IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Burke v. Burke 2005 NSSF 11

Date: 20050215
Docket: SFHD-10447 1201-55637
Registry: Halifax

Between:

Joanne Christine Burke

Applicant

v.

Wayne John Carl Burke

Respondent

Judge: The Honourable Justice Kevin Coady

Heard: December 13, 2004, in Halifax, Nova Scotia

Counsel: Joanne Burke, self-represented
Michelle Cleary for Wayne Burke

Coady, J.

[1] Joanne and Wayne Burke were married in 1987 and separated in 2000. There is one child of this marriage, Ryan, who is presently 17 years old. He resides with his mother. This couple signed a Separation Agreement on April 9, 2002. That Agreement was comprehensive and both parties had independent legal advise. Mr. Burke's income, at that time, was $48,216. and basic guideline support was set at $400. per month.

[2] The Burkes are now before the court for a divorce. There have been a number of changes in Mr. Burke's life since the signing of the Separation Agreement. He has a common-law spouse and they have an infant child. Also he has retired from the Canadian Armed Services after 22 years. His severance pay ended on December 31, 2004. Further, Mr. Burke and his present spouse have decided that Mr. Burke will be the stay-at-home parent providing childcare to their young child. Mr. Burke's present spouse earns $68,000. per annum which is substantially more than what Mr. Burke was earning in the forces.

[3] The parties consented to the dealing with the child support issue as part of their divorce proceeding. Ms. Burke had made an application in writing to increase child support. Mr. Burke has requested a reduction in support to reflect his retirement income of $18,967. This would represent a reduction from $400. per month to $150. per month. Ms. Burke opposes any reduction and in response requests that the court impute income at his pre-retirement income level.

[4] The issue in this Hearing evolved into the singular issue of whether the court should impute income to Mr. Burke sufficient to support a child support payment of $400. There is no dispute as to the fact Mr. Burke is retired, has another spouse and child, that he stays at home to care for that child and that his pension income is $18,966. per annum.

[5] I found that all jurisdictional requirements were met and I issued a Divorce Judgment on December 13, 2004. The parties agreed that the terms of the Separation Agreement will be incorporated into a Corollary Relief Judgment except for child support. Consequently this decision will resolve the only outstanding issue in the way of finalizing this divorce proceeding.

[6] Mr. Burke argues that he is not intentionally unemployed or underemployed. He feels that his decision to retire was reasonable, as was the decision to stay at home. He argues that child support be set at $150. per month effective January 1, 2005 when his severance ended.

[7] Ms. Burke argues that Mr. Burke's choices are unreasonable given his obligation to support Ryan. She points out that he is 42 years old and healthy and could have remained in the forces until Ryan is no longer a child of the marriage. In the alternative he should be expected to work in the civilian community. She argues that there are alternatives to Mr. Burke providing childcare for his young son. She observes that Mr. Burke's present standard of living exceeds hers and she put forth expenditures that support her position.

[8] Section 19(1)(a) of The Guidelines specifies the following:

> Imputing income
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> 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;

[9] Ms. Burke bases her argument on the words “required by the needs of ... any child under the age of majority”. Mr. Burke argues that if the genders were reversed, there would be no issue. In other words, if a court finds his decision to stay at home unreasonable and imputes income to him, such would amount to a double standard.

[10] In **MacDonald and Wilton, Child Support Guidelines Law and Practice** (Toronto, Carswell 2004) it is explained that in order to be found intentionally unemployed or underemployed, it is not necessary that there is a finding that the payor has the intention to evade responsibilities for child support. What is essential is that the payor establish, on the balance of probabilities, that a present employment decision is reasonable. If it is not reasonable, the court should impute income.

[11] In the Manitoba decision of **Donovan v. Donovan** (2000), 190 D.L.R. (4th) 696 (C.A.), Steel J.A. explained at paragraph 19:

> The question is what is reasonable in the circumstances:
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> In determining whether to impute income on the basis of intentional under-employment or unemployment, the court ought to have regard to what is reasonable under the circumstances. The age, education, experience, skills and health of the payor are factors to be considered in addition to such matters as the availability of work, the freedom to relocate and other obligations.

[12] Mr. Burke argues that to impute income to him in these circumstances would amount to a "double standard". In other words if a mother decided to stay at home to care for a young child, the court would not: (a) suggest she continue working; (b) suggest she work part-time; or (c) suggest she use daycare as an alternative. There are many situations where a mother decides to make a career change, or even leave her career, in order to meet family obligations, such as child care, or to maintain a cohesive family unit. Generally, courts appear more indulgent towards women who seek to minimize their first-family child support obligations because of second-family responsibilities then men who try to do the same.

[13] In **Omah-Maharajh v. Howard,** [1998] 7 W.W.R. 342(Q.B.) income was not imputed to the payor mother for the period when she took an extended parental

leave upon the birth of her new child. The court found that it was reasonable for the mother to take such a leave and refused to impute income.

[14] In **Dunn v. Madder**, [2002] N.B.J. No. 377 (Q.B.) the court decided not to impute income to a mother in a situation where she had retired from a well-paying job with the military when she was not able to obtain a transfer to the province where her new partner had been posted. The court felt that it was not appropriate to impute income in these circumstances because the mother's change of occupation was reasonable given her understandable desire to maintain her family unit in the same province.

[15] In **Demers v. Moar** (2004), 6 R.F.L. (6th) 240 (C.A.) the court refused to impute income to a mother who had made a decision to stay at home to care for her two young children, both from her new marriage. Bielby J. reasoned at paragraphs 17-20:

> The wording of s. 19(1)(a) of the Guidelines creates an exemption within which the mother falls. She has established that she is unemployed due to a decision to provide personal care to her two young children.

> The father argued that this alone does not show that care is "required by the needs of a child" absent evidence of special needs on the part of one of her children. That interpretation is not supported by the express wording of s. 19(1)(a). Had Parliament intended such a limited ambit to the exemption more precise wording would have been used.
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> No affidavit evidence is needed to prove the trite fact that children aged two and four months need constant care, and that they cannot be left alone while their parents pursue employment. Even if support for the suggestion of dependency for children of that age were required, it could be found in federal and provincial legislation which grants new parents periods of leave from employment, acknowledging the emotional and physical health needs of both mother and child during the periods surrounding childbirth.
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> Even in those cases where income-earning ability was imputed to the mothers of young children, the period of imputation did not commence until the expiry of their statutory or contractual maternity leave: see *Lachapelle v. Vezina* (2000), 11 R.F.L. (5th) 328 (Ont. S.C.J.), and *Zieglgansberger v. Venyige* (2003), 240 Sask. R. 109, 2003 SKQB 512 (Sask. Q.B.).

[16] I find that Mr. Burke's decision to retire from the military was a reasonable choice in the circumstances. While he is 42 years old, his retirement came after 22 years. His future with the military had limitations and it is not an unusual age for retirement from the military. I also conclude that his decision to stay at home to provide childcare is a reasonable one. I am satisfied that Mr. Burke's circumstances come within the exception "required by the needs of ... any child under the age of majority." Consequently income should not be imputed to Mr. Burke. I conclude that to find otherwise would amount to a "double standard".

[17] In light of these findings, I set Mr. Burke's income, for the purpose of the Child Support Guidelines, at $18,967. He shall pay basic child support for Ryan in the amount of $150. per month effective March 1, 2005.

[18] Ms. Burke has also requested a variation of the prior consent Order effective June 1, 2003, a period of 18 months. Justice Williams has already set arrears at $624. as of September, 2003, and therefore she is entitled to an adjustment for 15 months only. Mr. Burke declared his 2003 income to be $53,574. which would allow for a basic support Order of $444. monthly, a change of $44. per month. I, therefore, set arrears as of December 31, 2004 at $660. This is in addition to the $624. set by Justice Williams. Both of these amounts are payable forthwith.

J.