SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: DeWolfe v. McMillan, 2011 NSSC 301

Date: 20110721
Docket: 1201-061704
Registry: Halifax

Between:

Heather Marie DeWolfe

Applicant

v.

Alan Burgess McMillan

Respondent

Judge:	The Honourable Justice Deborah Gass
Written Submissions:	March 22, 2011, April 12, 2011 and April 26, 2011
Counsel:	Patrick L. Casey, for the Applicant Steven Zatzman, for the Respondent

By the Court:

[1] The sole issue to be decided in this matter is whether the severance pay received by the Respondent in 2009 should be included in his income for the purpose of determining child support for the subsequent year.

[2] The facts which are limited are not in dispute, and it was agreed that the matter would proceed by way of written submissions.

FACTS

[3] The parties were married May 27, 1995 and divorced July 15, 2009. They have one child, Emma Elizabeth McMillan, born May 29, 1996.

[4] They entered into an Agreement and Minutes of Settlement on April 28, 2009. This was incorporated into their Corollary Relief Judgment.

[5] The parties agreed to a division of the Respondent's severance pay in paragraph 41 of their agreement:

> SEVERANCE PAY
>
> 41. The parties acknowledge that any severance pay payable to the Husband upon the termination of his employment constitutes a matrimonial asset and shall be divided in proportion to the years of service. The Husband shall immediately upon receipt provide copies of all correspondence or documents pertaining to is severance pay entitlement through his former employment with the Department of National Defence, including but not limited to the generality of the foregoing, copies of any correspondence sent or received concerning the severance pay issue and copies of any "T" statements issued for tax purposes. If any portion of the Wife's entitlement to the Husband's severance pay can be rolled into an RRSP, then the necessary arrangements shall be put in place forthwith upon receipt of the funds by the Husband. The Husband shall promptly forward to the Wife all necessary documents in order to complete the RRSP rollover, and both parties will cooperate to ensure this occurs in a timely fashion. The Wife shall be entitled to 50% of the severance benefit that accrued to the Husband between May 27, 2995 and April 6, 2007.

[6] The parties also agreed that the mother would have primary care of the their daughter and the father would pay child support in the table amount according to his total income from the previous year.

[7] In 2009 he received the severance pay referred to in paragraph 41, in the amount of $49,723.00. It appeared on his tax returns at line 130 under “other income” and his line 150 income for that year was substantially increased accordingly and he was taxed on the full amount of $175,268.00.

[8] The parties divided this severance package and the Applicant received $11,255.00 which was rolled into an RRSP. The remainder ($38,468.00) was retained by the Respondent and also rolled into an RRSP.

[9] It is the Applicant’s position that the Respondent’s portion of the severance pay ought to be included as income for the purpose of determining his child support obligation. The amount is prima facie considered as the annual income for support purposes under s. 16 of the Guidelines.

[10] The Respondent argues that it should not be included as it was divided as a matrimonial asset.

[11] The Respondent describes this severance pay being received by the Respondent upon leaving his career with DND, as a contractual entitlement, in the nature of a public service award for long service. The Applicant contends that there is no evidence to support the Respondent’s characterization that this was not intended to be income replacement. This then becomes a fact in dispute, which requires the court to make a determination based on the limited evidence before it, as it is a key question to be answered.

[12] If it was income replacement as severance pay often is, it would presumably not have been contemplated with such specificity in para. 41 of their agreement. It was described as a “severance benefit” to be divided in proportion to the years of service during the parties’ cohabitation. It was not pay in lieu of notice, received post separation but a benefit accruing while the parties were together. It was clearly agreed to be an asset and not income.

[13] It is argued by the Respondent that once the parties agreed it was an asset it should not then be considered as income for child support purposes. It is suggested that this would constitute “double dipping”.

[14] In addition, the severance package constitutes non-recurring income and is addressed by the Child Support Guidelines as a factor to be considered in arriving at a fair and equitable determination of income for child support purposes.

[15] To summarize the parties’ positions, the argument against the severance pay being included as income for chid support purposes is:

1. It is an asset, not income.

2. It has already been divided and to consider it again as income would be double dipping.

3. It is a non-recurring amount.

[16] The argument for the severance pay being included as income for child support purposes is:

1. It is prima facie income as shown on the Respondent’s income tax return.

2. The “double dipping” prohibition generally applies to spousal support. Double dipping may be permitted for child support purposes.

3. It is in the best interests of children to benefit from any changes in the parents’ income and it is not unfair to include it.

[17] This severance benefit was divided between the parents as an asset in accordance with the accepted law of this province, but the result appears as income on the Respondent’s tax return.

[18] The Federal Child Support Guidelines defines income in s. 16 and 17:

> 16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in according with Schedule III.
>
> 17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[19] The funds received were not used as income. Their potential use as income has been deferred through investment in an RRSP. The Respondent's position is that it would not be fair to include the package as income even though it appears as such on his tax return.

CASE LAW:

[20] The principles of child support were reiterated by Jollimore, J. In *Stevenson v. Kuhn* 2010 Carswell NS 735 (N.S.S.C.):

> 68 . . .
>
> 1. child maintenance is the right of the child;
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> 2. the right to be maintained survives the breakdown of relationship between adults;
>
> 3. as much as possible, child maintenance should provide the child with the same standard of living the child experienced when the parents were together; and
>
> 4. child maintenance will vary, depending on the income of the paying parent.

[21] The Applicant relied on *Walsh v. Walsh* 2008 Carswell ONT 99 in urging the court to include severance payments as income. In my view the analysis in that situation pertains to severance that was paid to compensate for loss of income and

to alleviate the hardships incurred by loss of employment. Even in that case the court acknowledged that some costs incurred in the search for new employment which could include the expense of a possible move, might be excluded.

[22] It is suggested at para. 28 that s. 17 is relevant for predicting future income from past experience, where "unique and non-recurring events may well be disregarded ..." and not for setting support based on actual income.

[23] The Applicant thus argues that s. 17 is applied when trying to arrive at a fair determination of income for child support purposes where there may be fluctuating income and a non-recurring amount might artificially "skew" the income for setting the appropriate amount of child support on a prospective or retroactive basis and does not apply when looking at actual income for a given year.

[24] However the court in *Walsh* (supra) at para. 29 also clearly distinguishes its facts from those where RRSPs may have already been equalized between the parties.

> 29. Other factors may also weigh in the exercise of discretion under s. 17. For example, as indicated above, income may have increased to cover expenses consequent upon employment termination. Income may have increased upon the realization of assets, such as pentions, RRSP's, or stock options, that have already been equalized between the parties, and the court may be concerned about "double-dipping". None of these additional factors are present in the case at bar.

[25] The concept of "double dipping" was addressed in *Best v. Best*, 1999 CarswellOnt 1995:

> 119. Cases and commentators appear to be divided on the issue whether a pension, once equalized as property, can also be treated as income from which the pension-holding spouse may make support payments. Several authorities appear to be on the side of at least taking a pension's equalization into account when fixing the amount of support, if not excluding the equalized portion from consideration altogether. ... Other cases have expressed no concern with treating a pension as both property to be equalized and income from which to demand support. .

[26] This case recognized the problem, but it was in relation to spousal support only. It appears that this principle against double dipping does not extend to child support.

[27] It is acknowledged that pension income is considered for child support purposes, and that is as it should be. It is the actual income the individual receives on a recurring basis. When the Respondent cashes in his RRSP which may be incrementally or all at once, that is the time for the court to consider it as income for child support purposes. It is conceivable even then that it might be argued that if it was cashed in to purchase a major asset such has a vehicle or a house (an asset purchased from his share of an asset) that the court could exercise its discretion in excluding it from income for support purposes, but that is for another day. This possibility is supported by the decision in *Leet v. Beach* 2010 CarswellNS 757 wherein O'Neil, ACJ held that the purpose for which the non-recurring income was used was a relevant consideration in excluding the RRSP income.

[28] This is not to say that non-recurring income should never be included as income for child support. In *Desjardins v. Bart* 2006 CarswellOnt 5520 (Ont. C.A.), for example, non-recurring income from the sale of a business, was included as income. The income generated in those circumstances should be considered to be available to the benefit of the children. It is the payor's business asset that was sold; not a matrimonial asset that was already divided.

[29] The decision of the Alberta Court of Appeal in *Ewing v. Ewing* 2009 CarswellAlta 979 assists the court in the application of ss. 16 and 17 of the Guidelines:

> 33. Thus, the nature of the sale of a capital asset, or other extraordinary gain or fluctuation in income, should always be considered when determining fair income. Frequently the fairest method of income may be to exclude the gain. On the other hand, where a non-recurring gain is in the nature of an employment bonus, in the sense that it is truly income for work done, its inclusion in section 16 income may not make that method of calculation unfair. The sale of stock options as part of annual compensation may be such an example.
>
> 34. In addition to considering the nature of the non-recurring gain, or fluctuation of income, it is also important to consider the purpose of support orders when deciding whether a section 16 calculation of income is fair. Support orders are directed at ensuring that, to the extent possible, that children enjoy the same standard of living they would have experienced if the marriage had not broken down. Thus, when determining a fair and reasonable income, the day-to-day standard of living the family would have enjoyed, had it remained intact, is relevant. A court might want to consider whether a specific non-recurring gain

would have resulted in a change in lifestyle of a particular family, had it remained intact. For instance, if the family's standard of living is high to begin with, the unusual gain may not affect the family's standard of living at all but may simply be seen as a means of providing security for future years. Thus, notwithstanding a large gain, a section 16 calculation which includes the gain might not be the fairest method of calculation.

35. While the courts have the discretion to determine whether the section 16 income calculation is fair, having regard to non-recurring gains and patterns of income, the following, although not an exhaustive list, outlines some of the matters a court might consider:

> Is the non-recurring gain or fluctuation actually in the nature of a bonus or other incentive payment akin to income for work done for that year?
>
> Is the non-recurring gain a sale of assets that formed the basis of the payor's income?
>
> Will the capital generated from a sale provide a source of income for the future?
>
> Are the non-recurring gains received at an age when they constitute the payor's retirement fund, or partial retirement fund, such that it may not be fair to consider the whole amount, or any of it, as income for child support purposes?
>
> Is the payor in the business of buying and selling capital assets year after year such that those amounts, while the sale of capital, are in actuality more in the nature of income?
>
> Is inclusion of the amount necessary to provide proper child support in all the circumstances?
>
> Is the increase in income due to the sale of assets which have already been divided between the spouses, so that including them as income might be akin to redistributing what has already been shared?
>
> Did the non-recurring gain even generate cash, or was it merely the result of a restructuring of capital for tax or other legitimate business reasons?
>
> Does the inclusion of the amount result in wealth distribution as opposed to proper support for the children?

[30] In this instance the income is not a bonus, nor is it something that resulted in a change in lifestyle for the payor but rather it provides some security for the future when it may be taken to replace or supplement income.

[31] In applying these considerations and those articulated in *Ewing*, I cannot conclude that it would be fair to include his share of this asset as income for child support purposes, and therefore s. 17 applies. The severance benefit is excluded.

J.