SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Christmas v. McDonald, 2011 NSSC 480

Date: 20111222
Docket: 65457
Registry: Sydney

Between:

Michelle Christmas

Applicant

v.

Alexander Peter McDonald, Jr.

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	September 19 and December 19, 2011, in Sydney, Nova Scotia
Written Decision:	December 22, 2011
Counsel:	Alfred Dinaut, for the applicant Alexander Peter McDonald, Jr., not appearing

By the Court:

[1] **Introduction**

[2] Michelle Christmas seeks an order for custody, access, and child support involving her two year old son, Mikeda. The respondent, Alexander Peter McDonald, Jr. has not responded to the claim, although he is a possible father of Mikeda. The trial was held on September 19 and December 19, 2011. The decision was reserved.

[3] **Issues**

[4] The following issues will be determined in this decision:
(a) Should income be imputed to Mr. McDonald?
(b) Should a retroactive order for child support issue?
(c) What is the appropriate parenting order?

[5] **Analysis**

[6] **Should income be imputed to Mr. McDonald?**

[7] Mr. McDonald did not participate in the hearing and has not disclosed his financial information. Ms. Christmas, therefore, seeks to have income imputed to Mr. Christmas in the amount of $62,400 per annum, in the absence of disclosure, pursuant to s. 19(1)(f) of the *Provincial Child Support Guidelines*.

[8] This court reviewed the law respecting imputation of income in **MacDonald v. Pink** 2011 NSSC 421, at paras 24 to 26, which state as follows:

> 24 Section 19 of the *Guidelines* provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:
>
> > a. The discretionary authority found in sec. 19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic** 2005 NSSC 291.

> b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49.
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> c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivary v. Ross**, 2008 NSSC 339.
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> d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi** 2011 NSCA 65; **Van Gool v. Van Gool**, (1998), 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532 (S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.
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> e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: **Duffy v. Duffy**, supra; and **Marshall v. Marshall**, 2008 NSSC 11.

25 In **Smith v. Helppi** 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. in **Gould v. Julian** 2010 NSSC 123. Oland J.A. states as follows:

> 16 Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in Gould v. Julian, 2010 NSSC 123 (N.S.S.C.), where Justice Darryl W. Wilson stated:
>
> > Factors which should be considered when assessing a parent's capacity to earn an income were

succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in Hanson v. Hanson, [1999] B.C.J. No. 2532, as follows:

> 1. 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". ...
>
> 2. 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.
>
> 3. 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.
>
> 4. Persistence in unremunerative employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
>
> ...
>
> [33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.
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> 26 In **Gill v. Hurst** 2011 NSCA 100, Bryson J.A. affirmed the trial judge's decision, [2010] N.S.J. No. 645, to impute income where the father's attempt to justify his under-employment for health and educational reasons was rejected: paras. 30 and 31. In addition, Bryson J. held that the trial judge made no error by imputing the "modest sum" of $25,000 to the father.

[9] Ms. Christmas has proven, on a balance of probabilities, that income should be imputed to Mr. McDonald in the absence of financial disclosure. Mr. McDonald had ample time to provide income information to the court; he has elected not to disclose income information and not to participate in the proceedings. He does so at his peril. Based upon the evidence of Ms. Christmas, I find that Mr. McDonald has an income earning capacity of approximately $40,000 per annum. I make this finding based upon the following reasons:

(a) Ms. Christmas advises that Mr. McDonald has no health difficulties nor other impairments which impede his ability to work. I accept her evidence.

(b) Ms. Christmas states that Mr. McDonald has worked in the fishing industry as well as in the oil and gas industry for a number of years, with periods of unemployment. I am told that Mr. McDonald also obtained a diploma and certificate to work in these areas. I accept Ms. Christmas' evidence.

(c) Government of Canada figures confirm that fishing masters and officers in Cape Breton earn an average wage of $30 per hour. Government of Canada information also confirm that oil and gas well drilling workers and service operators earn an average wage of $27.50 in Cape Breton.

> Assuming that Mr. McDonald earns a wage of $27.50 at 35 hours per week @ 52 weeks of the year, his income equates to about $50,000. However, given Ms. Christmas' evidence concerning the collection of E.I. for a portion of the year, I reduce his annual income to $40,000.

[10] Mr. McDonald will pay Ms. Christmas monthly child support of $348 commencing December 15, 2011 and continuing on the 15th of every month thereafter.

[11] **Should a retroactive order for child support issue?**

[12] Ms. Christmas seeks a retroactive child support order for the past three years. I am not prepared to provide a retroactive order for a time period prior to Mikeda's birth. Mikeda was born in April 2009.

[13] The four factors that I must balance when determining the issue of retroactivity are set out in **S.(D.B.) v. G.(S.R.)**, 2006 SCC 37, by Bastarache J., as follows:

> (a) The reasonableness of the custodial parent's excuse for failing to make a timely application in the face of an insufficient payment for child support.
>
> (b) 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. Bastarache J. confirmed that the determination of blameworthy conduct is a subjective one based upon objective factors. The court should not encourage blameworthy behaviour. The court must also determine if the non-custodial parent contributed to the child in any way that satisfied his or her obligation, or a portion of the obligation.
>
> (c) The circumstances, past and present, of the child, and not of the parent. This includes an examination of the child's standard of living.
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> (d) 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] I make the following findings in relation to these factors:

> (a) Ms. Christmas made application for child support on July 17, 2009. Her son was born in April 2009. There was little delay between the birth of Mikeda and the application. The application was delayed because of difficulties encountered in serving Mr. McDonald. The first factor, therefore, weighs in favour of a retroactive order.
>
> (b) Mr. McDonald has conducted himself in a blameworthy fashion. He has not provided any support, nor disclosure of his income. Mr. McDonald has not contributed in any way to Mikeda. The second factor also weighs in favour of a retroactive award.
>
> (c) Mikeda is an infant. His standard of living is connected to the standard of living of his mother. His mother's circumstances are financially difficult and challenging. A retroactive award would improve Mikeda's standard of living at a time when he requires such assistance. The third factor also weighs in favour of a retroactive award.
>
> (d) I have no evidence respecting any potential hardship which may accrue to Mr. McDonald. This factor is, therefore, neutral in determining the appropriateness of a retroactive award.

[15] In the circumstances, I determine that a retroactive award to the date of Mikeda's birth is appropriate. Mr. McDonald is required to pay a retroactive order based upon $348 a month for a period of 31 months, which equates to a payment of $10,788. The retroactive support will be payable at a rate of $200 per month until the award is paid in full.

[16] **What is the appropriate parenting order?**

[17] I have determined that it is in the best interests of Mikeda to be placed in the sole custody of Ms. Christmas. There is no communication between Ms. Christmas and Mr. McDonald, nor has Mr. McDonald ever exercised access. Access will be at the discretion of Ms. Christmas or until otherwise ordered by a court of competent jurisdiction upon an application to vary.

[18] **Conclusion**

[19] Ms. Christmas is granted sole custody of Mikeda. Access is at the discretion of Ms. Christmas. Monthly child support in the amount of $348 is ordered commencing December 15, 2011 and continuing on the 15th of every month thereafter.

[20] Further, Mr. McDonald will pay Ms. Christmas a retroactive award in the amount of $10,788 at a rate of $200 per month until the award is paid in full. The standard reporting and payment clauses are to be included in the order to be drafted by Mr. Dinaut, solicitor for Ms. Christmas.

DATED at Sydney, Nova Scotia, on December 2011.

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Forgeron, J.