SUPREME COURT OF NOVA SCOTIA
Citation: Hoeg v. Buckler, 2011 NSSC 221

Date: 20110606
Docket:STD 031276
Registry: Truro

Between:

Rick Hoeg Jr.

Applicant

v.

Janice Buckler

Respondent

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	May 30, 2011, in Truro, Nova Scotia
Written Decision:	June 6 , 2011
Counsel:	Karen Killawee, for the applicant Colin Campbell, for the respondent

By the Court:

[1] This is an application to vary brought pursuant to section 17 of the **Divorce Act**.

[2] The parties were divorced on June 8, 2006 after a nine year marriage. There are two children of this union, namely Rielle Hoeg, born August 17, 1995 and Lienna Hoeg, born October 15, 1996. The Corollary Relief Judgment contained the following information and relief respecting the children's care and support:

- Ms. Buckler's income for child support purposes was set at $29,000.00
- Mr. Hoeg's income for child support purposes was set at $34,700.00.
- The children would spend a minimum of 40% of time with each parent.
- No child support would be paid by either parent.
- The parents would split the child tax benefit.
- The parents would claim one child each for income tax purposes.

[3] On November 12, 2009 Ms. Buckler filed an Interlocutory Notice seeking a variation of the custody and child support arrangements. In her application Ms. Buckler stated "we now have shared care of Lienna and Rick now has primary care

of Rielle." She further stated "since our last order granted in 2006 my place of employment has changed, along with my earnings."

[4] On June 7, 2010, after a hearing, Justice Murphy issued a varied Corollary Relief Judgment. The following information and relief were contained in that order:

- One child was in the primary care of Mr. Hoeg.

- One child was in a shared custody arrangement and was spending 50% of her time with each parent.

- Mr. Hoeg's income for child support purposes was set at $55,134.00.

- Ms. Buckler's income for child support purposes was imputed at $32,000.00.

- No table child support would be paid by either parent.

- The parties would share proportionately to a maximum of $300 per year the cost of school supplies and a birthday party and anything above that will be borne by Mr. Hoeg. (37% and 63%)

- Each would contribute $50 to the children's RESP.

- Ms. Buckler would contribute to the children's extra curricular activities to a maximum of $1300 per annum.

- Ms. Buckler would pay $1,000 toward each child's orthodontic bills when incurred.

- The parties would maintain individual $200,000 life insurance policies with the children as beneficiaries.

[5] On January 5, 2011, Mr. Hoeg made an application to vary custody, access and child support. In his application he stated "since we appeared in court in February 2010 Lienna has started spending less and less time at her mother's home. Over the course of the past year she has spent more than 60% of her time at my home . . . since August of 2010 Lienna has resided in my home more than 75% of the time."

[6] Ms. Buckler does not contest the care arrangements set out in Mr. Hoeg's application. She has taken the position that requiring her to pay child support on an imputed $32,000 income would amount to "undue hardship." Mr. Hoeg argues that Ms. Buckler is intentionally underemployed and has arranged her substantial assets in a form that brings her below the poverty line.

[7] The issues at this hearing are as follows:

·The appropriate custody arrangement.
·Imputing income to Ms. Buckler.
·Table child support going forward.
·Section 7 expenses going forward.
·Retroactive support.
·Undue Hardship.

Mr. HOEG'S SITUATION:

[8] Mr. Hoeg has remarried and both Rielle and Lienna are now in his primary care. He has a Bachelor of Science degree and works in the agricultural sector. He earned $45,704 in 2010. Mr. Hoeg's spouse earned $45,700 in 2010 and will likely earn $65,000 in 2011. He is very involved in supporting his daughters many activities and receives very little assistance from Ms. Buckler.

MS. BUCKLER'S SITUATION:

[9] Ms. Buckler is presently 41 years old and has a Bachelor of Science degree in chemistry as well as qualifications in the area of nutritional counselling. She received an inheritance in 2006 from her father which included her home, various parcels of land and the proceeds of life insurance policies. Ms. Buckler has created

a plan whereby she has substantial assets and very little income. It is interesting to note that in her 2010 submissions she stated “I am 40 years of age, of which I feel is not an unreasonable age to be in a semi-retired position, regardless of how that came to be so.”

[10] Ms. Buckler’s 2010 line 150 income was $9,964.81 derived from some seasonal part time work. She holds investments worth $226,754 and $7,143 and has received regular recurring capital gains as a result of properties she has been selling. I find that because of these assets Ms. Buckler has made the decision to be virtually unemployed. She derives income from non-taxable sources and writes off costs associated with those investments. She is refunded all of her income tax as well as other expenses. She is eligible to receive an additional tax refund under the Nova Scotia Affordable Living Tax Credit, the poverty reduction credit, GST credit and receives a generous child tax benefit for her four-year-old son. It is noteworthy that in 2008 she received a return of capital of approximately $42,000, in 2009 approximately $27,000 and in 2010 $28,495.00. I recognize that from these returns she must make her loan payments.

[11] Ms. Buckler also states that she should not be forced into employment because she does not have to work and because she wants to stay home with her son. She has chosen not to disclose who fathered this child and has decided to not seek child support from that individual. She also feels that her daughters do not need her support because Mr. Hoeg has an income earning spouse. She testified that she feels that the $1,300 per annum in specials should be reduced.

[12] I have observed that Ms. Buckler is very knowledgeable about all things financial and is very adept at discussing revenue and tax principles. Yet when pushed on cross-examination she feigned ignorance in these areas. While her children are wandering away from her, this court did not sense the least bit of concern. She seems to have accepted their departure, decided to focus on her new family unit and has created an income/asset arrangement that she truly feels legitimizes her not supporting Rielle and Lienna. Ms. Buckler's focus in life is entirely financial.

CUSTODY ISSUES:

[13] The evidence clearly establishes that the children are now living in Mr. Hoeg's home. Ms. Buckler does not dispute this fact and did not suggest that they would be living with her in the foreseeable future. I order that Rielle and Lienna will be in the joint custody of the parties and that Mr. Hoeg shall have primary care. Ms. Buckler will enjoy liberal access on terms that reflect the children's wishes. There has been no suggestion that Mr. Hoeg interferes with contact or in any way alienates Ms. Buckler. I order the following ancillary relief:

- The children's RESP accounts shall be transferred to Mr. Hoeg.
- Mr. Hoeg will be entitled to the full child tax benefit for Rielle and Lienna.
- Mr. Hoeg will be entitled to claim Rielle and Lienna as dependants in each tax year.

[14] These directions reflect Ms. Buckler's diminishing role in her daughters' lives. I am confident that Mr. Hoeg will not exploit these responsibilities.

IMPUTING INCOME:

[15] Section 10 of the child support guidelines allows this court to impute income to a spouse "as it considers appropriate in the circumstances." The circumstances that apply to Ms. Buckler are:

(a) The spouse is intentionally under employed or unemployed.

(e) The spouses property is not reasonably utilized to generate income.

(h) The spouse derives a significant portion of income from dividends, capital gains, or other sources that are taxed at a lower rate than employment or business income.

[16] Justice Forgeron reviewed the principles in *Marshall v. Marshall*, 2008 NSSC11 and cited the following:

> "I am not restricted to the actual income which he earned or earns, rather I am permitted to review . . . income earning capacity having regard to his age, health, education, skills and employment history."

> "By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children. Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity."
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> "There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor."
>
> "When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations."
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> "A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment."

[17] Justice Murphy imputed income of $32,000 to Ms. Buckler in February 2010. I find no change in her circumstances that would dictate increasing that amount beyond a cost of living increase. Ms. Buckler's income for child support purposes is set at $35,000 per annum. I am basing this decision on her underemployment. If she wants to continue being unemployed, then she should

draw down from her investments for as long as the children are children of the marriage.

TABLE SUPPORT GOING FORWARD:

[18] On the basis of the imputed income, I order that Ms. Buckler pay $517 per month to Mr. Hoeg for the support of Rielle and Lienna, effective July 1, 2011.

RETROACTIVE TABLE SUPPORT:

[19] I ruled earlier that if I award retroactive support I would not go back beyond August 2010. I have reviewed both parties evidence on when both children came to be in Mr. Hoeg's primary care. I am satisfied that as of August 2010 the children were effectively in Mr. Hoeg's primary care.

[20] The award of retroactive support is discretionary but that discretion must be exercised judicially on the evidence. In the case of *D.R.S. v. S.R.G.* 2006 S.C.C. 37 Justice Bastarache stated at paragraph 97:

> 97 Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.

[21] I find that Ms. Buckler was required to pay child support for the two children since August 2010 at the then imputed rate of $32,000. The monthly table support for two children, on that income, is $479 per month. This amount is payable from August 2010 until July 2011, a period of eleven months. I order Ms. Buckler pay Mr. Hoeg $5,269 in retroactive table support.

SECTION 7 EXPENSES GOING FORWARD:

[22] The evidence establishes that Mr. Hoeg and his present spouse are very committed to the various activities enjoyed by Rielle and Lienna. The reality is that Ms. Buckler shows little interest in these pursuits. In fact, I am satisfied that this disinterest was a significant factor in influencing the children to spend more time with Mr. Hoeg. While Ms. Buckler is somewhat supportive of Mr. Hoeg's facilitation of the various activities, she is adamant that she should not contribute to the costs. Justice Murphy obviously found that it was less conflictual to cap Ms.

Buckler's contribution and to allow Mr. Hoeg to approve the activities. This removes any dispute over which expenditures are recoverable under section 7 of the child support guidelines. I support this approach with some minor variations. Justice Murphy's order is set forth here for ease of reference:

> 7. The parties shall share, proportionately, the costs of extra curricular activities for both children to a maximum of $3600.00 per year. Ms. Buckler shall not be required to pay more than 37% of $3600.00, for a total of $1300 per year. Mr. Hoeg shall have the ability to determine, in consideration of the children's wishes, the activities that the children shall participate in. Mr. Hoeg shall, no later than December 31st of each year, commencing in 2010, provide Ms. Buckler with copies of receipts totalling $3600.00 consisting of necessary equipment, fees and registration costs, and not to include gas and meal costs. As it is presumed that the cost of extra curriculars will exceed $3600.00 per annum, and that Ms. Buckler's share of same is $1300.00 per year as her contribution to Rielle and Lienna's joint extra curricular activities, the method of payment shall be as follows:
>
> a) Ms. Buckler shall pay to Mr. Hoeg four (4) equal instalments of $325.00, payable on the first day of January, the first day of April, the first day of July, and the first day of October of each year, commencing April 1, 2010.
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> b) In the event Mr. Hoeg is not able to provide proof of receipts totalling $3600.00 for the joint extra curricular activities of Rielle and Lienna, Ms. Buckler shall be reimbursed, no later than January 31st of the following year for her proportionate share of the amount less than $3600.00.
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> c) All payments for Section 7 expenses shall be paid to the Office of the Director of Maintenance Enforcement, P.O. Box 803, Halifax, Nova Scotia B3J 2V2 while the Order is filed for enforcement. A payor or recipient under a Maintenance Order being enforced by the Director shall advise the Director of a change of address within ten (10) days of the date of the change; and a payor under a Maintenance Order being enforced by the Director shall advise the Director of

> any change in location, address or place of employment, including the commencement or ceasing of employment, within ten (10) days of the date of such change.

[23] The children's activities will, no doubt, increase in costs from the last order. I am increasing the maximum to $4,000 and setting Ms. Buckler's share at 40% which increases the quarterly payment to $400.00. All other aspects of paragraph seven will remain in force. I recognize that these figures do not represent a proportional sharing.

UNDUE HARDSHIP:

[24] Ms. Buckler has filed an undue hardship application in response to Mr. Hoeg's application for child support. She advanced the circumstances that "I have a legal duty to support a dependant child in my household."

[25] Section 10 of the **Child Support Guidelines** is as follows:

> 10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(b) the spouse has unusually high expenses in relation to exercising access to a child;

(c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;

(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(i) under the age of majority, or

(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

(e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

[26] The analysis of undue hardship was considered in *Gaetz v. Gaetz*, [2001] N.S.J. No. 131 (C.A.) at paragraph 15:

"The Guidelines authorize the Court to depart from awarding child support as calculated in the tables only when the payer spouse or a child, on whose behalf a

> request is made, would suffer undue hardship. This is determined by a two step test. First, section 10(2)(a) to (e) of the Guidelines, list circumstances which must be considered: there must be a determination that the spouse has an unusually high level of debts incurred in the family context, high access expenses, or several instances of legal duties of support to a child or other person other than a child of the marriage. Only when circumstances capable of creating undue hardship are found does the second step become relevant - the comparison of the standards of living of the household of the payer spouse and the custodial spouse."

[27] Justice Forgeron provided the following analysis in Tutty v. Tutty, [2005] N.S.J. No. 514 at paragraph 23:

> 23 "The discretionary authority stated in section 10 of the Guidelines is not unfettered. Courts must be cautious in granting undue hardship applications. Cogent and specific evidence must be advanced if the table amount of child support is to be displaced. In Child Support Guidelines in Canada 2004, Julien and Marilyn Payne state a pp. 281 to 282 the undue hardship provisions of section 10 of the Federal Child Support Guidelines create a fairly narrow judicial discretion to deviate from the Guidelines."

> "Undue hardship is a tough threshold to meet. Furthermore, the use of the word "may" in section 10(1) of the Guidelines clearly demonstrates that any deviation from the Guidelines amount is discretionary, even if the Court finds undue hardship and a lower standard of living in the obligor's household. Although there is little judicial guidance on when this residual discretion will be exercised, it is inappropriate to exercise it where the parent alleging undue hardship has wilfully refused to pay child support. The Court should not readily deviate from the presumptive rules set out in section 3 of the Guidelines in the absence of compelling reasons for doing so. The presumptive rule under section 3 of the Federal Child Guidelines should not be displaced in the absence of specific and cogent evidence why the applicable table amount would cause an "undue hardship." Section 10 of the Guidelines is only available where excessively hard living conditions or severe financial consequences would result from the payment of the Guidelines amount. A Court should refuse to find undue hardship where a parent can reasonably reduce his or her expenses and thereby alleviate hardship. In the absence of the circumstances that constitute "undue hardship under section 10 of the Federal Child Support Guidelines," a Court has no residual discretion to

> lower the applicable table amount of child support under the Guidelines. If a parent has difficulty paying the table amount of child support because of other financial commitments that fall short of constituting "undue hardship" within the meaning of section 10 of the Guidelines, that parent must rearrange his or her financial commitments; the child support obligation takes priority. In most cases, wherein the undue hardship provisions of the Guidelines are met by the obligor, there is only a reduction in the amount of support; the child support obligation is rarely extinguished, although circumstances may arise where this is the appropriate disposition. Where the obligor has a low income, a Court may order a modest amount of child support as a "symbolic" gesture to reinforce the parental role, but such an order may be deemed unnecessary in light of the attendant circumstances of the particular cases."

[28] There is no undue hardship happening in the case of Ms. Buckler. She has made choices respecting employment, alignment of her assets, and child support for her son that reflect her interests and not the needs of her two teenage children. In light of this conclusion it is not necessary to go to the standard of living analysis. The Courts on many occasions have stated that parents are not free to barter away their child support obligations.

CONCLUSION:

[29] Mr. Hoeg shall have primary care of Rielle and Lienna under the terms of a joint custody order. Ms. Buckler's income is imputed at $35,000 and will pay $517 a month in table support effective July 1, 2011. Additionally Ms. Buckler

will pay Mr. Hoeg $5,269 in retroactive support. She will also contribute up to $1600 per annum to the children's activities. Ms. Bucklers application for undue hardship is dismissed.

[30] Ms. Buckler will pay $1000 in costs to Mr. Hoeg before July 1, 2011. She will also pay her retroactive obligation by that date.

J.