

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Power v. Power, 2013 NSSC 99

Date: 20130312

Docket: 1201-059120

Registry: Halifax

Between:

Joseph Patrick Power

Petitioner/Respondent

v.

Angela Rose Power

Respondent/Applicant

Judge:

The Honourable Justice Mona M. Lynch

Heard:

February 25, 2013 in Halifax, Nova Scotia

Counsel:

Kim A. Johnson, for the Petitioner/Respondent
Judith Schoen, for the Respondent/Applicant

By the Court:

Background:

[1] The parties were married in 1991 and divorced in 2005. The Corollary Relief Judgment set out the income of Mr. Power as \$51,600.00 and required him to pay child support of \$700.00 a month for the two children. Mr. Power was also ordered to provide a copy of his Income Tax Return and Notice of Assessment to Ms. Power by June 1st of each year.

[2] In 2010, Ms. Power filed an application to vary the child support. At that time Mr. Power filed financial information showing his annual income to be approximately \$40,000.00 per year and indicated to Ms. Power that he was going to seek to have child support lowered. Ms. Power did not proceed with her application to vary.

[3] In December 2011 Ms. Power applied again to vary the child support payable for the two children retroactive to 2006. On July 31, 2012, at the conference prior to the hearing of the application to vary, counsel for Ms. Power requested disclosure of documents from Mr. Power. The court directed counsel

for Ms. Power to provide a list of the documentation requested to counsel for Mr. Power within two weeks and for counsel for Mr. Power to respond within two weeks of receiving the request. Counsel were told that if there were any issues with disclosure, counsel should request a further conference. Filing directions were also given by the court. Upon learning that the filing deadlines had not been complied with, the court set the matter down for a further conference on November 27, 2012 and released the date for the hearing of the application to vary.

[4] On November 27, 2012 counsel for Ms. Power indicated that she was still seeking disclosure from Mr. Power in the form of bank accounts, information from Revenue Canada, corporate accounts and statements and financial information from Mr. Power's current spouse. The court directed disclosure of financial information from Mr. Power's spouse, including a sworn statement of financial information and bank account statements for the previous two years. Further filing deadlines were given and the matter was adjourned to February 2013 for the hearing on child support.

[5] A further telephone conference was held on February 21, 2013 after a review of the file showed that the disclosure ordered by the court from Mr. Power's spouse was not filed and there was not a sworn financial statement from Mr. Power. Counsel for Mr. Power informed the court that Mr. Power and his spouse had separated two days after the direction by the court requiring Mr. Power's spouse to provide financial disclosure.

[6] In the information that was filed with the court, Mr. Power admitted that he had been dishonest in the past about his income with Ms. Power, the court and Revenue Canada. Instead of the \$52,000.00 shown in his sworn financial information, Mr. Power admitted to net income of between \$40,916.00 in 2007 to \$162,530.00 in 2011.

Issues:

1. What is Mr. Power's income for child support for the period in question?
2. What is the amount of retroactive child support that Mr. Power owes to Ms. Power, if any?

Position of the parties:

[7] Ms. Power asks that I find Mr. Power is still not honest in the information that he has provided to the court and in his testimony before the court. She asks that I find Mr. Power's income to be between \$153,305.29 and \$410,393.71 for the period in question.

[8] Ms. Power's position is that Mr. Power did not provide all of his personal bank statements that were requested; he did not provide all of the invoices and information from the company and he did not provide the disclosure directed with regard to his spouse. Based on his lack of complete disclosure and honesty, Ms. Power asks me to impute income to Mr. Power over and above the income he has recently admitted to.

[9] Mr. Power asks that the court not impute as much income to him as Ms. Power requests; that the court not order retroactive income for as long a period as requested by Ms. Power; that the children will not benefit from an award of retroactive child support and that the court remember that he will have to pay penalties to Revenue Canada based on admitting to the additional income.

Mr. Power's Credibility:

[10] Mr. Power has admitted lying in the sworn documents he filed with the court. In April 2012, Mr. Power filed a sworn statement of income showing an income of \$52,000.00. Mr. Power now admits to earning \$162,530.00 in 2011. This amount is the amount paid to his company net of his expenses. He provided documentation indicating that as of August 2011 he was working exclusively as an employee. This was not true. He was receiving income from other sources and was not an employee. In November 2012, it was again asserted on behalf of Mr. Power that he is now only an employee.

[11] In 2010 when Mr. Power filed financial information he indicated that his company was no longer active. He did not disclose that he started a new company.

[12] Mr. Power did not provide the full disclosure requested by counsel for Ms. Power. Mr. Power was not truthful when he testified before the court on February 25, 2013. He was asked on cross-examination where his current spouse banked and he indicated that he did not know. Further questions revealed that his current spouse does not work outside the home and that he does transfer money into her

account to pay the household bills. He then admitted he did know where his current wife banked.

[13] When financial information was ordered to be provided by his current spouse the information provided to the court was that the couple did not have a joint account and that Mr. Power did not put any monies into his spouse's account, although all household bills were paid from that account. The bank account records of his current spouse were ordered to be disclosed. Mr. Power then indicated that he and his current spouse separated two days after that direction was given. During testimony at the hearing, Mr. Power indicated that they are separated but living under the same roof.

[14] During his testimony, Mr. Power contradicted himself on numerous occasions; he hesitated frequently and had to be directed to answer the questions asked.

[15] Mr. Power has been dishonest from the start of the proceeding and while he has admitted to some dishonesty, he is still not credible. The court finds that the documents filed by Mr. Power and his testimony are not credible.

Statutory Authority:

[16] This is an application to vary under section 17 of the **Divorce Act**, R.S., 1985, c. 3.

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses;

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Section 14 **Federal Child Support Guidelines** (SOR/97-175) provides that:

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

(a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof.

[17] I am satisfied that there has been a change in Mr. Power's income since the making of the original order that would result in a different child support order. I therefore find that there has been a change in circumstances since the making of the last order.

Analysis:

1. What is Mr. Power's income for child support for the period in question?

[18] Mr. Power has provided voluminous records from his company "Mousework". This material includes some invoices, bank account records, credit card statements, etc. These records go back to 2007.

[19] Mr. Power has not provided any documents prior to 2007 although Ms. Power's requested child support is retroactive to 2006.

[20] On cross-examination it was clear that the records Mr. Power provided for Mousework were not complete. Invoices were missing and some invoices were paid to Mr. Power directly to his personal account and not through the company. There were no records showing income for the first few months of 2007 although Mr. Power did earn income.

[21] There were no records showing income for the last few months of 2012 although Mr. Power did earn income of at least \$60,000.00. Mr. Power suggested that this \$60,000.00 may have gone directly to his current spouse.

[22] Mr. Power deducted expenses for items, such as clothing, that would not be deducted for child support purposes. Mr. Power claimed to have charged HST but many of the invoices presented to him on cross-examination clearly indicated that they were HST exempt. Mr. Power receives income in the form of dividends from Mousework.

[23] Section 19 of the **Federal Child Support Guidelines** (SOR/97-175) reads:

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from 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 or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

(2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

Section 19 allows the court to impute such amount of income to Mr. Power as it considers appropriate. There is evidence that income which has been diverted to Mr. Power's current spouse would affect the level of child support. There is an abundance of evidence that Mr. Power has failed to provide income information which was requested by counsel for Ms. Power, which was directed by the court and which was ordered to be provided in the Corollary Relief Judgment. There is evidence that the expenses that Mr. Power has deducted from his income are not all reasonable for child support purposes. There is evidence that Mr. Power derives a significant portion of his income from dividends.

[24] It is clear this is an appropriate case to impute income to Mr. Power.

Counsel for Ms. Power asks that I gross up Mr. Power's income by 40%. Counsel

for Mr. Power indicated this was too much but did not offer an alternative.

Pouring over the documents provided by Mr. Power provides little assistance as there are documents missing, inaccuracies in the documents and dishonesty in the documents. The court will accept the figures provided by counsel for Ms. Power and gross up Mr. Power's income by 40%. This amount is appropriate, not as a punishment or deterrent to Mr. Power but, based upon the lack of credible information that he provided.

[25] Counsel for Ms. Power also asks me to add in amounts that are not included in the documents that Mr. Power provided from Mousework such as missing amounts for 2007, amounts paid to him directly and amounts diverted to his present spouse. It is because of the missing amounts that came to light in cross-examination that I am convinced that the documents provided do not show Mr. Power's true income and I am grossing up his income by 40%. It would not be appropriate to both gross up his income and add in the amounts not included in the documents.

[26] Mr. Power's income is found to be: 2007 – \$153,305.29; 2008 – \$270,183.00; 2009 – \$153,213.08; 2010 – \$215,866.89; 2011– \$410,393.71 and 2012 – 263,753.15.

2. What is the amount of retroactive child support that Mr. Power owes to Ms. Power, if any?

[27] In **D.B.S. v. S.R.G.**, 2006 SCC 37, Bastarache J. reviews the principles of retroactive child support and child support generally:

- (a) Core principles animate the support obligations that parents have towards children. These include: child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent. (paragraph 38)
- (b) The obligation is not merely to provide the “necessities of life”. (paragraph 39)
- (c) When a payor parent does not increase the amount of support when income increases, it is the child who loses. (paragraph 45)
- (d) The **Divorce Act** in s. 26.1(2) provides that parents have a joint obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to that obligation. (paragraph 48)

- (e) Child support orders are not set in stone and even when an order does not provide for ongoing disclosure, parents must understand that the order is based on a snapshot in time. The certainty of a court order does not absolve parents of their responsibility to continually ensure that their children receive the appropriate amount of support. (paragraph 64)
- (f) A retroactive award does not impose an obligation on a payor parent that did not exist at the time because the payor always has the obligation to pay and the child always has the right to receive the amount of child support that is commensurate with the payor's income. Even if the payor is making payments consistent with an existing order he would not be fulfilling his obligation to his children if those payments did not increase when they should have. (paragraph 68)
- (g) Retroactive awards need not be seen as exceptional. A retroactive award can be avoided by appropriate action at the time the obligation to pay the increased amounts of support arose. (paragraph 97)

[28] In considering an award of retroactive child support **D.B.S.** requires the court to consider the following factors to determine whether retroactive child support should be ordered: (a) reasonable excuse for why support was not sought earlier; (b) conduct of the payor parent; (c) circumstances of the child and (d) hardship occasioned by a retroactive award.

(a) Reasonable excuse for why support was not sought earlier:

[29] Ms. Power cannot be blamed for any delay in bringing forward the application to vary child support. Mr. Power provided her with inaccurate information about his income. When Ms. Power brought an earlier application to vary, Mr. Power filed with the court and provided Ms. Power inaccurate information about his income and threatened to apply for a reduction in child support. When Ms. Power applied for the current variation in child support in late 2011, Mr. Power again filed inaccurate financial information and threatened her with an application to reduce child support and an application for costs.

(b) Conduct of the payor parent:

[30] Although Mr. Power has admitted blameworthy conduct, it is necessary to review some of his actions. He swore to knowingly inaccurate financial information which he filed with the court and provided to Ms. Power. He diverted income; he failed to disclose that he started a new company; he failed to provide disclosure ordered by the court; he gave false and misleading testimony in the court and he intimidated Ms. Power into withdrawing a prior application to vary.

[31] But by far the most blameworthy of his abundance of blameworthy conduct was that he watched while Ms. Power struggled to provide for the children and he did not increase the amount of child support payable although his income increased substantially. Even after he admitted to providing false financial information he tried to justify his actions by suggesting that Ms. Power would have used the child support inappropriately. Mr. Power's conduct goes beyond blameworthy.

(c) Circumstances of the children:

[32] The parties have been separated since 2002. The children are currently 18 and 12 years of age and were about 8 and 2 years of age when the parties separated. Ms. Power has no formal education. She supported the children by working in fast food restaurants, bowling alleys, selling baked goods and taking in students requiring that she and one of the children share a bedroom.

[33] Ms. Power purchased the children's clothing from used clothing stores. When Mr. Power purchased "good" clothing for the children for Christmas or

birthdays, he insisted that the clothing remain at his house. In his affidavit Mr. Power explains that keeping the clothing was necessary because the children needed appropriate clothing to wear to family outings, birthday parties, etc., and their mother did not send them for access with appropriate clothing.

[34] Despite the above, Mr. Power asserts that the children did not go without and that he did not want to give more money to Ms. Power as she would use it to go on vacation. I accept Ms. Power's evidence that she has taken one vacation since 1998.

[35] I accept the evidence of Ms. Power that Mr. Power did not contribute to school supplies when asked but indicated they were covered in the child support he paid. He did not contribute to the children's extracurricular activities such as sports and guitar lessons. He did not contribute to prescription medication.

[36] I accept that Ms. Power has gone into debt while struggling to support the children.

[37] At the time the increased child support should have been paid, Ms. Power and the children were struggling. Mr. Power thoughtlessly and callously watched although he had the obligation and the means to alleviate that struggle. His conduct was reprehensible.

[38] The children's hardship in the past can be compensated for through a retroactive award. As stated by Bastarache J. at paragraph 148 of **D.B.S.:**

148 On the issue of the children's circumstances, both children lived in conditions far below what they should have for substantial periods of time. The children implicated in this appeal deserve compensation for the unfulfilled obligation of their father, and I see no reason to conclude that they should not benefit from a retroactive award now.

Hardship occasioned by a retroactive award:

[39] A broad consideration of hardship must be looked at to determine whether a retroactive award is justified. Mr. Power points out his recent contribution to his oldest child's university expense and to the debt he owes Revenue Canada due to his inaccurate reporting of income.

[40] Bastarache J. at paragraph 116 of **D.B.S.** notes that it is not always possible to avoid hardship. He goes on to say that “hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct”. Here the hardship that Mr. Power will suffer is due to his own actions, deceit and dishonesty.

[41] A retroactive award is appropriate in this case.

[42] In the submissions before the court, Ms. Power asks that the court award retroactive child support from 2007. She provided notice to Mr. Power that she was seeking retroactive child support in 2010 and again in 2011. **D.B.S.** provides for a rough guideline of three years.

[43] However **D.B.S.**, at paragraph 124, provides for a longer period than three years where the payor parent engages in blameworthy conduct:

Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child’s support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances — including an increase in income that one would expect to alter the amount of child support payable — is itself blameworthy conduct.

The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

And in paragraph 125:

However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

[44] I will make the order retroactive to 2007.

[45] In deciding the quantum of the retroactive award, I must consider the **Divorce Act**. There is not much discretion for the court in the **Divorce Act**. In **D.B.S.**, at paragraphs 129 and 130, Bastarache J. notes that undue hardship can affect the quantum. The second way to affect quantum under the **Divorce Act** is by altering the time period that the retroactive award captures. He cautions courts not to order a retroactive award in an amount that the court considers unfair, having regard to all of the circumstances of the case. (Paragraph 130)

[46] In the present case I find that it is not unfair to award the proper amount of child support from 2007 forward. Anything other than the full award of child

support from 2007 forward would be grossly unfair considering the actions and conduct of Mr. Power.

Calculation of Retroactive Award:

[47] For all of the years under consideration Mr. Power's income has been over \$150,000.00 a year. Therefore, I must consider s. 3(4) of the **Child Support**

Guidelines:

4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

(a) the amount determined under section 3; or

(b) if the court considers that amount to be inappropriate,

(i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

[48] Sections 3(4)(a) and (b) direct that I award child support in the amount of the applicable table unless I find that amount to be inappropriate. In the present case, both children are under the age of majority. The oldest child is in her first year of university and is not living with the mother. The mother has not made a claim for contribution to section 7 expenses for the oldest child's university expenses. The father made a voluntary contribution to the oldest child's university expenses. In the present case it is not inappropriate to award the table amount of support.

[49] Mr. Power's income is found to be: 2007 – \$153,305.29; 2008 – \$270,183.00; 2009 – \$153,213.08; 2010 – \$215,866.89; 2011– \$410,393.71; 2012 – 263,753.15. Mr. Power's income for 2013 has not yet been determined so Mr. Power will continue to pay based on his 2012 income.

Year	Mr. Power Should Have Paid	Mr. Power Actually Paid	Amounts Owed
2007	\$1950.00 per month	\$700.00 per month	$\$1950.00 - \$700.00 \times 12 = \$15,000.00$
2008	\$3259.00 per month	\$700.00 per month	$\$3259.00 - \$700.00 \times 12 = \$30,708.00$
2009	\$1949.00 per month	\$700.00 per month	$\$1949.00 - \$700.00 \times 12 = \$14,988.00$
2010	\$2651.00 per month	\$700.00 per month	$\$2651.00 - \$700.00 \times 12 = \$23,412.00$
2011	\$4829.00 per month	\$700.00 per month	$\$4829.00 - \$700.00 \times 12 = \$49,548.00$
2012	\$3242.00 per month	\$700.00 per month	$\$3242.00 - \$700.00 \times 12 = \$30,504.00$
2013	\$3242.00 per month	\$700.00 per month	$\$3242.00 - \$700.00 \times 3 = \$ 7626.00$
TOTAL			\$171,786.00

For the years 2007 - 2011 the 2006 Child Support Tables were used
For the years 2012 and 2013 the 2011 Child Support Tables were used.

Based on the calculations above, the amount owed by Mr. Power is \$171,786.00.

Mr. Power is to pay this amount in full within 90 days. The children have waited long enough for proper support from their father.

Conclusion:

[50] I am satisfied that Mr. Power has hidden assets, hidden sources of income and has deceived the court, Revenue Canada and Ms. Power for many years. I find that the documents filed with the court still do not reflect all of his income.

[51] This is an appropriate case for retroactive child support. There is a reasonable excuse for the delay in bringing the application. There is more than blameworthy conduct by Mr. Power. The children will benefit from an award of retroactive child support and any hardship to Mr. Power is more than outweighed by his blameworthy conduct. I will award the full amount of retroactive child support back to 2007 as requested by the applicant. Mr. Power is to pay Ms. Power the amount of \$171,786.00 within 90 days.

[52] If either party wants to be heard on costs, they are to contact the Scheduling Office to arrange for a one- hour hearing. The party seeking costs shall file their Brief on costs two weeks prior to the costs hearing and the other party shall file their Brief on costs one week prior to the costs hearing.

[53] Counsel for Ms. Power will prepare the order.