SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Suen v. Dunn*, 2018 NSSC 17

Date: 2018-01-31
Docket: *Halifax* No. 1201-51796
Registry: Halifax

Between:

Martin Lai Him Suen

Applicant/Petitioner

v.

Frances Ann Dunn

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	September 12, 2017, in Halifax, Nova Scotia
Written Release:	January 31, 2018
Counsel:	Richard Bureau for the Applicant/Petitioner Jennifer Schofield for the Respondent

By the Court:

[1] Martin Suen and Frances Dunn have one child, Anna. They divorced in 1998 when their daughter was three years of age. Anna is currently 22 years of age. This proceeding relates to requests of both parties to vary child support.

[2] The initial court order dealing with child support was the Corollary Relief Judgment dated September 17, 1998. There have been subsequent variations to the quantum of child support: a Consent Variation Order issued on August 5, 2003, a Provisional Order issued on March 17, 2005, and an Order of the Superior Court of Ontario which did not confirm the Provisional Order. The Order of the Superior Court of Justice was issued on January 24, 2006, and set child support at $605 per month.

CURRENT COURT APPLICATION

[3] Mr. Suen filed a Notice of Variation Application on July 20, 2015 and an Amended Notice of Variation Application filed October 23, 2015. Mr. Suen is seeking to terminate child support for Anna..

[4] Ms. Dunn filed a Response to the Variation Application on August 24, 2015, seeking to retroactively vary child support back to January 1, 2007. She then filed an Amended Variation Response on April 20, 2016, also seeking to claim section 7 expenses. She has since abandoned her claim for section 7 expenses. Prior to the hearing of this matter, Ms. Dunn's request for retroactive support was amended such that she claimed a retroactive adjustment from 2009 (not 2007) through to 2014.

BACKGROUND

[5] Anna was born March 26, 1995. Ms. Dunn had primary care of Anna throughout her childhood. During her first year of post-secondary studies, Anna remained living with Ms. Dunn. She excelled academically and played on the varsity volleyball team. Mid way through her second year, Anna moved into a rental property owned by Mr. Suen's company. Both parties acknowledge that Anna moved out of Ms. Dunn's residence and into the rental property of Mr. Suen's company in January 2015.

[6] For the period January 2015 until Anna's graduation in the spring of 2017, Mr. Suen testified that he furnished Anna's apartment and she lived in the apartment rent free. Mr. Suen also paid utilities on the unit including internet. He provided Anna with a credit card in addition to covering the expenses noted. The average amount charged to the credit card between January 2015 and June 2017 was $714 per month which was covered by Mr. Suen.

[7] Ms. Dunn testified that she provided financial support to Anna during this time as well. She has paid motor vehicle expenses and cell phone expenses. She also testified that she provided money to Anna from time to time.

[8] Anna received an athletics scholarship which covered her tuition and books during her undergraduate degree. She completed her undergraduate degree in May 2017. She moved to Toronto in the summer of 2017 and is training for beach volleyball with Team Canada. Mr. Suen continues to support Anna financially in excess of $1,000 per month. Ms. Dunn indicates that she pays Anna's cell phone bill, pays for her to fly to Nova Scotia to visit with her and continues to provide other monetary assistance.

[9] It is interesting to note that, despite challenging the termination of child support in court in August 2015, Ms. Dunn did not respond to a request for basic information from the Maintenance Enforcement Program. On September 29, 2015, the Maintenance Enforcement Program wrote to Ms. Dunn requesting she complete the Dependent Information form. Ms. Dunn did not send any information to confirm Anna's dependency and, as a result, the Maintenance Enforcement Program ceased enforcement of child support.

[10] At the court appearance on June 5, 2017, Ms. Dunn confirmed that child support for Anna should terminate as of January 2015. She is, however, seeking child support for the period 2012-2014. Ms. Dunn indicates that she did not seek financial disclosure from Mr. Suen during the period 2012 – 2014 because she was setting up her yoga business and she was busy as a result of Anna graduating high school and starting university. There was minimal detail in relation to the time required for her to deal with these issues. Ms. Dunn testified that she purchased her yoga business in 2012.

[11] In late 2014 counsel for Ms. Dunn requested financial disclosure from Mr. Suen including requests for information related to Mr. Suen's companies. Some

financial disclosure was provided to Ms. Dunn's counsel. Ms. Dunn did not make an application to vary upon receipt of the financial disclosure. Her variation application was not made until Mr. Suen applied to court to terminate child support. Ms. Dunn disputes the adequacy of the financial disclosure provided by Mr. Suen.

[12] In addition, Ms. Dunn is seeking to retroactively vary child support for the period 2009-2011. Evidence disclosed that Mr. Suen provided financial information to Ms. Dunn within days of her request in 2009 and 2010. Despite receipt of the disclosure, Ms. Dunn did not seek to vary child support during this period of time.

ISSUES

1) Has there been a material change in circumstances?

2) Was Anna a "child of the marriage" at the time Ms. Dunn filed her response application in August 2015?

3) Should there be a retroactive adjustment for child support for the period from January 1, 2009 to December 31, 2014?

LEGAL ANALYSIS

Change in Circumstances

[13] The first stage in an application to vary is to determine whether or not there is a material change in circumstance. Section 17 of the *Divorce Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, sets out the statutory framework for the consideration of any variation:

> "(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, 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."

[14] The Supreme Court of Canada has stated in the case of *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.) that a material change must be substantial, unforeseen and permanent. It cannot be trifling or time limited. Numerous cases since *Willick, supra*, have affirmed the considerations on a variation application.

[15] Both parties accept that there has been a change in circumstances sufficient to warrant a variation of the previous order:

1) Mr. Suen's position was that Anna had graduated with her undergraduate degree and was not attending post-secondary education. Mr. Suen's position that Anna's entitlement to ongoing child support should be terminated was not challenged by Ms. Dunn.

2) Ms. Dunn's position was that Mr. Suen's income had changed and as a result child support should be retroactively adjusted. Mr. Suen did not dispute the fact that his financial circumstances had changed since the granting of the last order.

WAS ANNA A "CHILD OF THE MARRIAGE" AT THE TIME OF THE APPLICATION?

[16] Subsection 2(1)(b) of the *Divorce Act*, *supra*, provides the statutory definition for "child of the marriage" where the child is over the age of majority:

> "2(1) child of the marriage" means a child of two spouses or former spouses who, at the material time…
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life."

[17] This is a fact specific exercise to be determined by the trial judge. In particular, the court was asked to determine whether Anna was a "child of the marriage" as of the date of Ms. Dunn's application in August, 2015. I have reviewed the evidence provided by the parties. Anna met the definition of a "child of the marriage" pursuant to the *Divorce Act, supra* throughout her undergraduate degree.

[18] At the time of Ms. Dunn's Response Application, Anna was in full time studies at Dalhousie pursuing her undergraduate degree. Although living in rental accommodations closer to her university, she was completely financially dependent on her parents. Without the financial contribution of both parents, Anna would not have been able to continue with her undergraduate studies and pursue her varsity athletics. There is a distinction to be drawn between the recognition that a parent is not entitled to continue to receive child support payments from the other parent versus a finding that a child meets the definition of "child of the marriage" as found in the *Divorce Act, supra*.

[19] Ms. Dunn appropriately recognized that she should no longer receive child support as of January 2015. Does her recognition that she not directly receive support for Anna negate the possibility that Anna still meets the definition of child of the marriage? The short answer is no.

[20] Ms. Dunn implicitly recognized that the financial contributions made directly by Mr. Suen to Anna's expenses mandated that Ms. Dunn not seek additional contribution from Mr. Suen. She did not seek further contribution from Mr. Suen after January 2015 but did seek a retroactive adjustment.

[21] Anna turned 19 years of age on March 26, 2014. The considerations related to the appropriate amount of support to be paid for children under the age of majority are to be differentiated from those appropriate to adult "children". Having reached the age of majority, the circumstances of adult "children" are often fluid with differing levels of independence. As a result, the Federal Child Support Guidelines recognize that these fluid circumstances should give rise to far more discretion in court applications. Parents will often make decisions (including financial decisions) based on those fluid circumstances.

[22] Section 3(2) of the *Federal Child Support Guidelines,* SOR/97-175 state:

> "Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other

> circumstances of the child and the financial ability of each spouse to contribute to the support of the child."

[23] Section 3(2)(b) gives the court broad discretion, if it finds the applicable table amount of support to be inappropriate. If that is the case, the court may consider the broader circumstances of the child and the parents in determining the appropriate quantum of support payable. In reaching my decision, I have taken into account the evidence of the parties and the circumstances of Anna.

[24] At the time of the hearing, both parties confirmed their understanding that the court's jurisdiction to order retroactive support is limited to instances when the child was entitled to support at the time the application was filed. In support of this position counsel referred to the following cases: *DBS v. SRG*, *LIW v. TAR*, *Henry v. Henry*, *Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraphs 86-90, and *Burns v. Barrett*, 2011 NSSC 9 at paragraph 7. This approach has been confirmed by our court on a number of occasions including the case of *Burns v. Barrett*, 2011 NSSC 9, *Poirier v. Poirier*, 2013 NSSC 314.

[25] Reference should also be made to the case of *Weseman v. Weseman*, 1999 CarswellBC 1347 (B.C. S.C.). Justice Martinson set out a four-step test to determine the approach pursuant to section 3(2) of the *Divorce Act*, *supra*. The test is set out at paragraph 6 of the decision:

> "Step One
>
> Decide whether the child is a "child of the marriage" as defined in the Divorce Act? If s/he is not, that ends the matter.
>
> Step Two
>
> Determine whether the approach of applying the Guidelines as if the child were under the age of majority ("the usual Guidelines approach") is challenged. If that approach is not challenged, determine the amount payable based on the usual Guidelines approach.

> Step Three
>
> If the usual Guidelines approach is challenged, decide whether the challenger has proven that the usual Guidelines approach is inappropriate. If not, the usual Guidelines amount applies.
>
> Step Four
>
> If the usual Guidelines approach is inappropriate, decide what amount is appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child?"

[26] The *Weseman* test has been widely cited and accepted as the appropriate approach to retroactive variation application. The line of authority emanating from *Weseman*, *supra*, appears to have been challenged in the recent case of *Colucci v. Colucci* 2017 ONCA 892 (Ont. C.A.). The Ontario Court of Appeal addressed the issue of jurisdiction in applications for retroactive variation when there are adult children. At paragraphs 28-30 of the decision the court held:

> [28] This brings me to the considerations of certainty, predictability and finality. I recognize that these are important values in the family law regime. The law should strive to be as certain and predictable as possible. The law should also discourage disturbing settled arrangements so that parties are encouraged to resolve their disputes and get on with their lives following family break-down, ideally without ever resorting to litigation for the sake of the children: see Louie v. Lastman (2001), 54 O.R. (3d) 286 at paras. 33-34 (S.C.), aff'd (2002), 61 O.R. (3d) 449 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 465.
>
> [29] But as I have already mentioned, the interests of fairness and the need to ensure that children get the support they deserve precludes a rigid approach that forbids changing support orders when there has been a change in circumstances. The very existence of s. 17(1) demonstrates that finality has its limits and that neither children nor parents can safely assume that support orders will never change. The interest of certainty and finality does not, in my view, justify erecting a rigid jurisdictional bar on variation applications simply because the children are no longer "children of the marriage".
>
> [30] For these reasons, I conclude that neither the language of s. 17(1) nor the principles of child support require us to deny a court jurisdiction to vary an existing child support order or well established written or oral argument after the children cease to be "children of the marriage".

[27] This would not appear consistent with the line of authority which stated that a retroactive variation application could only proceed if the child qualified as a "child of the marriage" at the time the application is made. I cite this case to highlight current case law in this area but my decision does not rest on this. I find that the court does retain jurisdiction to address the issue of Ms. Dunn's request for retroactive variation. The ruling from the Ontario Court of Appeal in *Colucci, supra*, appears to render the first stage of the *Weseman* test unnecessary.

CLAIM FOR RETROACTIVE RELIEF:

[28] I then turn to whether there should be a retroactive increase in the child support payable by Mr. Suen. The test for retroactive increase is set out in *D.B.S. v. S.R.G., supra*. The four factors to be examined by the court can be summarized as follows:

1) Is there a reasonable excuse for the payee parent's delay in making a timely application?

2) Is there blameworthy conduct on the part of the payor parent?

3) What are the circumstances, past and present of the child?

4) The hardship which may accrue to the payor parent.

[29] I do not accept that Ms. Dunn had a reasonable excuse to delay making her application to vary child support. I make this finding for the following reasons:

1) She states that she could not advance the variation application because she was setting up a yoga business. She is seeking a retroactive variation back to 2009. The business was purchased in 2012. This factor would not apply to the delay from 2009 to 2012. The application was not made until 2015- three years after she purchased the business. No particulars were provided by Ms. Dunn to substantiate what was required in setting up her business in 2012 or thereafter. There was no evidence provided to indicate whether this new business required 5 hours work per work or fifty plus hours. Absent any details, I do not find her new business to be a reasonable excuse for the delay.

2) Ms. Dunn also states that she was busy with Anna's high school graduation which took place in June 2013. Again, no details were provided to substantiate why this would delay the application until 2015. Many parents are faced with their child's high school graduation from high school in June each year. Absent evidence to indicate why this would result in a two year delay to her application to vary, this would not be an reasonable excuse.

3) Ms. Dunn also states that she was busy getting Anna ready for university in the fall of 2013. No further details were provided as to what was entailed in Anna commencing university. She remained living at home with Ms. Dunn that fall. Rather than attending high school classes, she attended post secondary courses but I have no details as to why Ms. Dunn's responsibilities would increase to the point that her delay in making an application is reasonable. In the absence of details, this excuse is not found to be reasonable in delaying the application.

[30] I then turn to the conduct of Mr. Suen to determine whether he engaged in blameworthy conduct. In 2009 and 2010 Mr. Suen provided financial information to Ms. Dunn when requested. He did not voluntarily provide financial disclosure thereafter and indicates that Ms. Dunn did not request it until late 2014. There is an obligation on Mr. Suen to disclose financial information in a timely fashion and the obligation is not reliant on requests by Ms. Dunn.

[31] The initial Corollary Relief Judgment contained certain provisions which do not appear to have been effected by subsequent variations. Paragraph 6 of the Corollary Relief Judgment contained a provision which required both Ms. Dunn and Mr. Suen to exchange income tax returns by May 15th of each year. There is no indication that Ms. Dunn provided her income tax returns to Mr. Suen at any point in time prior to these proceedings in 2015. Mr. Suen did not provide the requisite disclosure as required by the Corollary Relief Judgment

[32] The last order issued by the Superior Court of Justice in 2006 directed Mr. Suen to provide Ms. Dunn with his T-4 annually. There is no indication that Mr. Suen provided his T-4's for 2011 through to his disclosure provided in 2014. I do find that Mr. Suen did not provide appropriate and adequate financial disclosure for this period. I also note that Ms. Dunn did not provide her financial disclosure as required by the Corollary Relief Judgement.

[33] I find that the retroactive claim of Ms. Dunn relating to the period prior to 2012 is disallowed in its entirety. There is no reasonable explanation for the delay in making an application to vary. Should the retroactive claim of Ms. Dunn be allowed, it would be calculated on the period from 2012-2014. The retroactive claim for the period 2012-2014 (based on Mr. Suen's line 150) has been quantified by Ms. Dunn's counsel to be $9,379.20

[34] The third factor to be considered is the circumstances of the child. I have no information from Ms. Dunn to indicate that Anna's standard of living was compromised during the period 2009-2014. Evidence discloses that Anna resided with Ms. Dunn and her spouse. They were able to provide Anna with a vehicle, save monies through RESP's and provide her with additional financial support. I have no information related to any changes in Anna's standard of living.

[35] The evidence does disclose that Anna earned some money through part time employment. Her employment, however, did not impede her ability to pursue her athletic passion- volleyball. She was able to concentrate on her studies and her athletics to the extent that she was awarded a scholarship for all her hard work and dedication. Anna continues to benefit from her parents' financial contributions. She is able to pursue her desire to play volleyball with assistance from both Mr. Suen and Ms. Dunn. The ability of Anna to continue to participate at the highest level in volleyball is a factor to be considered by the court.

[36] The fourth factor to consider is the hardship which may be occasioned on Mr. Suen by a retroactive award. Mr. Suen advises that he is only able to provide the level of assistance to Anna based on the current financial circumstances. He testified that he contributes in excess of $1,000 per month to Anna's expenses. He has also indicated that he has increased her credit card limit from $1,000 to $2,000.

[37] Mr. Suen is self employed as a consultant in the oil industry. The volatility in that industry has meant that he has had period of unemployment. On cross examination, he indicated that there is a high risk that he may have no income for a period of time given the fluctuations in the oil industry.

[38] He incorporated a company, Neusource Holdings Inc. in 2009. He subsequently incorporated a numbered company. Neusource Holdings owns residential property and manages investments. The revenue of the numbered company is generated by Mr. Suen's consulting work. The two companies are

interrelated and monies are transferred between them. For example, monies were transferred from the numbered company to Neusource Holdings in order to finance the rental property purchased in the name of Neusource.

[39] Counsel for Ms. Dunn indicates that the entire pre-tax corporate revenue of the companies should be attributed to Mr. Suen. Pursuant to section 18(1) of the *Federal Child Support Guidelines*, I may attribute some or all of the pre-tax income of a corporation if I am satisfied that the payor's line 150 reported income "does not fairly reflect all the money available to the spouse for the payment of child support". I must therefore determine whether Mr. Suen has corporate monies available to him which should be included in income for the purpose of calculating support.

[40] I do not have sufficient evidence before me that would persuade me that I should include the pre-tax income of the corporations. I say this for the following reasons:

1) Mr. Suen testified to the volatility in the oil industry and that he may have significant periods of unemployment. As a result, I am unable to find it unreasonable that the corporate entity through which his consulting income flows (Neusource Holdings) would not establish some financial reserves to deal with this fluctuation.

2) The numbered company holds rental properties which have mortgages in addition to other loans. Mr. Suen testified to the fact that he needed to secure personal loans in order to purchase the rental property in which Anna resided for a period of time.

[41] I find that the line 150 income of Mr. Suen would be appropriate in the determination of the quantum of child support payable. The appropriate quantification of any retroactive claim is therefore $9,379.20. I decline, however, to order such a retroactive variation.

[42] I decline to order a variation on the totality of the evidence before me. There is little, if any justification in bringing forward the claim years later and only after there has been an application to terminate by Mr. Suen. Further, to simply look at the calculation of the amount which may have been paid up to 2014 ignores the magnitude of the financial support provided to Anna from 2015 to her graduation in 2017. Should a retroactive variation be considered, the total period for which Anna would be considered a "child of the marriage" should be subject to

scrutiny. It may well have been that Mr. Suen's financial support of Anna from 2015 to 2017 was far in excess of any legal obligation he would have.

[43] In the past, at present and for the foreseeable future Anna benefits from the significant financial contribution of Mr. Suen. A retroactive award would only impede his ability to continue to assist her financially. There is no indication that a retroactive award would be for the benefit of Anna in the circumstances. To the contrary, the evidence indicates that a retroactive award will have a detrimental effect on Anna.

[44] Ms. Dunn has also recognized Anna's ongoing financial dependence on the parties arising from her pursuit of volleyball. Her evidence indicates that she continues to assist Anna (along with Mr. Suen) in her athletic pursuits. If either of her parents are unable to continue to provide financially, Anna will suffer hardship. Anna is a young adult pursuing her dream of playing volleyball at the highest levels of competition. Impairing the ability of Mr. Suen to significantly contribute to Anna as he is doing currently would not appear to be in her best interests.

CONCLUSION

[45] In all the circumstances, I decline to make a retroactive award to Ms. Dunn. The relief sought by Mr. Suen in his application was agreed upon by Ms. Dunn. By consent, the effective date of termination of his obligation to pay ongoing child support directly to Ms. Dunn was January, 2015.

Chiasson, J.