SUPREME COURT OF NOVA SCOTIA
Citation: *Matheson v Ryan*, 2020 NSSC 247

Date: 2020-09-23
Docket: 1204-006384B
Registry: Kentville

Between:

Alisa Marie Ryan

Applicant

v.

Kevin Marcus Matheson

Respondent

Judge:	The Honourable Justice John A. Keith
Final Written Submissions:	March 19, 2020
Counsel:	Maggie Shackleton, for Alisa Ryan Don Urquhart, for Kevin Matheson

By the Court:

PROCEDURAL BACKGROUND

[1] On December 13, 2019, Kevin Matheson filed a Notice of Motion to vary the spousal support order of June 21, 2018. He proposed this motion be heard as part of Alisa Ryan's ongoing application to vary the parties' parenting arrangements and, more specifically, her proposed move with the children of the marriage to Cape Breton. Supporting his motion, Mr. Matheson filed the Affidavit of Kevin Marcus Matheson sworn December 6, 2019, and a brief.

[2] By consent, it was agreed that the issue of spousal support should be deferred until after a determination respecting Ms. Ryan's proposed move was made. The parties properly acknowledged that the move may affect their positions on both child support and spousal support.

[3] I rendered my oral decision dismissing Ms. Ryan's application to vary the parenting arrangements on January 23, 2020. At around that same time, I established a filing schedule, with a hearing scheduled for March 24, 2020 at 2:00 p.m.

[4] In the interim, COVID-19 erupted and spread infection across the globe. Legal proceedings in the Supreme Court of Nova Scotia moved to an essential services model. In this instance, the parties were only able to file unsworn affidavits and the March 24, 2020 hearing was adjourned.

[5] At the end of April and early May, both parties confirmed that they did not require either cross-examination or the opportunity to make oral submissions. They asked that the motion be determined entirely based on the materials previously filed but subject, of course, to the filing of properly sworn affidavits. Unfortunately, the pandemic delayed even that expedited process. Finally, on July 28, 2020, Court Administration requested the parties file properly sworn affidavits, in accordance with the Court's pandemic protocols.

THE ISSUE

[6] The issue in dispute is relatively narrow. Paragraph 5 of the Corollary Relief Order issued June 21, 2018 addresses spousal support. It states:

> Kevin Marcus Matheson shall pay Alisa Marie Matheson spousal support in the amount of $1,200.00 each month, payable at a rate of $600.00 on the 15th and $600.00 on the last day of each month commencing August 31, 2016 as per the conditions set out at paragraph 20 in the attached Separation Agreement dated July 25, 2016.

[7] Paragraphs 20 (iii) – (vi) of the attached Separation Agreement dated July 25, 2016 establish the mutually accepted circumstances under which spousal support shall either reduce or terminate altogether. They state:

> iii) Regardless of any change in circumstances, whether radical, catastrophic or unforeseen, spousal support shall terminate absolutely in July 2022, with the last payment of spousal support being July 30, 2022.
>
> iv) If Alisa's earned income, which does not include spousal support, is $25,000 or more in a taxation year, then spousal support shall decrease to $800 per month commencing in July of the following year.
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> v) If Alisa's earned income, which does not include spousal support, is $35,000 or more in a taxation year, then spousal support shall decrease to $600 per month commencing in July of the following year.
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> vi) If Alisa's earned income, which does not include spousal support, is $45,000 or more in a taxation year, then Kevin's obligation to pay spousal support shall cease absolutely in July of the following year.

[8] The focus of this proceeding is paragraph 20(iv). More specifically, Mr. Matheson argues that Ms. Ryan's "earned income" is now more than $25,000.00 and thus, pursuant to paragraph 20(iv), spousal support shall decrease from $1,200.00/month to $800.00/month. Ms. Ryan disagrees.

[9] The more precise issue is one of contractual interpretation: what is the meaning and scope of the term "earned income" under the Separation Agreement? Even more specifically, the questions become:

1. does the term "earned income" encompass all revenues (i.e. her gross income) earned by Ms. Ryan in her daycare business? Or does the term "earned income" allow for business deductions (i.e. her net income)? ; and

2. If "earned income" allows for business deductions, is Ms. Ryan's income more that $25,000.00 such that her entitlement to spousal support drops to $800.00/month?

BRIEF CONCLUSION

[10] For the reasons discussed below, I conclude that:

1. The term "earned income" includes legitimate deductions for business expenses claimed by Ms. Ryan in connection with her daycare business;

2. Ms. Ryan's earned income for 2018 remains less than $25,000.00; and

3. Based on the evidence before me, Ms. Ryan's entitlement to spousal support under the Separation Agreement continues at $1,200.00/month in accordance with the Corollary Relief Order and Separation Agreement.

THE EVIDENCE AND PARTIES SUBMISSIONS

[11] By affidavit sworn December 6, 2019, Ms. Ryan confirmed that she operated a day care business, that her gross income for 2018 was $26,248.00 and that she claimed expenses in the amount of $5,505.00 such that her net business income was $20,743.00. Based on that information, Mr. Matheson reduced his monthly payments to Ms. Ryan from $1,200.00/month to $800.00/month. When Ms. Ryan objected, Mr. Matheson responded "I have no control over what expenses she declares as business expenses, and as her 2018 tax return does not list any business expenses as deductions, I was not in a position to agree or disagree as to the legitimacy of said expenses being legitimate business expenses."

[12] Notably, Mr. Matheson's initial reaction was not whether the term "earned income" was to be interpreted as gross income or net income. Rather, he pointed to concerns around whether the business expenses being claimed by Ms. Ryan were legitimate; and his own inability to independently validate those expenses.

[13] That same argument was repeated in the legal submissions prepared by Mr. Matheson's legal counsel dated December 13, 2019. Mr. Urquhart wrote:

> We understand Ms. Ryan will argue that her "earned income" is still less than $25,000, so no reduction in spousal support is warranted. We have no details about what those expense deductions are, and so are not in a position to comment on the validity of any deductions from income Ms. Ryan has made.

[14] By unsworn affidavit sworn March 17, 2020 (sworn on July 30, 2020 and filed on July 31, 2020), Ms. Ryan confirmed her understanding that "earned income" meant net business income because all parties were aware that she operated an in-home day-care business with expenses. She further observed that the parties relied upon Mr. Matheson's net income when determining spousal support.

[15] In legal submissions dated March 17, 2020, Ms. Ryan's counsel (Ms. Shackleton) argued that:

1. The parties agreed that Ms. Ryan's income would be based on her net income as that figure more accurately reflected the amounts available to Ms. Ryan. Ms. Ryan attached a text to her legal counsel dated July 6, 2016 (a few weeks before the Separation Agreement was signed) in which she complained that Mr. Matheson was "not taking into consideration that he's comparing his Net income to my Gross income. I want to make sure that if we have to have those automatic decreases in support payments that it goes by my Net income and not my Gross income." Ms. Ryan further noted that any decrease in spousal support is permanent. She warned that, under the terms of the agreement, once spousal support is reduced, it would not increase in the future, even if her earned income actually dropped back below a contractual threshold;

2. In response to the argument that some of the expenses claimed by Ms. Ryan were simply operating costs associated with living in a home and would be incurred in any event (e.g. a portion of her utility bills), Ms. Ryan replied that the amounts claimed were legitimate and reasonable. Ms. Ryan's Affidavit also provides the following details regarding her business deductions:

    a) $2,283.92 - daycare food and supplies;

    b) $25.00 - daycare driveway snow plowing;

    c) $462.45 - cell phone used for contacting clients, manage Facebook and promote the business;

    d) $557.35 - percentage of heat pump purchase and percentage of a new daycare roof;

> e) $2,175.64 is the combined percentage of my "use of the house" daycare utility bills.

Ms. Shackleton concludes that "Even if we "add" the deduction of $2,175.64 (the combined percentage of her "use of the house" daycare utility bills) her "earned income" is still only $22,919.28".

[16] By way of rebuttal, Mr. Matheson filed an unsworn affidavit on March 19, 2019, which was sworn on August 10, 2020, and filed on August 11, 2020. He maintained that Ms. Ryan's counsel did not specifically distinguish between the terms "gross income", "earned income" and "net income" and, further, that "There was no mention of expenses or deductions during these negotiations." Mr. Matheson also repeated that he had no knowledge as to whether the deductions claimed for the daycare business were "accurate or a reasonable percentage to deduct from household expenses."

ANALYSIS

[17] This case does not involve a determination of entitlement or quantum or duration under the *Spousal Support Advisory Guidelines* (Professor Carol Rogerson and Professor Rollie Thompson, "Spousal Support Advisory Guidelines: The Revised User's Guide", Final Draft, February, 2016). The parties agree that Ms. Ryan is entitled to spousal support under the Separation Agreement. The parties have further agreed on quantum and duration; with quantum being determined by reference to Ms. Ryan's earned income in any given taxation year.

[18] As mentioned, this case turns on an issue of contractual interpretation. And the threshold question is whether the calculation of "earned income" as that term is used in the Separation Agreement excludes deductions for expenses reasonably incurred in the operation of Ms. Ryan's daycare business.

[19] In considering this question, the following basic principles of contractual interpretation bear emphasis:

1. The Court seeks to arrive at "an interpretation that reflects and promotes the intention of the parties at the time they entered into the contract" (*Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888);

2. It is trite law that the Court does not interpret contracts by selectively isolating (or "cherry picking") specific provisions without regard to

the contract as a whole. Rather, the Court strives towards an interpretation that considers the entire contract and fulfills the reasonable expectations of the parties *(Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53 ("*Creston"*));

3. The written words of a contract are given primacy; and an examination into the surrounding circumstances cannot overwhelm the words chosen by the parties to record their agreement. That said, the surrounding circumstances will inform what those words mean and deepen the Court's appreciation of the parties' underlying, objective intentions (*Creston*).

[20] In my view, the phrase "earned income" includes valid deductions for business expenses associated with Ms. Ryan's daycare business because:

1. Referring first to the actual wording of the Separation Agreement:

a) Paragraphs (e) and (f) of the initial "Background" section in the Separation Agreement refers to the parties' "gross annual income". This agreement expressly acknowledges that Ms. Ryan's "gross annual income" was approximately $10,000.00 as at the date of the agreement. That phrase ("gross annual income") obviously was intended to mean the parties' annual income before deductions. Notably, the phrase "gross annual income" is not repeated in paragraphs 20 (iv) – (vi) of the Separation Agreement. Instead, a new and different phrase appears in paragraphs 20 (iv) – (vi) to describe the threshold incomes which would determine Ms. Ryan's entitlement to spousal support. That new phrase was "earned income". The phrase "earned income" in paragraphs 20 (iv) – (vi) was clearly intended to mean something different from the phrase "gross annual income". Otherwise, the parties would have used the same, consistent language throughout;

b) In my view, the phrase "earned income" in paragraph 20 of the Separation Agreement includes legitimate deductions while the phrase "gross annual income" found earlier in the Separation Agreement clearly does not. My reasons include:

(i) As indicated, the ordinary and everyday meaning of "gross annual income" is total revenues earned, without

deductions. Thus, "earned income" must be less and, in my view, is distinguished from "gross annual income" by deducting legitimate business expenses. The word "earned" connotes a benefit which a person actually derives from the performance of a valuable service – after deducting the costs associated with performing that service. Put slightly differently, legitimate business deductions do not form part of the benefit that a personally actually earns. And it is important that the word "income" in paragraph 20 is qualified by the word "earned";

(ii) The term "earned income" in paragraphs 20 (iv) – (vi) of the Separation Agreement is further qualified by the words "in a taxation year". This reinforces the intention to deduct legitimate business expenses as it aligns the phrase to the calculation of income for tax purposes. The income tax returns filed in connection with this proceeding clearly show that "business income" is calculated by deducting identified expenses from "Gross Business Income" to determine "Net Income" for taxation purposes. I agree that the agreement might have been clearer had the parties used the term "net income" rather than "earned income". However, in my view, the result is the same.

2. As to the circumstances surrounding the creation of the Separation Agreement, the evidence before me firmly supports the same conclusion that the phrase "earned income" in paragraph 20 permits valid business deductions. For example:

a) As indicated, Mr. Matheson's initial affidavit and submissions filed on December 13, 2019 do not focus upon the meaning of the words "earned income". Instead, he questioned the validity of the expenses claimed by Ms. Ryan and his own inability to independently verify the reasonableness of those expenses. In short, Mr. Matheson did not object to the notion of deducting reasonable expenses from income but objected to the lack of transparency around business expenses claimed by Ms. Ryan;

b) The evidence filed by Ms. Ryan clearly confirms an intention to ensure that both parties (Mr. Matheson included) used net income in

the determination of spousal support. She attached as an Exhibit to her affidavit a contemporaneous text written to her legal counsel at the time. That text squarely raises the distinction between gross income and net income and confirms Ms. Ryan's specific understanding that the provisions regarding spousal support are based upon the parties' net incomes. Mr. Matheson elected not to cross-examine Ms. Ryan on this point and his rebuttal affidavit filed March 19, 2020 is equivocal. In particular:

> (i) He simply confirms an agreement "to use the income she earned from her daycare business." He neither elaborates on what this means nor directly rejects Ms. Ryan's evidence on the point;
>
> (ii) He states that Claire Levasseur was Ms. Ryan's lawyer negotiating the Separation Agreement; and that Ms. Levasseur did not distinguish between gross income, earned income or net income. However, again, he does not expressly reject Ms. Ryan's interpretation. Nor does he expressly confirm his own understanding;
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> (iii) He states that there "was no mention of expenses or deductions during these negotiations." However, again, he does not reject Ms. Ryan's interpretation. Nor does he expressly and directly confirm his own understanding;
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> (iv) Consistent with his original affidavit, he repeats that he has "no knowledge if these figures [claimed by Ms. Ryan as deductions] are accurate or a reasonable percentage to deduct from household expenses." However, embedded within this concern is the underlying presumption that the issue is whether any claimed deduction is valid and *not* whether deductions are precluded entirely in the determination of "earned income" under paragraph 20.

c) Overall, the evidence as to the parties' intentions as revealed in the circumstances surrounding the agreement strongly favours the interpretation proposed by Ms. Ryan.

3. Finally, I refer to the underlying principles upon which spousal support is based. Spousal support may be compensatory or non-compensatory in nature. While the philosophical underpinnings are different[1] both forms of spousal support seek to calculate and redress a form of financial loss brought about by marital breakdown. To that extent, they both are concerned with the actual financial circumstances of the spouse claiming support. Artificially inflating the actual, available income of a spouse by ignoring legitimate business deductions runs contrary to the underlying purposes of spousal support as confirmed by section 15.2(6) of the *Divorce Act*, 1985, c. 3 (2nd Supp.), and expressly recognized in the agreement itself.

[21] I reviewed the expenses claimed by Ms. Ryan in taxation year 2018 with respect to her daycare business. I do not find them to be unusual or unreasonable and note that they were accepted by Canada Revenue Agency. In the absence of any compelling evidence which might call these expenses into question, I am not prepared to make any adjustments.

[22] I conclude that Ms. Ryan's earned income for the purposes of spousal support remains under $25,000.00 and that she is entitled to continue receiving spousal support in the amount of $1,200.00/month in accordance with section 20 of the Separation Agreement.

[23] The motion is dismissed.

[24] I am prepared to hear the parties on costs. Costs submissions are limited to 10 pages (double-spaced) and shall be filed on or before October 16, 2020.

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[1] . With compensatory support, the focus is mainly on the economic losses or disadvantages which arise as a result of roles taken during the marriage (*Moge* v *Moge*, [1992] 3 S.C.R. 813 ("***Moge***")). It offers a restitutionary response or redress for the economic losses or disadvantages arising out of certain sacrifices made *during* the marriage and speaks to a renewed need for independence (or a "clean break") upon marital breakdown (*Bracklow* v *Bracklow*, [1999] 1 S.C.R. 420 ("***Bracklow***")). By contrast, non-compensatory support is premised on an underlying interdependence within the marital relationship; and it assesses the extent to which the spouses relied upon (or reasonably expected) a shared life and standard of living. Non-compensatory support seeks to redress the financial repercussions arising after (not during) the marriage and it recognize the interdependence or merger of interests which developed over time. As the Supreme Court of Canada in the leading case of *Bracklow* stated: "marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support." (at para 32).