SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Newell v. Upshaw-Oickle, 2017 NSSC 226

Date: 20170818
Docket: FKMCA 019010
Registry: Halifax

Between:

Christopher Douglas Newell

Applicant

and

Melanie Dawn Upshaw-Oickle

Respondent

Judge:	Associate Chief Justice Lawrence I. O'Neil
Heard:	April 11, 26 and June 20, 2017 in Halifax, Nova Scotia
Written Decision:	August 18, 2017
Counsel:	Christopher Newell, Self-Represented Melanie Upshaw-Oickle, Self-Represented

By the Court:

Introduction

[1] The matter is before the Court pursuant to the provisions of the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 9 and the companion legislation in Ontario. Mr. Newell lives in Ontario. Ms. Upshaw-Oickle lives in Nova Scotia.

[2] On June 17, 2016 Mr. Newell filed an Application in Ontario to Vary his child support obligation for the parties' child, D.O.B. June 3, 1999. The child has always been in his mother's primary care. Mr. Newell has never been involved in the child's life.

[3] The order sought to be varied issued out of this Court on January 23, 2009 and was subsequently varied by the Superior Court of Justice, Family Court Branch sitting at Kingston, Ontario on March 29, 2012.

[4] The relevant clauses of the 2012 order are 1 – 4:

> 1. The Respondent, Christopher Douglas Newell shall pay support to the Applicant, Melanie Dawn Upshaw-Oickle for support of the child Kelvin Douglas Upshaw born June 3, 1999 in the amount of $613.00 per month commencing January 1, 2011 and payable on the 1st day of every month thereafter. Support is based in the imputed income in the amount of $67,000.00 annually.
>
> 2. Arrears under the old Court Order of Justice Elizabeth Jollimore issued out of the Supreme Court of Nova Scotia (Family Division) dated January 15, 2009 are fixed at $962.00 as of today. As of March 31, 2012, arrears under the new Court Order dated today are fixed at $765.00 for total arrears owing of $1,727.00.
>
> 3. For the purposes of s.7 expenses, I find that the Applicant's income is $30,000.00, the payor's share is 2/3. The child's soccer costs of $500.00/year (excluding tournaments) are reasonable and necessary. The Respondent' share shall be $25.00 per month. The Respondent shall pay a further $35.00 cost per month for the child's extended health benefits due to the fact that the Respondent has not maintained the child on his extended benefits.
>
> 4. The Respondent shall pay 100% of the child's dental costs should he not place the child on his dental plan available through his employment.

Background

[5] Mr. Newell's application is a 'paper' application filed in Ontario with the Family Responsibility Office on June 17, 2016. It was received by the Nova Scotia Reciprocity Office on September 8, 2016.

[6] The matter was referred to a Court conciliator in the fall of 2016, shortly after the file first reached Nova Scotia. Conciliation was unsuccessful. The matter was then referred to Court in March 2017. Ms. Upshaw-Oickle was given Notice to

Appear. Although not required by the 'ISO' legislation, Mr. Newell was given the opportunity to participate by telephone.

[7] Ms. Upshaw-Oickle appeared before the Court on three (3) occasions. Mr. Newell participated by telephone each time.

[8] A Conference Memorandum records the results of the April 11, 2017 appearance. On April 26, 2017 new filings from Mr. Newell resulted in the matter not being concluded and the parties returned on June 20, 2017.

Issues

[9] Mr. Newell's request to have child support paid directly to the child's maternal grandparents where the child is living was denied on April 11, 2017.

[10] Mr. Newell seeks to vary child support downward to $250.63 per month. Ms. Upshaw-Oickle opposes the change and asks the Court to impute income to Mr. Newell.

[11] Ms. Upshaw-Oickle says arrears of child support and related expenses were $7,030.52 as of April 10, 2017; $6,000 or so of that having accrued since the 2012 order.

[12] Mr. Newell says his income was much less than the Court anticipated after 2014 and he asks that his child support obligation be recalculated to reflect that reality. Mr. Newell says as a result of the recalculation, he will have overpaid child support in the amount of $5,148.12. He asks that this amount be applied to the subject child's post-secondary education costs, should they arise. If they do not arise, he does not seek a return of these funds from Ms. Upshaw-Oickle.

[13] Initially, Mr. Newell said his ongoing child support obligation should end August 1, 2017 if the parties' son does not continue in school in the fall. As stated, the child will be 18 years of age on June 3, 2017. On June 20, 2017 Mr. Newell confirmed he now accepts his obligation to pay child support will presumptively continue until the child reaches nineteen (19) years of age.

Evidence

[14] Mr. Newell's filings and his oral submissions are to the effect that he left the military for medical reasons and is now self-employed as a satellite installation technician working principally for Bell in the region near Kingston, Ontario. His tax filings for recent years show gross business income of $54,625 for 2015 and $47,213.42 for 2016. His line 150 income for these years was $30,477 and $23,241.12 respectively.

[15] Mr. Newell wants his child support and special expense obligation to be adjusted effective January 1, 2015 based on his 2015 line 150 income of $30,477.

[16] Ms. Upshaw-Oickle argues his gross business income should be used for the purpose of determining Mr. Newell's child support obligation. She does not offer any evidence in support of that argument. Mr. Newell responds that he is struggling financially, has responsibility for two other children living with his former wife and he is a step father to two more children of his current partner.

[17] Ms. Upshaw-Oickle says Mr. Newell's income should be higher given his line 150 income in 2013 was $62,563 and in 2014 was $95,938. Mr. Newell explained, in response, that increased competition significantly reduced his cash flow in 2015 and 2016. He says he did not have the same demand for his services in 2015 and 2016 as he did in 2013 and 2014.

[18] Finally, Mr. Newell is awaiting a decision on whether he is eligible for a 'medical' pension because of 'PTSD' flowing from his service in the Canadian military. He is also hopeful that he will be hired as a civilian employee by the Department of National Defence. He is on a priority list to be hired.

Conclusion

[19] I am satisfied the 2012 support order should be varied to reflect Mr. Newell's reduction in income and therefore, the quantum of his ongoing child support obligation, including his obligation to contribute to the special expenses of the subject child.

[20] I am further satisfied that the recalculation should be effective as of January 1, 2015. His 2015 line 150 income ($30,477) will be used to determine his obligation for 2016 as well. Mr. Newell does not ask that his 2016 line 150 income (which is less) i.e. $23,241.22 be used to determine his obligation for 2017. He is agreeable to using his 2015 line 150 income.

[21] I am satisfied the effect of this recalculation is that Mr. Newell has exceeded his child support obligation for 2015 and 2016. Payments made by Mr. Newell to the Ontario Family Relations Office and related to the subject child for the period January 1, 2015 to January 1, 2017 total $12,496.45.

[22] The obligation based on a retroactive recalculation using Mr. Newell's line 150 income results in an overpayment by him in the amount of $6,402.48 to December 31, 2016:

Retroactive Recalculation of Table Amount of Child Maintenance (using Ontario Tables)

	Christopher Newell's Annual Income	Monthly table amount of child maintenance for 1 child based on line 150 Income	Monthly table amount payable pursuant to Order dated April 2, 2012 (income imputed at $67,000 & MEP reference point)	Monthly Difference	Annual Difference
2013	Based on 2013 line 150 $62,563	$570.07	$613.00	-$42.93	-$515.16
2014	Based on 2014 line 150 $95,938	$847.13	$613.00	$234.13	$2,809.56
2015	Based on 2015 line 150 income of $30,477.	$250.63	$613.00	-$362.37	-$4,348.44
2016	Also based on 2015 line 150 income (as explained in paragraph 20 supra)	$250.63	$613.00	-$362.37	-$4,348.44
TOTAL					**-$6,402.48**

[23] The court's disposition of applications for retroactive calculation of child support and the sharing of a child's special or extraordinary expenses is governed by a number of established principles. These were discussed by the Supreme Court in *D.B.S.*, 2006 SCC 37; by our Court of Appeal in *Smith v. Selig*, 2008 NSCA 54 and *Smith v. Helppi*, 2011 NSCA 65.

[24] Justice Oland for the Court in *Smith v. Helppi* at paragraph 20 - 21 stated:

> 20. I observe that there is a distinction between a retroactive award of child support and a retroactive reduction of child support. The former awards payments and thereby increases child support. See, for example, D.B.S v. S.R.G, 2006 SCC 37 (CanLII) which set out factors governing retroactive awards of child support. In contrast, a retroactive reduction of child support reduces support, whether it takes the form of forgiveness of arrears or a retroactive decrease in support payable and recalculation of arrears. See, for example, Brown v. Brown, 2010 NBCA 5 (CanLII) which distinguished D.B.S. on this basis, and Kuszelewski v. Michaud, 2009 NSCA 118 (CanLII). Other than Gould, the cases supplied by Mr. Smith to support his argument pertained to retroactive awards rather than retroactive reductions.
>
> 21. In Brown, Robertson J.A. writing for the New Brunswick Court of Appeal indicated that, in regard to the requisite material change of circumstances, an order to retroactively vary downwards could be based on many factors. He explained:
>
> > 19. There is no reason why the concept of "change in circumstances" cannot be viewed flexibly as it has in the past, thereby accommodating a host of factual developments justifying the issuance of retroactive orders that reflect a partial or full remission of support arrears. Certainly, estoppel and detrimental reliance based arguments that the support recipient led the payer to believe that the obligation to pay support would not be enforced would fall within the ambit of the change in circumstances test. Hence, for purposes of deciding this appeal, and for ease of analysis, I am going to consider the factual scenarios described in ss. 118(1)(b) and (c) of the Family Services Act as falling within the concept of "change of circumstances".
> >
> > 20. As a matter of fact, the two most common grounds for relief from the payment of arrears are the payer's reduced ability to pay and the payee's reduced need for support during the period of retroactivity. With respect to the payer's ability to pay, the majority of cases involve payers who experienced a decline in income (most often due to unemployment or illness) in the years during which the arrears were accumulating. Of course, a payer who wants to reduce support arrears because of an income decline must be prepared to make full and complete disclosure.

> 21. In summary, the jurisdiction to order a partial or full remission of support arrears is dependent on the answer to two discrete questions: Was there a material change in circumstances during the period of retroactivity and, having regard to all other relevant circumstances during this period, would the applicant have been granted a reduction in his or her support obligation but for his or her untimely application? As a general proposition, the court will be asking whether the change was significant and long lasting; whether it was real and not one of choice.

[25] I apply the reasoning of Justice Oland and conclude the child support obligation of Mr. Newell should be reduced to reflect his line 150 income as Mr. Newell requests. I therefore find he has overpaid.

[26] I accept Mr. Newell's evidence that his line 150 income fairly represents the income he has (after expenses) to support his standard of living. As a consequence, this is not a proper case for imputation of income. In coming to this conclusion I have considered the guidance of the court in *Smith v Helppi* wherein the court discussed the principles governing when imputation of income is appropriate.

[27] I am mindful of the medical and other personal struggles Mr. Newell has been facing since his discharge from the military. A decision to not recalculate his obligation would represent a hardship for Mr. Newell. A conclusion that an overpayment of child support should be a credit to be applied against his future obligations would represent a hardship for Ms. Dawn Upshaw-Oickle. For that reason, I decline to credit Mr. Newell with an overpayment.

[28] Effective January 1, 2015 Mr. Newell's child support obligation for one child, using his line 150 income, and applying the Ontario Child Support Tables was $250.63 per month for 2015; $250.63 per month for 2016 and $250.63 per month for 2017 to August 31, 2017. The recalculation office will recalculate the obligation effective September 1 of each year commencing September 1, 2017.

[29] Ms. Upshaw-Oickle has not perfected a claim for special expenses. Regardless, given Mr. Newell's financial responsibilities for other children and his modest income, this is not a case where special expenses for the subject child should be ordered.

[30] There is no requirement to contribute to special expenses for the child.

[31] Ms. Upshaw-Oickle is a person of modest means and has significant financial obligations flowing from her responsibility for her other three children in addition to those costs related to the parties' child.

[32] The analysis herein is complicated by the prospect of Mr. Newell being qualified to receive ongoing disability income and a sum that may be described as 'back time' to the date of his discharge from the military. In *Darlington v. Moore*, 2013 NSSC 103 I discussed whether one's disability income should be considered when one's child support obligation is being determined. For the reasons outlined therein, I ruled that it should. This issue has also been referenced in *Vaughan v. Vaughan* 44 R.F.L. (7th) 20 (N.B.C.A.) and *Rooker v. Rooker*, CarswellAlta. 410 (Alta. C.A.).

[33] The order flowing from this proceeding will therefore provide that the child support recalculation effective January 1, 2015 may be revisited if Mr. Newell receives disability income retroactive to January 1, 2015. The obligation will rest with Ms. Upshaw-Oickle to initiate a proceeding to accomplish that result.

[34] This she may do by asking the Court to review the subject recalculation. The matter shall be returned and reviewed by me for that purpose.

[35] Mr. Newell shall notify Ms. Upshaw-Oickle of any increase in his income; any approval of his application for disability benefits and the date from which benefits are payable and he shall also advise her of the amount any 'back time' related to this approval. Ms. Upshaw-Oickle must keep Mr. Newell informed of their son's status as a student; whether he is employed or becomes independent. Should Mr. Newell's business or personal income increase for any reason, he must notify Ms. Upshaw-Oickle within thirty days of that happening.

[36] Finally, on or before June 1 of each year and pertaining to the previous taxation year, each party shall provide to the other, a copy of their complete personal and business income tax return(s) and notice of assessment(s).

[37] An order will issue setting Mr. Newell's ongoing child support obligation as $250.63 per month payable by him on the last day of each month commencing July

2017. The order shall state that no arrears of child support are owed by Mr. Newell and no money is owed to Mr. Newell for a claimed over payment of child support paid to Ms. Upshaw-Oickle.

ACJ