

SUPREME COURT OF NOVA SCOTIA

Citation: *MacPherson v. MacPherson*, 2017 NSSC 321

Date: 2017-12-12

Docket: *Antigonish*, No. 1205-003087

Registry: Antigonish

Between:

Kenneth Vernon MacPherson

Applicant

v.

Deborah Ann MacPherson

Respondent

ORAL DECISION

Judge: The Honourable Justice N. M. (Nick) Scaravelli

Heard: November, 2016, in Antigonish, Nova Scotia

Decision Date: December 12th, 2017

Counsel: Kalysa Archibald for the Applicant/Petitioner

Deborah Ann MacPherson on her own behalf

Orally by the Court:

[1] This is an application by Mr. MacPherson to vary a corollary relief judgement issued November 16th, 2011.

[2] The corollary relief judgement was further varied on February 1st, 2016 and March 17th, 2017.

[3] Pursuant to the variation order of March 17th, 2017 the parties have joint custody of the child Tyler MacPherson with day to day care with the applicant, Mr. MacPherson. The parties have shared custody of the other child Emma MacPherson.

[4] Child support was calculated and ordered as a set off pursuant to sections 8 and 9 of the *Federal Child Support Guidelines* resulting in the applicant paying an off setting payment of \$373.85 per month based on incomes for the year 2015. The respondent's income was \$40,412 and the applicant's income for 2015 was set at \$114,327.

[5] The variation order confirmed the February 2016 variation in all other respects. That order contains a provision that child support be adjusted each year based on respective incomes.

[6] At the time of the March 2017 variation order it appears the parties' incomes for 2016 were not before the court.

[7] The respondent became self employed in the spring of 2016 starting a business of residential and commercial pressure washing and vehicle cleaning services. The respondent's 2016 reported income was \$21,580 dollars based upon her salary from previous employment plus EI benefits. The financial statement for the business showed gross sales for the year was \$11,634.14. The business had a net loss of \$7,817.25 after adjustments. The respondent's projected 2017 income based solely on the operation of her business will very likely not exceed her income for 2016 with net income from the business of approximately \$14,000 as of October 2017. This represents a significant decrease in her income from previous years. The applicant's line 150 income for 2016 was \$135,139.

[8] Based solely on the annual adjustment clause the applicant would be required to assume a more significant share of child support obligations.

[9] The applicant submits the respondent is voluntarily underemployed and requests the court impute income in the amount of \$40,000 in accordance with her earning capacity.

[10] The respondent Mrs. MacPherson has filed a notice of contest asserting her income has been materially reduced and that the set off amount payable by the applicant should be calculated based on her current reported income and not potential earnings.

[11] Although this is Mr. MacPherson's application to vary, in reality it is a claim by Mrs. MacPherson of a material change in circumstances warranting increased child support.

[12] The court notes that although the variation order requires child support to be adjusted annually based on respective incomes, this does not necessarily mean line 150 income where subsequent events relating to earning capacity and imputation of income are at issue.

Imputation of Income

[13] Imputation of income is dealt with under section 19 of the *Federal Guidelines*.

[14] As a general rule a parent cannot avoid child support obligations by a self-reduced reduction in income. The court considers the reasonableness of the underemployment and looks at earning capacity while considering all of the

circumstances including age, education, experience, skills, health, and availability of work.

[15] Imputation may result where a person chooses to remain in a low income earning situation where the person has a greater earning capacity.

[16] The person applying for imputation, has the burden of proving the person is intentionally under-employed. Once established, the respondent has burden of proving the under-employment is justified.

[17] The respondent is 49 years of age. She has a university degree in Business Administration. Prior to starting her own business she worked approximately 16 years in the Antigonish area performing office work including clerical, bookkeeping and accounting duties. She does not report any health issues. The Corollary Relief Judgement Order issued in 2011 was based on the respondent's income of \$37,000. Her 2013 income was \$39,131 with income of \$41,214 in 2014.

[18] In January 2016 the respondent registered a business name in contemplation of setting up a residential and commercial pressure washing business. It was her intention at the time to operate the business as a sideline while employed. After registering the business she began purchasing equipment.

[19] The respondent stated in her affidavit filed with the court that she was laid off from her place of employment in April of 2016 and decided to operate her business as a full time source of employment. While laid off she qualified for aid under the Self-Employment Benefit Program which she began in June 2016. She operates her business out of her home which allows her to claim tax deductions for some household expenses as well as other business expenses. No documentation relating to these expenses was provided to the court. The respondent had an income tax refund of \$5,836.43 for the 2016 taxation year.

[20] Under cross-examination the respondent stated she sent out resumes in Antigonish following her lay-off and received no response. The respondent did not provide any supporting documentation in this regard. She has not sought out other employment since.

[21] I find the respondent is intentionally under-employed. In my view this is not a case where the respondent is specifically attempting to avoid child support obligations. The test to be applied in determining self-induced employment is reasonableness which does not require proof of a specific intention to avoid maintenance obligations.

[22] In light of her on going obligations to contribute to child support, I find it is unreasonable to continue her wish of obtaining income solely from her business venture. Her long term goal is to grow the business. However, it appears it could take a long period of time for that to happen in order to benefit the children, if at all.

[23] I find the respondent has the capacity to earn more income in her prior field of employment given her education and work experience, either full time or part time as originally intended should she continue to operate her business.

[24] In light of the evidence I find the respondent's earning capacity to be \$40,000 and I impute that amount for child support purposes, effective April 2017.

Scaravelli, J.