

Supreme Court of Nova Scotia (Family Division)

Citation: *Hillier v. Hayes*, 2020 NSSC 21

ENDORSEMENT

Donald Hillier v. Michelle Hayes

January 16, 2020

SFSNMCA 53191

- Donald Hillier, self represented
- Michelle Hayes, self represented

Decision:

Child support is terminated and arrears are forgiven.

Reasons:

1. The parties have one adult son, who lives with Ms. Hayes.
2. They signed a consent order issued August 15, 2011 which set out Mr. Hillier's monthly child support obligation of \$139.00 per month, effective January 1, 2011. It also calculated arrears owing to the end of 2010 in the amount of \$2,232.00.
3. In the order, Mr. Hillier's projected income for purposes of the Guidelines was calculated at \$18,705.00.
4. The order contains a clause requiring annual disclosure of Mr. Hillier's income tax return and notices of assessment.
5. Mr. Hillier applied to vary child support on March 1, 2019. An order suspending enforcement of arrears was issued on March 29, 2019 pending a hearing into the merits of his application.
6. Ms. Hayes disputes Mr. Hillier's request to forgive arrears.
7. I find there's been a change in circumstances in accordance with s.37 of the ***Parenting and Support Act*** [RSNS 1989, c 160]. Ms. Hayes concedes that their son was no longer a dependent child as of February, 2016. This constitutes a change sufficient to justify variation of the 2011 order.

8. When a hearing date was set, Mr. Hillier was directed to file a detailed affidavit, along with medical information to support his claim of disability. Ms. Hayes was given time to file a responding affidavit.
9. Mr. Hillier filed a note from his physician on October 16, 2019, but no affidavit. The note from the physician simply confirms his diagnosis of chronic liver disease, but it doesn't say that Mr. Hillier is incapable of working.
10. Ms. Hayes filed an affidavit detailing the reasons why the court should recalculate arrears and impute income.
11. In 2011 Mr. Hillier reported line 150 income of \$23,112.00 to Revenue Canada. He didn't file annual tax returns for six years after that. He filed his 2012 – 2018 returns all in 2018.
12. In 2018 a garnishee order was put in place by the Maintenance Enforcement Program (M.E.P.), through which \$3,750.65 was collected.
13. Mr. Hillier didn't disclose his annual income, tax returns, or notices of assessment to Ms. Hayes.
14. His tax returns show only income from provincial income assistance (I.A.) since 2012.
15. He didn't report his change in employment circumstances to Ms. Hayes or the Director of M.E.P., despite a clause in the order requiring him to do so.
16. Ms. Hayes notified M.E.P. that their son was no longer dependent after his 21st birthday, and as a result, M.E.P. stopped enforcing the order for child support after February, 2016.
17. She agrees that ongoing child support was properly terminated after February, 2016.
18. However, she says that Mr. Hillier should pay a retroactive adjustment (increase) for the years leading up to 2016.
19. She asks that income be imputed to Mr. Hayes in the annual amount of \$19,000.00. She bears the onus of proving that income should be imputed to Mr. Hillier.
20. Ms. Hayes relies on the M.E.P. records to calculate arrears owing to her for child support between 2011 and 2016 in the amount of \$7,099.35 (which appears to include the arrears set out in the 2011 order) plus retroactive adjustment for support payable in 2011.

21. A claim for retroactive child support or adjustment of arrears requires a **D.B.S.** analysis. This involves an assessment of the four factors laid out by the Supreme Court, which are (a) whether there's a reasonable excuse why support was not sought earlier; (b) the conduct of the payor parent; (c) the circumstances of the child; (d) the hardship associated by a retroactive award.
22. Ms. Hayes says that a **D.B.S.** analysis supports a retroactive adjustment and payment of arrears. She says that Mr. Hillier should have filed his variation earlier, and that the only reason he filed to vary in 2019 is because M.E.P. threatened to suspend his passport. She also stresses that he exhibited blameworthy conduct, and that their son could use the money.
23. Mr. Hillier offered no evidence to explain why he waited until 2019 to file his application to vary. However, it's fair to infer that his illness probably prevented him from doing so. It appears to have prevented him from filing tax returns as well, even though he was entitled to federal monies that were paid in 2018 when he filed, and which were captured by the M.E.P. garnishee.
24. Ms. Hayes did not advance a claim for a retroactive adjustment before 2019 because she didn't have Mr. Hillier's income information. However, she was aware of his obligation to provide disclosure, and she didn't apply to enforce that provision of the order. So there's delay on both sides.
25. Mr. Hillier acknowledges that he didn't file tax returns or provide income information to Ms. Hayes after 2011, despite the clear wording in the consent order. However, his illness may mitigate his blameworthiness.
26. Ms. Hillier asserts that their son could use the money, but she didn't advance evidence of his circumstances. All I know is that he still lives at home with her. I don't know if he has student loans, plans for his education, or other needs.
27. Mr. Hillier argues that if arrears aren't forgiven, he'll suffer hardship. He advanced no evidence to support this, other than his tax returns which show line 150 income of less than \$10,000.00 annually since 2012. It's fair to infer that a significant arrears payment will cause hardship to someone with such limited income.
28. The balance of these factors favours Mr. Hillier. I'm satisfied that child support was properly terminated after February, 2016. I'm further satisfied that any arrears accumulated between 2011 – 2016 should be forgiven. It is unusual to vary retroactively more than three years prior to the filing date, but the circumstances of this case justify it.

29. I have not included the arrears owing to the end of 2010 in my calculations above. That sum was agreed between the parties while Mr. Hillier was still employed. He made no payments on the arrears until 2018 when \$3,750.65 was collected under a garnishee order.
30. Given the forgiveness of arrears, this means that Mr. Hillier overpaid by \$1,518.65. However, he's prepared to pay \$660.00 to top-up his 2011 payments, leaving only \$858.65 owing to him. I direct that this overpayment be forgiven in lieu of interest on the unpaid 2010 arrears.
31. In the result, neither party will pay the other party any further monies. Child support is terminated and all arrears accumulated under the 2011 order are forgiven.

MacLeod-Archer, J.