ANALYSIS**

[7] **Should income be imputed to Mr. Marshall?**

[8] Ms. Young asks that the court impute income to Mr. Marshall for two reasons. First, she notes that Mr. Marshall is exempt from the payment of income tax. Second, Ms. Young seeks to impute income because Mr. Marshall failed to disclose income information.

[9] Mr. Marshall's position on this issue is not known.

[10] The decision to impute income is a discretionary remedy. Like all discretionary awards, the discretion must be exercised judicially in accordance with rules of reason and justice - not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court will impute income: **Coadic v. Coadic** 2005 NSSC 291 and **Marshall v.**

Marshall 2008 NSSC 11. The burden of establishing an imputation claim rests with the party who seeks the relief.

[11] In this case it is appropriate to impute income to Mr. Marshall for two reasons. First, Mr. Marshall is exempt from paying income tax, as noted in s. 19(1)(b) of the *Child Support Guidelines*. Mr. Marshall is employed by the Chapel Island Band Council, and he resides at Chapel Island, which is a First Nations reserve.

[12] Second, Mr. Marshall failed to disclose all income information when under a legal duty to do so, as stated in s. 19(1)(f) of the *Child Support Guidelines*. Specifically, clause 4 of the Corollary Relief Judgment dated December 4, 2003 required Mr. Marshall to provide Ms. Young with a copy of his income tax return by June 1st of each year. Mr. Marshall failed to do so. Further, Mr. Marshall did not provide complete disclosure in response to the variation application. He only filed limited financial information on July 3, 2009. At that time, Mr. Marshall filed a Statement of Income, a printout from his employer, and a copy of his 2006, 2007, and 2008 T4s.

[13] I draw a negative inference from Mr. Marshall's failure to supply his income tax returns and current income information: s. 24(c) of the *Child Support Guidelines*; and **Reid v. Reid**, 2010 NSSC 62, para. 22. I infer that Mr. Marshall's failure to supply income information was because his income has substantially increased from that which was produced in July, 2009.

[14] Ms. Young states that when she met with Mr. Marshall prior to the 2011 hearing, Mr. Marshall advised her that his income was $70,000. I accept Ms. Young's evidence and impute income of $70,000 to Mr. Marshall effective January 1, 2010. I further find that Mr. Marshall's income for the period between March 1, 2007 to January 1, 2010 was $42,000, which grossed up for its tax free status, equates to an imputed income of $58,825.

[15] **What is the appropriate child support award?**

[16] Effective January 1, 2011, Mr. Marshall will pay Ms. Young child support in the amount of $983 per month, commencing January 1, and continuing on the first day of every month thereafter unless otherwise ordered by a court of competent jurisdiction.

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

[18] Ms. Young seeks retroactive child support from the date of the issuance of the last varied Corollary Relief Judgment, which order issued on February 6, 2007.

[19] Mr. Marshall's position is not known because he did not participate in the hearing. In **S.(D.B.) v. G.(S.R.)** 2006 SCC 37, 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 the issuance of 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 a non-custodial parent's current financial circumstances and obligations, although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct.

[20] In respect of these four factors, I find as follows:

> a) Ms. Young filed an Application to Vary on May 20, 2009. Ms. Young did not provide any additional reason for the delay, other than the fact that Mr. Marshall did not disclose income information in conformity with the court order.
>
> b) Mr. Marshall engaged in blameworthy conduct. He consistently failed to supply Ms. Young with income information as mandated.
>
> c) The Statement of Expenses which was filed by Ms. Young outlines the financial circumstances of the children and Ms. Young. It appears that the children's lifestyle has been negatively impacted by the insufficient payment of child support.

d) I have no information about Mr. Marshall's current circumstances because he chose not to participate in the hearing.

[21] I conclude that it is appropriate to award retroactive child support. Mr. Marshall failed to comply with an order of the court. As a result, Ms. Young was not aware that Mr. Marshall's income had increased. Mr. Marshall should not be permitted to benefit from his blameworthy conduct. Child support will be varied effective June, 2007. This is the date when Mr. Marshall was obligated to disclose his income tax information.

[22] The following table outlines the retroactive award outstanding:

Time Period	Annual Income	Amount Due	Amount Paid/Required to be Paid	Difference
June to December 2007	$58,825	$835	$579	$256 x 7 = $1,792
2008	$58,825	$835	$579	$256 x 12 = $3,072
2009	$58,825	$835	$579	$256 x 12 = $3,072
2010	$70,000	$983	$579	$404 x12 = $4,848
Total				**$12,784**

[23] Mr. Marshall thus owes retroactive child support to Ms. Young in the amount of $12,784, plus any arrears outstanding from the last order.

[24] **Conclusion**

[25] A retroactive child support order is granted based upon income imputed to Mr. Marshall because of the tax free nature of his income, and because Mr. Marshall failed to supply the court and Ms. Young with income information when under a legal obligation to do so. Ongoing child support in the amount of $983 per month is granted based upon an imputed income of $70,000 effective January 1, 2011. Retroactive child support is granted in the amount of $12,784, which shall be payable at a rate of $200 a month until the retroactive award is paid in full, together with any arrears which have arisen under the last order.

Forgeron, J.
(NSSCFD)