SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Léveillé v. Léveillé, 2012 NSSC 422

Date: 20121206
Docket: 1201-064896
(SFHD072558)
Registry: Halifax

Between:

Joseph Gerald Steve Léveillé

Petitioner

v.

Elizabeth Ellen Cross Léveillé

Respondent

Judge: The Honourable Justice Moira C. Legere Sers

Heard: October 29, 2012 in Halifax, Nova Scotia

Counsel: Shawna Y. Hoyte counsel for the petitioner
Paula Condran for the respondent

By the Court:

[1] This is an application brought by Joseph Gerald Steve Léveillé pursuant to Sections 15.1(2) and 16(2) of the *Divorce Act,* R.S.C., 1985, c. 3 (2nd Supp.), (more properly pursuant to Section 17(1) as a variation application).

[2] Mr. Léveillé seeks an order reducing child support retroactively starting December 1, 2009.

[3] The parties were married on September 25, 2004. There are two children ages seven and four. The parties separated on July 13, 2009.

[4] An order dated December 21, 2009 granted the parties joint custody of their children with primary care and control resting with the respondent mother, Elizabeth Ellen Cross Léveillé. The order was issued December 23, 2009.

[5] This interim order used the figure of $32,000 per annum for Mr. Léveillé's income from employment based on anticipated income resulting from a potential job with the Department of National Defence ("DND") commencing January 5, 2010.

[6] Mr. Léveillé intended to relocate to Newfoundland shortly after the court appearance to begin his posting with DND.

[7] As a result of these expectations, the parties agreed that he would pay $468 per month commencing December 1, 2009 with the provision that he shall confirm his income forthwith upon receipt of the actual details.

[8] Mr. Léveillé did not actually assume this position. He testified that a condition precedent to his employment with DND was a requirement that he first settle his matrimonial and legal issues.

[9] Mr. Léveillé believes that he has proceeded with due diligence to settle the legal proceedings in accordance with the directions given to him by DND before being deployed to Newfoundland.

[10] Mr. Léveillé believes that despite his best efforts, he has been unable to conclude the proceedings in a satisfactory manner for DND. Ms. Léveillé disagrees.

Facts Supporting this Argument

[11] On November 13, 2009, Mr. Léveillé received a written offer of employment from DND to work as a Naval Electronics Technician, Communications. This required him to relocate to St. John's, Newfoundland, on **November 23, 2009** for an administration briefing.

[12] At paragraph 3 of that letter, the Detachment Commander said as follows:

> Your suitability for selection enrolment in the Canadian Forces is based, in part, on several personal factors, such as current medical condition, financial situation, and legal commitments. If any of these factors have changed since your final interview with the military career counsellor you are obliged to inform us by telephone before your scheduled enrolment date.

[13] On that basis, Mr. Léveillé advises he entered into the consent order payable according to the Newfoundland Child Support Tables on an anticipated salary of $32,000.

[14] However, on December 4, 2009 Mr. Léveillé was advised by letter from the military career counsellor that while his application for enrolment was actively held, he was required to be in Newfoundland on January 8, 2010. He was advised as follows:

> In order for the Canadian Forces Recruiting Centre Halifax to complete your job offer and enrol you into the Canadian Forces, **you cannot have any outstanding legal obligations (ie separation documentation, child custody agreements, etc.). We require notarized documentation that your legal issues have been resolved prior to your enrolment.**
>
> We require the documentation **no later than Tuesday, January 5, 2010 or your job offer will be rescinded and your application for employment for the Canadian Forces will be closed.**

[15] Mr. Léveillé advises that despite his efforts between December 2009 through to June 2010 and despite several offers moving back and forth between his then current lawyer and then current lawyer for Ms. Léveillé, no conclusion was brought to the outstanding matrimonial issues between the parties.

[16] Attached to Mr. Léveillé's affidavit dated August 1, 2012 and marked as Exhibit "D" is a letter dated May 10, 2010 from the Canadian Forces Recruiting advising that his application for enrolment continued to be actively held.

[17] They advised Mr. Léveillé to contact the Canadian Forces Recruiting Centre.

[18] They advised him if they did not hear from him within 30 days "**we will assume you wish your application withdrawn and your file will be closed**."

[19] It is clear in the letters from DND that they do not want a potential employee to be distracted by legal proceedings in the course of their basic training and deployment.

[20] As of May 10, 2010, Mr. Léveillé was not in a position to comply with the requirement that all legal proceedings be concluded.

[21] **Ms. Léveillé advises** that the legal proceedings concerning their divorce and division of property were not completed because of Mr. Léveillé's own failure to provide documentation and full disclosure in order to address the outstanding matrimonial issues.

[22] The parties have not settled their division of property, in part due to the fact that full disclosure has not been completed and neither party has pursued the divorce in a fashion which would result in a settlement nor court hearing.

[23] Whether it is the fault of the petitioner or respondent is not clear to me. What is clear is that no agreement was reached on all remaining issues.

[24] I cannot conclude without more evidence whether the petitioner or the respondent have done everything they need to do to finalize the divorce and division of property.

[25] I also could not conclude whether the petitioner is still interested in pursuing a position with DND or whether that position is still available.

[26] However, subsequent to the order, Mr. Léveillé did not make the salary contemplated when the order was first taken out.

Income History - 2009

[27] Mr. Léveillé's 2009 UFile declared income of $11,977.

[28] However, his Notice of Assessment includes employment earnings of $34,980; RRSP income of $7,987 and other income of $3,582. His total income from all sources for 2009 was **$47,207.** The RRSP income is in contention in the division of property.

Income History - 2010

[29] Mr. Léveillé's 2010 income is $14,997.26 of which $6,015 came from employment insurance benefits and $8,982.26 from social assistance, together with a lump sum payment of $3,582.63.

[30] His Notice of Reassessment finds income of $18,879.

Income History - 2011

[31] Mr. Léveillé shows income for 2011 of $2,070.84 with social assistance payments of $8,262.67, for a total income of $10,334. This is confirmed in his Notice of Assessment as $10,632.

[32] He was employed at the Université Sainte Anne from March 21, 2011 to March 31, 2012 as a second language instructor, a casual part-time employee. They paid him in the year 2012 $1,123.20.

[33] A letter from Convergys, dated November 21, 2011 confirmed they employed him from October 11, 2011 until November 3, 2011, holding an entry level position.

[34] Mr. Léveillé advises that he has done an extensive job search and currently has no income.

[35] Mr. Léveillé received social assistance from January 2010 to June 2012.

[36] The letter from Community Services indicates that he was, as of February 3, 2010, in receipt of income assistance but does not indicate anything further.

[37] Mr. Léveillé has identified his job searches in his Affidavit of August 1, 2012, at Exhibit "J".

Medical Issues

[38] In addition to his argument that the legal proceedings interfered with this ability to present himself to work for DND, Mr. Léveillé cites his medical condition as a reason for failure to be gainfully employed.

[39] In addressing the factors cited in **D.B.S. v. S.R.G.**; **L.J.W. v. T.A.R.**; **Henry v. Henry**; **Hiemstra v. Hiemstra**, [2006] 2 S.C.R. 231, 2006 SCC 37, Mr. Léveillé advises that he has not engaged in any blameworthy conduct as his health has prevented him from finding and keeping a job.

[40] From the end of 2009 until mid-2010 he suffered clinical depression and was under the care first of Dr. John Curtis and his family doctor.

[41] Mr. Léveillé tendered a doctor's note. This note states that in 2010 the petitioner was unable to work for the full year due to a clinical depression, situational anxiety, and adjustment reaction disorder.

[42] As of April 16, 2010, Dr. Ashton's note indicates it was impossible to predict when he would be able to work.

Retroactive Adjustment

[43] At this hearing, Mr. Léveillé requested a retroactive assessment at $110 per month using an average income. Due to the fact that he had found employment with Amplify Media, he promised to pay $296.68 per month on a go-forward basis.

[44] However, he lost that job and is currently unemployed.

[45] His calculations for retroactive adjustment are as follows:

Time Frame	Monthly Amount	Annual Total
December 1, 2009 to December 31, 2010	$280.00	$3,640
January 1, 2011 to December 31, 2011	$87.00	$1,044
January 1, 2012 to May 31, 2012	$0.00	$0.00
June 1, 2012 to Present	$296.68	$11,086.72

[46] This results in arrears of $5,870.72 owing since December 1, 2009.

[47] Mr. Léveillé advises he made payments of $1,307.99 which would result in a balance of $4,562.73.

[48] In part, Mr. Léveillé's error in his calculations for the 2011 year is due to his use of the 2006 tables as opposed to the 2011 tables.

[49] The Maintenance Enforcement Program has calculated the arrears as of July 25, 2012 at **$13,200** based on the original consent order which identified an annual income for the purposes of child support at $32,000 and arrived at a monthly figure of $468.

Financial Hardship

[50] Mr. Léveillé advises that there is no evidence of financial hardship with respect to the children.

[51] Mr. Léveillé believes that an order requiring him to repay this money will be onerous given that he has suffered from health difficulties, been in receipt of social assistance for some of the months in the last couple of years and he is unable to find steady and quality work.

[52] Mr. Léveillé indicates he has no vehicle in which to travel.

Ms. Léveillé's Position

[53] The mother of the two children and primary caretaker does not agree with the retroactive evaluation.

[54] Further, she advises she believes that Mr. Léveillé has been consistently underemployed. She advises that he was underemployed in the years proceeding their separation (Affidavit dated October 22, 2012, paragraphs 6, 7 & 8).

[55] Ms. Léveillé argues that Mr. Léveillé is applying for jobs for which he is not qualified, in particular Vice President of Corporate Services, Marketing Specialist, Director of Marketing and Marketing Advisor.

[56] She argues there are other applications he has made including manager, ticket lottery, information communications technology resource coordinator, program administrative officer, marketing assistant, bilingual customer services, and ships crew for which he was or could have been qualified.

[57] The manager of the ticket lottery business strategy and analysis manager appeared to indicate in their letters that Mr. Léveillé was not qualified for the position that they were advertising.

[58] Mr. Léveillé was likewise advised that he did not match the requirements for the Resource Coordinator Position and the Director of Marketing.

[59] Mr. Léveillé advises that his educational background is in marketing, having graduated with an International Marketing Certificate from the University of Quebec in 2000. He has had 10 years of marketing and sales experience. He also has mortgages and loans management certification.

[60] He was offered conditional employment with TigerTel Communications on May 20, 2010 at an hourly rate of $11.60 for between 20 and 40 hours per week.

[61] A Statement of Income prepared on August 1, 2012 shows a monthly income of $1,795.58 for an annual income of $20,989. This job did not last.

Findings

[62] I am satisfied that there has been a change in circumstances since the making of the original order in accordance with section 17(4) of the *Divorce Act* and section 14(a) of the *Federal Child Support Guidelines*.

Calculations

[63] I have reviewed both parties' arguments as presented by counsel as to how to calculate Mr. Léveillé's income and whether to average that income over the last three years.

[64] His income each year has been based on unique circumstances that existed at the time.

[65] In December of **2009** when this order as entered into, Mr. Léveillé's actual income as reported was reassessed to include not only his employment income in the amount of $34,980, additional income of $308 as well as dividends of $140 and other income of $210. It also included RRSPs he had cashed in and received in the amount of $7,987 and additional income of $3,582. He was reassessed to reflect an annual income of **$47,207.**

[66] The RRSP will be dealt within the division of property. I decline, therefore, to include the RRSP income of $7,987 as part of his income for the purposes of calculating child support.

[67] This is a one-time income for Mr. Léveillé. If I use the RRSP income to calculate retroactive child support and it is later divided in the division of property proceeding, it would be double counted.

[68] For 2009 I accept as his income $39,220. That would yield a payment of $569. I acknowledge he paid in December 2009 the sum of $468 (based on a prospective income of $32,000 with DND).

[69] **In 2010**, his reassessed income by Revenue Canada is $18,879 including social assistance payments and $6,015 in EI.

[70] Mr. Léveillé was reassessed to reflect an income of **$18,879**. This is the income I will use for the purposes of child support.

[71] **In 2011** he received employment income of $2,070 as a result of income from Convergys, Université Sainte Anne, and Consumer Impact. He also received social assistance payments of $8,162.67 for a total of $10,333.51. His Notice of Assessment reflects an income of **$10,632.** This is the income that I will use for child support purposes.

[72] Mr. Léveillé received GST and qualified for the Nova Scotia Affordable Living Tax Credit on a quarterly basis.

[73] To re-evaluate in accordance with his actual income as of 2009, using an income of $39,220, Mr. Léveillé would be required to pay $569 per month commencing December 1, 2009.

[74] For the 2010 year using an income of $18,879, Mr. Léveillé would be required to pay $280 per month.

[75] For the 2011 year using the income of $10,632, he would **not be required** to pay child support.

[76] For the one month in 2009, twelve months in 2010 and no months in 2011, Mr. Léveillé would have been required to pay a total of $3,929.

[77] In the consent order of December 2009 there was no mention of child care expenses.

[78] The parties agree that $1,307.99 was garnished off his required payments, leaving **$2,621** owing based on the retroactive recalculation.

[79] In reviewing the file materials it appears that for the year 2012 Mr. Léveillé received income in 2012 from Telesales (Tiger Tel) in the total amount of $3,224.10 as of his last pay cheque on the July 19, 2012.

[80] He has also received income from Community Services $3,783.46, for a total amount of $4,760.92, currently under the table amount.

Is Mr. Léveillé underemployed?

[81] The final issue is whether Mr. Léveillé is underemployed and if so what income should be imputed. In addition, would payment of retroactive arrears if any be onerous.

> Ought he be forgiven the amount he ought to have paid if it was calculated in accordance with his actual income?
>
> Ought the Court to impute income?

[82] Ms. Léveillé testified that there was a history of sporadic employment prior to the separation. Mr. Léveillé was employed at a CIBC call centre and let go after two weeks.

[83] During her pregnancy while he was employed at Convergys in October of 2004, he sent an internal email to fellow employees mocking the company. He was fired the next day.

[84] Mr. Léveillé was at another sales call centre for one year.

[85] He was with a bank from 2005 to 2009. The respondent advises he was demoted and he lost this job shortly after separation.

[86] Clearly his employment history has deteriorated further. He requires social assistance to survive.

[87] Based on his own statement of his qualifications, it appears that Mr. Léveillé is applying for jobs for which he is not qualified. Thus, his efforts are meeting with rejection.

[88] Mr. Léveillé's certificate is not a report; it is simply a note on a prescription pad. It is insufficient to convince me that he cannot currently work and/or insufficient to convince me that is unable to work.

[89] However, Mr. Léveillé's demeanor in court was disturbing once he began to be cross examined. He was monosyllabic and tearful about his station in life. His

medical state of affairs appears to have arisen from the failed marriage, the failure to reach agreement and to adequately deal with the separation issues and finalize the divorce proceedings.

[90] I do not have enough evidence to confirm why this has happened.

[91] I acknowledge that there has been a significant downhill slide in Mr. Léveillé's ability to obtain employment, to sustain the employment and to recover from this separation sufficiently to reestablish himself economically.

[92] On top of this, his children now live in rural Nova Scotia, a considerable distance from him. He has lost touch with them.

[93] Initially the negotiations between the parties anticipated that significant, albeit block contact would occur between Mr. Léveillé and his children.

[94] Mr. Léveillé indicates he is unable now to see them due to the cost of transportation. He is requesting the court to require the mother to transport them to Halifax and to assist in the cost in order to allow him contact.

[95] While the matter of access is not before me, the lack of contact is clearly aggravating his current situation.

[96] In reviewing the authorities on retroactive child support, the court is required to consider certain factors.

[97] I have insufficient evidence to cause me to conclude that the conduct of Mr. Léveillé is sufficiently blameworthy that I should impose arrears based on an amount of income he never earned.

[98] It is clear that Mr. Léveillé's own response to the separation and divorce in part has contributed to this downward slide. To move me to label it as blameworthy without further evidence and in light of the medical history would be premature.

[99] Mr. Léveillé was able to be employed prior to the separation and earn an income of $39,200. The imposition of payment of arrears at a future date would

not be onerous on Mr. Léveillé given what he ought to be able to earn based on past earnings.

[100] Failure to require a reasonable contribution would be onerous on Ms. Léveillé who has the responsibility for the support of the children at this time.

[101] The issue of timeliness is not relevant here.

[102] I therefore set the arrears to the date of the hearing at $3,874 less what he has paid, fix them and place a moratorium on collection until further evidence can be called with respect to his ability to obtain employment.

[103] I am unwilling to forgive the arrears given the evidence I have heard as to the effect this has been financially on the mother in her attempt to bear the full financial burden with respect to raising the children and meet their day to day needs.

[104] Given the demeanor of Mr. Léveillé, his history in the last two years, the fact that he is in receipt of social assistance and the fact that he is unemployed, it would be counterproductive and unrealistic to impute income until further evidence is lead with respect to his medical condition.

[105] I reserve for Ms. Léveillé the right to retroactively assess for contribution to child care, placing the petitioner on notice that he is responsible to contribute to child care expenses.

[106] I reserve for Ms. Léveillé the right to request a retroactive analysis as to the petitioner’s ability to work in the 2012 year given that the only medical evidence before me suggests he is able to return to work.

[107] The divorce matter should be settled and disclosure take place so that a final settlement can occur with respect to division of property.

[108] I am unable make any conclusions as to whether this intervening period of time subsequent to the separation and prior to the divorce is simply an unfortunate blimp in Mr. Léveillé's employment history or whether it is a sample of what is to come.

[109] Mr. Léveillé is on notice that he is responsible to put himself in a position both medically and professionally to address his medical issues and to put himself in a position to be able to be employed in order to fulfill his responsibility to support his children in accordance with his ability.

[110] Within 48 hours of finding employment or income from any source, Mr. Léveillé shall provide full particulars of the source and amount of any income from employment or otherwise and he shall make immediate arrangements to pay child support in accordance with the *Child Support Guidelines*.

Child Care: Section 7 Expenses

[111] I understand no receipts were made for child care. There was no order requiring a contribution to child care; however, it is a legitimate expense and I reserve for Ms. Léveillé the right to request compensation depending on what funds are available from the division of property and what set off can be made to adjust for the fact that she has absorbed full responsibility for child care.

[112] Ms. Léveillé's income for the 2010 year when child care expenses are said to have been incurred was $16,429.94; Mr. Léveillé's income as reassessed was $18,879. The only receipt available is the January 10, 2011 receipt indicating child care expenses were incurred between September 2010 and November 2010 in the amount of **$405**.

[113] Mr. Léveillé shall be responsible for **half of that expense**, which shall be added to the arrears and be forwarded for future payment.

[114] Finally, Ms. Léveillé submits a statement of special extraordinary expenses for the year 2012 prepared in October 3, 2012 indicating expenses for child care of $4,860.

[115] I am unable to consider this given that I have insufficient evidence to weigh the actual costs per child and to determine whether that cost was necessary for the purposes of obtaining employment.

[116] I do not have sufficient information concerning the needs, means and circumstances of both parties to determine what if any division should take place with respect to that account.

[117] I reserve the right for Ms. Léveillé to further delineate that in future at a time when Mr. Léveillé is actually earning an income and able to contribute or at a point in time when the court determines that it is prepared to impute income to him.

[118] In the event Mr. Léveillé is relying on his medical condition to justify an inability to find and retain employment, he shall provide complete particulars of his disability including medical evidence significantly more compelling than a doctor's comments written on a prescription pad.

[119] A review of this decision may be initiated by Ms. Léveillé within three months of this decision date or may be dealt with together with the divorce petition.

[120] Counsel for Mr. Léveillé shall prepare the order.

Legere Sers, Moira C.