

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Dow v. Dow*, 2011 NSSC 229

Date: 20110614

Docket: SFPAD-070520

Registry: Port Hawkesbury

Between:

Cory Dow

Applicant

v.

Laura Dow

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

May 16, 2011 in Port Hawkesbury, Nova Scotia

Counsel:

Lindsay McDonald, for the respondent
Cory Dow, self represented

By the Court:

[1] Cory Dow and Laura Kaye were married on September 12, 1996 and divorced on the 12th of May, 2004, by order from the Court of Queen's Bench of New Brunswick's Family Division.

[2] In the original Consent Order pertaining to child support for their child C.P.T. Dow (dob. November 21, 1997), the parents agreed that the father's annual income in 2004 was \$29,500.00. He agreed and was ordered to pay \$251.00 per month for his daughter.

[3] This order remained unchanged until a Provisional Order was granted by the New Brunswick court on April 13, 2010.

[4] There has been no disclosure of Mr. Dow's income from 2004 up to and including 2007.

[5] His 2007 income as assessed by Revenue Canada was \$53,775.00. Had there been annual recalculations based on increases and decreases in income, in 2007 he would have paid \$465.82 per month as opposed to the order in 2004 of \$251.00 per month.

[6] There was no regular voluntary disclosure provided nor any request for disclosure made by or to Mr. Dow that would have triggered an adjustment to child support in accordance with the expectations and responsibilities set out in **D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Heimstra**, [2006] 2 S.C.R. 231, 2006 SCC 37.

[7] Arrears accumulated to \$1,004.00 as of February 2, 2008.

[8] No payments were made from November 27, 2007, to April 19, 2011.

[9] Two payments of \$125.50 were paid on April 19, 2011, and May 3, 2011 for a total of \$251.00 paid by way of child support in 2011.

[10] The applicant father applied to the Court of Queen's Bench Family Division on September 3, 2009, to vary this original order. He was represented by counsel.

He obtained a provisional order dated April 13, 2010 which terminated his obligation to pay child support based on an apparent lack of employment income.

[11] In the Provisional Order, the Court required the applicant to return to the Court for a review date in six months.

[12] The New Brunswick Court also vacated the outstanding arrears which had accumulated between November, 2007, and April 13, 2010.

[13] According to the statement provided by the enforcement agency dated February 8, 2008, to May 3, 2011, arrears have now accumulated to \$10,217.00 plus an additional \$125.00 for total arrears of **\$10,542.00**.

[14] The Provisional Order was based on the father's affidavit evidence dated September 3, 2009. The Financial Statement filed with the Court contained virtually no particulars except a statement indicating that he (the applicant) was unemployed since October, 2007.

[15] Other than a 2008 Notice of Assessment from Revenue Canada, no financial evidence was tendered in support of his application.

[16] His 2008 Notice of Assessment filed shows a total income of \$3,576.00 "apparently" as a result of an RRSP withdrawal. The assessment also shows a previous tax debt of \$8,844.30, all but \$357.61 carried over from previous years.

[17] The transcript reflects that no oral evidence was taken in the New Brunswick Court. The submissions of counsel rested on the documentation provided including the 2008 Notice of Assessment and the one line in the Financial Statement indicating that he was unemployed since October 7, 2007

[18] As is usual in a reciprocal proceeding, the mother did not appear before the New Brunswick Court. The applicant's evidence, such as it was, was uncontested.

[19] The New Brunswick Court was advised by counsel that the father made arrangements with the enforcement office on a bi-weekly basis to inform them when he was employed. His license had been revoked by Family Support Orders Service in 2008 as a result of their efforts to enforce child support payments.

[20] He did this in order to have his license re-instated.

[21] Submissions were made that suggested that since the loss of his employment in 2007, up to the date of the appearance in February, 2010, the applicant remained unemployed. This is a period of two years and four months.

[22] The Applicant advised the Court that in those two years and four months he put out approximately 50 resumes and assured the Court he sought employment.

[23] The Applicant is remarried and has an additional three children. His wife works outside the home. He assists with child care.

[24] He also advised the Court, through his counsel, that he was “*working on some personal accomplishments and some steps forward in some type of business plan to try some self employment, possibly in the future if he is still unable to find employment*”.

[25] He advised the Court he had no income as of November of 2007. He also advised that he did not received Employment Insurance in November of 2007 forward.

[26] On the basis of the evidence provided and the submissions of counsel, the Court accepted that his income in November went from \$29,000.00 as stated in the original 2004 order to 0. On that basis the Court vacated the arrears.

[27] The matter came before the Nova Scotia Supreme Court, Family Division on February 22 2011.

Order to Disclose (Nova Scotia)

[28] After representations from counsel for the respondent and an affidavit filed by the respondent, the Nova Scotia Court refused to confirm, modify, or vacate the Provisional Order without further evidence from the applicant.

[29] The Court issued an order dated March 8, 2011, requesting specific further disclosure from the respondent and the matter was set down for a Confirmation Hearing on May 16, 2011.

[30] While it is not usual in these proceedings, both parties appeared on that date. The respondent with her counsel and the applicant unrepresented. He continued to have counsel in New Brunswick, although that counsel did not appear in the Nova Scotia Court.

[31] The applicant was given the opportunity to speak with counsel in New Brunswick and a short adjournment was granted.

[32] When the hearing proceeded, he opted not to give further evidence and chose to rest solely on his previous submissions, the New Brunswick Court's Decision and his subsequently filed affidavit in response to the March 8, 2011, Nova Scotia Court Order. He did not wish to submit himself to cross-examination.

[33] He was permitted to make submissions.

New Evidence

[34] As a result of the disclosures, the Nova Scotia Court learned the following:

- The applicant was employed with the CIBC from 2001 to September of 2007. His employment was, according to the applicant, "*terminated mutually without prejudice*" in September of 2007.
- A confidential agreement between himself and the bank was entered into. He advised he was unable to speak to the terms of these provisions because of the confidentiality clause. The contract, therefore, and terms were not in evidence before the Court.
- The Record of Employment shows that his last day at the CIBC was October 19, 2007. The Record of Employment indicates that the applicant quit his employment. His total insurable earnings, according to the chart on page 2, (not tendered in evidence) was said to be \$16,787.43. There was also a severance pay of \$14,400.00. This is likely the reason he did not immediately qualify for Employment Insurance in November of 2007.

[35] Further disclosure, as a result of the Nova Scotia Court Order, was as follows:

- In 2007 his income was assessed at \$53,775.00 (his Record of Employment does not indicate his full employment income).

- In 2008 his Notice of Assessment shows income of \$3,576.00. It was this Notice of Assessment shown to the New Brunswick Court to justify a termination of his child support obligation.

- His 2009 Notice of Assessment shows income of \$2,531.00 and in 2010 he shows income of \$10,896.49. No Notice of Assessment was filed with the Court.

- In 2011, according to his April 11th affidavit, he received \$530.00 from Employment Insurance per month and \$1,200.00 as a training allowance per month for a total annual income of \$28,180.00.

[36] In 2010 it appears he obtained employment in various locations disclosed as follows:

1. Between March 24, 2010, and May 20, 2010, he worked with Atelka Inc. earning \$2,760.08. A Record of Employment indicates he quit this job;
2. Between June 9, 2010, and August 26, 2010, he worked with Sean Knappe General Carpentry earning \$5,866.45. He quit this employment;
3. Between August 31, 2010, and September 10, 2010, he worked with Maple Leaf Home Inc. (01). His Record of Employment indicates he earned \$514.80 and he quit this job as well;
4. Between September 21, 2010, and September 22, 2010, he worked for Personnel Search Limited and earned \$499.62. The Record of Employment indicates that the reason for termination of this employment was "A" - shortage of work and/end of contract or season;
5. Between October 12th and December 8, 2010, he earned \$1,255.54 with MSI. The reason again "A" as above; and
6. Between March 8, 2011, and March 8, 2011, he again worked with Personnel Search Limited earning \$60.06 with the reason for termination "A" as described above.

[37] The father then enrolled in a 40 week carpentry course at the Carpentry Training Centre of New Brunswick. This course started February 7, 2011, and ends November 18, 2011.

[38] Tuition, fees, textbooks, etcetera costs an estimated \$9,155.00.

[39] He has attended or is attending this course, according to his evidence, and provides a February 2011 evaluation of his course marks for seven early test results showing success at 90.5%.

[40] Finally, in his evidence, in a letter directed to Family Support Orders Service when he seeks to have his license re-instated, the father informed them that his reason for quitting his CIBC job was stress related in part due to the loss of his daughter. I take this to mean that the loss of his daughter relates to the move of the daughter, who is the subject matter of this proceeding, from New Brunswick to Cape Breton.

[41] He advises now that he stayed home and his wife commenced work.

[42] In his efforts to obtain his license back, there was no mention in November of the severance pay he received from CIBC of \$14,400.00. He did, however, advise the Family Support Orders Service offices that as of the end of October, 2007, he had no income. The Record of Employment states otherwise.

[43] In a further effort to support his plea for a reinstatement of his license, he advised Family Support Orders Service that he lives in a remote part of New Brunswick and he has three children by his current common law partner.

[44] He advises that without his car he is unable to work and support his four children. An email written by S. Ward, his common law partner and attached to Mr. Dow's affidavit sworn April 11, 2011, indicates that on occasion he has walked 30 kilometres to buy diapers. To allow him to become re-employed and support his children, he argued that they should re-instate his license. It was at this point in 2008, that his license was re-instated with the condition that he report on a biweekly basis.

The Respondent's Evidence

[45] The mother also gave evidence at the confirmation hearing.

[46] She advised that she has been a full time homemaker since her remarriage in July of 2006. She and her husband have four dependant children including the child who's the subject matter of this proceeding.

[47] The mother denied the suggestions made by the father before the New Brunswick Court, that she left New Brunswick illegally in August of 2007. She advised that she and her husband and children moved due to her husband's employment.

[48] The applicant had been advised in advance of the move and expressed no opposition to the move. She advised that the father asked her in August of 2007 to release him from his obligations for child support.

[49] She also advised that during the relationship, he worked under the table recording music for musicians. (I note that he lists in his subsequently filed disclosure a \$3,000.00 debt to Long and McQuade, a well-known music store.)

[50] The applicant has disclosed no cash income.

[51] There was a review of the Provisional Order on August 4, 2010. No evidence was tendered although discussions took place between counsel and the Court and a transcript has been provided.

[52] While there was a suggestion from counsel that the applicant might have the basis of an Undue Hardship Application, no such application has been filed. Nor has there been any disclosure of the spouses' yearly income.

[53] The applicant has raised the issue of the costs of access although he has tendered no evidence in support of this argument.

[54] The mother testified that the father has not requested or sought access to his child in Nova Scotia since March of 2008. She further advised that shortly after she relocated, she drove their child back to New Brunswick to have an access week with the father and since that time there has been not attempt to have contact with the child.

[55] I agree with the New Brunswick Court that mobility and access is not an issue in this proceeding. I have no evidence to consider any Undue Hardship Application.

Conclusion

[56] The burden of proof is on the applicant in this proceeding on the totality of the evidence on the balance of probabilities.

[57] There is no evidence to support a conclusion that this family must live in a remote part of New Brunswick in order to support a conclusion that the place of residence that he currently has is outside the control of the applicant.

[58] I have insufficient evidence to support any conclusion that diligent efforts have been made to find employment between 2007 and the date the father started his course on February 7, 2011. Again, this appears to be a matter of choice.

[59] In this circumstance, however, it is a choice that may provide the father with more options. The respondent is indeed hopeful that this course will put the father back in an employment situation similar to what she has discovered he earned in 2007.

[60] I have no medical information to support the applicant is unable by reason of disability or illness to find suitable employment.

[61] I have no information from him regarding past and current cash jobs as suggested by the respondent.

[62] I have no information about household income.

[63] I have information to conclude that the applicant has voluntarily left the CIBC and at least three jobs in 2010.

[64] I have information that he subsequently, voluntarily, put himself in a situation where he became, at least in part, a child care provider for his family taking him out of the workforce.

[65] I have further information to confirm that he enrolled in a course and, while it may indeed prove profitable, put him in a situation where he has insufficient income to support four children.

[66] Voluntarily removing yourself from a diligent work search and work environment is not an excuse for forgiveness of arrears and for reduction or termination of a party's obligation to pay child support to existing children.

[67] I have insufficient evidence to conclude that the applicant is diligently looking for work at least up to his commencement of his course in February of 2011.

[68] I conclude that between 2007 and 2011, the applicant has been underemployed, in part as a result of his own actions.

[69] In addition, the applicant did not pay in 2007, that which he would have been required to pay for child support, \$465.82, rather than the \$251.00.

[70] He advised he had no income when, in fact, he had severance pay.

[71] The respondent has decided not to pursue retroactive child support or disclosure from 2004 to 2007.

[72] The respondent is prepared to accept and is hopeful that this course will provide the applicant with greater options for employment, thereby increasing his ability to support the child they have together.

[73] She, therefore, has agreed to accept nominal child support between February, 2011, and the end of his course on November 18, 2011. That is a generous concession on the part of the respondent.

[74] However, she is not prepared to forgive the arrears. However, she is prepared to consent to a temporary moratorium on collection while the applicant is currently enrolled in and diligently pursuing this course.

[75] The history indicates that the father has not kept the mother updated on his increased ability to pay. I note that the New Brunswick Order did not contain any clause requesting or demanding the provision of ongoing disclosure. This does not

excuse the applicant from providing disclosure currently and prospectively and adjusting the child support in accordance with his changing income.

[76] In light of the mother's consents and based on the totality of the evidence, I make the following Confirmation Order:

- a) I refuse to confirm the New Brunswick Order dated April 13, 2010, terminating his obligation to pay child support and forgiving arrears;
- b) The arrears outstanding in accordance with the Statement of Income up to and including January 31, 2011, shall be fixed and set based on the 2004 Order and a moratorium placed on the collection of those arrears;
- c) This moratorium shall be lifted on November 30, 2011;
- d) Commencing December 1, 2011, those arrears become enforceable by New Brunswick Family Support Orders Service;
- e) The applicant's current child support obligation shall be nominal for the months of February, 2011, up to and including November, 2011. Thereafter, commencing December 1, 2011, the Order of January 26, 2004, will be reinstated for a payment of \$251.00 per month child support, pending further disclosure from the applicant regarding his employment;
- f) **It is expected** that the applicant will be seeking out employment well before the end date of his course to ensure he is in a position to support this child;
- g) The onus will be on the applicant to bring the matter before the Court and provide disclosure regarding his efforts to find employment and with respect to his Income Financial Statement;
- h) The burden is on the applicant to put himself in a position to be employable in order to support the child before the Court;
- i) Immediately upon obtaining employment he shall **advise the respondent and Family Support Orders Services/ (FFOA)** of the full details of his employment so a recalculation can be made;
- j) On or before May 15th of each year, commencing immediately, the applicant shall provide to the respondent a **full and complete copy of his Income Tax Return** together with all income slips, income statements, schedules, etcetera;

- k) The applicant shall provide Notices of Assessment for each and every year when received forthwith and Notice of Re-assessment immediately upon receipt;
- l) Until employed, he shall provide monthly written statement confirming his efforts to obtain employment. This information shall be provided directly by mail to the respondent;
- m) He shall provide the respondent written proof, upon completion of his carpentry course in November, 2011, by way of a copy of his certificate or proof of completion;
- n) The child support shall be recalculated annually as permitted either by the local Maintenance Enforcement Program or Family Support Orders Service office or by application to a court of competent jurisdiction.

Legere Sers, J.