<u>SUPREME COURT OF NOVA SCOTIA</u>
<u>(FAMILY DIVISION)</u>
Citation: *D.G v. J.G.*, 2021 NSSC 57

Date: 20210217
Docket: 052158
Registry: Sydney, NS

Between:

D.G.

Applicant

v.

J.G.

Respondent

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Judge: The Honourable Justice Pamela A. Marche

Heard: February 17, 2021 in Sydney, Nova Scotia

Written Decision: February 18, 2021

Subject: Imputation of Income based on Intentional Underemployment without Reason; Child Support; Contribution to s. 7 expenses (dental/orthodontics); Retroactive / Prospective

Summary: Income imputed to payor on the basis of intentional underemployment without reason. Payor not required to contribute to retroactive s. 7 claim due to delay, agreement between the parties and hardship to payor but ordered to contribute to future s. 7 expenses proportionate with income.

Issues: (1) Should income be imputed to the payor on the basis of intentional underemployment? If so, what child support is payable?

(2) What amount, if any, should the payor contribute to the children’s dental/orthodontic expenses?

Result: Income was imputed to JG at a midpoint range between minimum wage and the income he was earning in 2018. JG not required to contribute to retroactive s. 7 expenses due to the delay of DG bringing forward the claim, the negotiation of a comprehensive child support agreement in 2018 after the bulk of the s. 7 expenses were incurred and the hardship that would result to JG. JG ordered to contribute to prospective s. 7 expenses proportionate to the parties respective incomes.

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Counsel: Jennifer Anderson for the Applicant
J.G – Self-Represented Respondent

By the Court:

Overview

[1] This is a decision involving child support, both prospective and retroactive for two children, JMG, born December *, 2001 and JBG, born February *, 2005.

[2] Their mother, DG, is asking the Court to impute income to JG, the father of the children, on the basis that he is intentionally under-employed without valid reason. DG is also asking that JG contribute to dental costs related to the children that she has incurred in the past and expects to occur again.

[3] JG argues his income is below the threshold requiring him to pay child support. He points to a Corrected Recalculation Order issued in 2019 setting his child support payment as zero as indicative of the fact he ought not to be paying child support. He further asserts that he should not be required to contribute to the cost of the dental work already incurred because this issue was known to DG when the parties came to an agreement about child support in 2018. Since DG did not raise the issue of the dental costs then, JG argues that delay should prevent DG from doing so now.

Background and Procedural Facts

[4] A Consent Variation Order was issued on April 16, 2018 to reflect an agreement the parties had reached through conciliation with respect to child support. JG's income at that time was determined to be $19,500 consisting of income from a landscaping company and employment insurance. Prospective child support was set at the table amount of $280.22 commencing April 1, 2018 and clauses authorizing administrative recalculation were included in the Order. Retroactive child support was calculated back to January 1, 2015 and the Court Order contained a tabulated calculation of child support analyzed for each year, based on JG's actual income.

[5] In April 2019, JG did not provide income information to the Administrative Recalculation Program on the review date of the Consent Variation Order being issued and, as a result, the Administrative Recalculation Program assessed his income as being 10% higher than it was in the previous year. Child support was recalculated in the amount of $304 per month with annual income of $21,450 being attributed to JG.

[6] JG objected to the Recalculated Child Support amount and filed his 2018 Notice of Assessment with the Administrative Recalculation Program. A Corrected

Recalculated Order was issued by the Administrative Recalculation Program on August 16, 2019 assessing income for JG at $5,681 and setting child support at $0 per month.

[7] In September 2019, DG applied to vary the Corrected Recalculated Order. That application is the subject of this decision. The matter was heard on cross-examination of affidavit evidence. In addition to her own evidence, DG filed affidavits from two of DG's former employers. JG, who represented himself, was permitted to give direct evidence.

[8] Although JG did not file a formal response to DG's application, during conciliation JG put forth a claim for parenting time with the children. DG did not object, noting the age of the children and the ability of JG to contact the children directly to make these arrangements. The Court was not asked to make a finding in this regard. **Issues**

1. Should income be imputed to JG on the basis of under-employment? If so, what amount of child support is payable?

2. What amount, if any, should JG contribute to the children's dental expenses?

Applicable Law

[9] Section 7 of the *Nova Scotia Child Support Guidelines* (*Provincial Child Support Guidelines* made under Section 55 of the *Parenting and Support Act* R.S.N.S. 1989, c. 160) provides direction on how the costs of certain expenses should be shared:

> <u>*Special or Extraordinary Expenses*</u>
>
> 7 (1) In a child support order the court may, on a parent's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation:

(c) health related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counseling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Subsidies, tax deductions, etc.

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

(4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

Imputation of Income

[10] Section 19(1) of the *Nova Scotia Child Support Guidelines* directs that a Court may impute income to a parent for the purpose of calculating child support in certain circumstances:

19 (1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:

> (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;
>
> (f) the parent has failed to provide income information when under a legal obligation to do so;

[11] Justice Forgeron in **Standing v. MacInnis**, 2020 NSSC 304, reviewed and summarized the law around imputation of income as follows:

> [21] In **Parsons v. Parsons,** 2012 NSSC 239, this Court reviewed legal principles that apply when underemployment is alleged. Paragraph 32 states in part as follows:
>
> [32] Section 19 of the Guidelines provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:
>
>> a. The discretionary authority found in s. 19 must be exercised judicially, and in accordance with rules of reason and justice, not arbitrary. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic**, 2005 NSSC 291.
>>
>> b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49
>>
>> c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor assets that his/her capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivary v. Ross**, 2008 NSSC 339.
>>
>> d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other

relevant factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi**, 2011 NSCA 65; **Van Gool v. Van Gool** (1998), 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532; **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.

e. A party's decision to remain in a unremunerative employment situation, may entitle a court to impute income where the party has a greater income early capacity. A party cannot avoid support obligations by a self-induced reduction in income: **Duffy v. Duffy**, *supra;* and **Marshall v. Marshall**, 2008 NSSC 11.

[12] In **Smith v. Helppi**, *supra,* at paragraph 22, the NS Court of Appeal confirmed the factors to be balanced when assessing income earning capacity:

> [22] Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in **Hanson v. Hanson**, [1999] B.C.J. No 2532, as follows:
>
> > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor".
> >
> > 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
> >
> > 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

> 4. Persistence in unremunerative employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
>
> [23] As also noted, in Nova Scotia the test to be applied when determining whether a person is intentionally under-employed is reasonableness, which does not require proof of a specific intention to undermine or avoid a support obligation: **Smith v. Helppi**, 2011 NSCA 65,

Retroactive Child Support

[13] Section 37(1) of the *Parenting and Support Act,* RSNS 1989, c 160, authorizes the Court to make a retroactive order for support:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a support order or an order for custody, parenting arrangements, parenting time, contact time or interaction where there has been a change in circumstances since the making of the order or the last variation order.

[14] The Supreme Court of Canada in **S. (D.B.) v. G. (S.R.)**, 2006 SCC 37, recently considered in Michel **v. Graydon**, 2020 SCC 24, addressed the issue of retroactive child support. Justice Forgeron in **Corbett v. McEachern**, 2017 NSSC 108, summarized the findings in **DBS** as follows:

> [33] In **S.(D.B.) v. G.(S.R.)**, 2006 SCC 37, the Supreme Court of Canada confirmed the legal test to be applied when retroactive child support is sought. Bastarache J. stated as follows:

- Child support is the right of the child and such right survives the breakdown of the relationship of the child's parents [para 3]
- The child loses when one parent fails to pay the correct amount of child support [para 45].
- Parents have an obligation to support their child according to their income and this obligation exists independent of any statute or court order [para 54].
- The payment of a retroactive award is not an exceptional remedy [para 97].
- A retroactive maintenance award should be payable from the date the custodial parent gave effective notice to the non-custodial parent [para 118]. It is generally inappropriate to make a retroactive award more than three years prior to the date when formal notice was provided to the non-custodial parent [para 123].
- The quantum of a retroactive award must be tailored to fit the circumstance of the case [para 128].
- The court must examine and balance four factors when determining the issue of retroactivity.
- The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of the nonpayment of child support, or in the face of an insufficient payment of child support: paras 101 and 104.
- The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based upon objective indicators [para 108] and the court should take an expansive view as to what constitutes blameworthy conduct in the face of the nonpayment or insufficient payment of child support: paras106 and 107.
- The third factor to be balanced focuses on the circumstances, past and present [para 110] of the child, and not of the parent [para 113], and include an examination of the child's standard of living [para 111].
- The fourth factor requires the court to examine the hardship which may accrue to the non-custodial parent as a result of the non-custodial parent's current financial circumstances and financial obligations [para 115], although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct [para 116].

Decision

Issue 1. Should income be imputed to JG on the basis of under-employment? If so, what amount of child support is payable?

[15] I am imputing income to JG on the basis that he is intentionally under-employed, and his under-employment is not related to his health or education needs or the needs of his children.

[16] In his testimony, JG acknowledged that he is in good health. He says he worked on a commission basis with a delivery company in 2020 where he earned approximately $10,400 plus tips. JG did not file his 2020 financial disclosure with the Court but this information was not contested by DG.

[17] JG testified he left his employment with the delivery company because of issues with his driver's licence. The owner of the delivery company testified that JG could get his job back with the delivery company if JG were to sort out issues with his licence.

[18] JG says he left his employment with a landscaping company in 2018 because DG was working there as well. JG says DG made a negative comment to him, which he found to be harassing, and so he left that employ. In cross-examination, JG acknowledged that he had worked alongside DG in the landscaping company for several years prior and their working relationship only became an issue when JG re-partnered. His new partner did not like that DG and JG were working with the same company.

[19] The owner of the landscaping company testified that JG told him that he (JG) was quitting to go on to other ventures. The owner also testified that JG could return to work at the landscaping company at any time.

[20] I am satisfied that JG left work at the landscaping company voluntarily and that there is no real bar to him returning to work there. Furthermore, I have considered the subjective factors related to JG such as his age, experience, skills and health and I am satisfied that there is nothing preventing him from procuring minimum wage employment elsewhere, notwithstanding Covid-19 which JG testified is the current barrier to his employment.

[21] JG admitted that if he were to resume working, his employment income would likely have a negative impact on the current total household income he shares with his new partner. She relies on income assistance.

[22] JG's current financial arrangement might be more advantageous to JG and his new partner, but it ignores JG's financial obligation to his children. JG cannot avoid his child support obligations to JMG and JBG by a self-induced, voluntary reduction in his employment income.

[23] DG has asked the Court to impute income in the amount of $23,218 to JG because that figure represents a midpoint range between the income JG was earning in 2018 and a full-time minimum wage job in Nova Scotia. I am satisfied that this is a reasonable approach in these circumstances.

[24] DG appropriately relied on the Administrative Recalculation Program to ensure JMG and JBG's entitlements to child support were properly being addressed on an annual basis. DG filed an application to vary within a month of the Corrected Recalculated Order being issued. The actions of DG were reasonable in this regard and there was no delay that would disadvantage JG.

[25] JG's income is assessed at $23,218. JG's voluntary reduction of income is blameworthy conduct and DG brought her variation claim without delay. JG must pay child support to DG for the support of JMG and JBG in the amount of $329 per month, commencing May 1, 2019. JMB is 19 but there was no contest that she remains a dependent child in need of support.

[26] As of December 2020, the Maintenance Enforcement Program (MEP) Record of Payment showed JG as owing $3,425.46 in child support arrears. This decision will result in additional child support arrears being calculated by MEP as owing. In addition to the table amount of child support, JG is required to pay DG the amount of $50 per month towards the repayment of arrears until the arrears are paid in full. The repayment structure of arrears is meant to reduce any financial hardship experienced by JG.

Issue Two: What amount, if any, should JG contribute to the children's dental expenses?

[27] DG seeks a retroactive contribution to dental/orthodontic expenses related to both JMG and JBG that total $15,295.50. There is no dispute that this was the amount paid for the children to have braces. Based on their respective incomes, DG

is asking that JG be ordered to contribute 40% of those costs. DG's income for 2019 was $35,557. DG did not file her income information with the court for 2020 but testified that her income in 2020 would be lower than 2019 because of the impact of Covid-19 on the landscaping business. She estimated her 2020 income to be in the range of $20,000.

[28] JG argues that the dental/orthodontic costs were incurred prior to 2018 and DG did not raise this issue when the parties were negotiating a settlement of retroactive child support for the years 2015 to 2018 during the conciliation process. The Consent Variation Order issued April 16, 2018 contains a tabulated chart of child support payments that were and ought to have been paid during that time to determine the total arrears owing. The parties agreed JG had overpaid child support to DG by $2,710 between the years 2015 and 2018. DG was represented by counsel at the time she made the child support agreement that resulted in the Consent Variation Order being issued.

[29] I agree with the submissions of DG that JG knew that the children had braces and there would have been a significant cost associated with that orthodontic work. However, much of the cost associated with this work was incurred prior to April 2018. DG, with the assistance of counsel, negotiated a child support settlement for the period of time the dental work was being done and did not bring forth any claim for these expenses to be considered as part of the comprehensive child support agreement.

[30] It is not clear why DG did not bring forth a s. 7 claim at that time but the delay in seeking a contribution from JG in this regard makes it unreasonable for her to do so now. I find that it is reasonable, given the circumstances of this case, that JG might rely on a belief that this issue was resolved and DG was not seeking a contribution from him towards the children's dental costs. To order otherwise now would create a hardship for JG who did not engage in blameworthy behaviour in 2018 when the matter was being sorted. JG is not required to contribute to the orthodontic costs in relation to JMG and JBG that have already been incurred.

[31] DG testified that JMB will need her wisdom teeth removed. The estimated cost of this procedure is $1,900 and surgery is scheduled to take place in April 2021. An official cost estimate was not provided to the Court. JG will be obliged to contribute to dental/orthodontic expenses going forward.

Conclusion

[32] The comfort level of a new partner can not serve to diminish a parent's financial obligation to their children.

[33] Income in the amount of $23,218 is imputed to JG on the basis of intentional under-employment without reason. JG must pay child support to DG for the support of JMG and JBG in the amount of $329 per month, commencing May 1, 2019.

[34] In addition to the table amount of child support, JG is required to pay DG the amount of $50 per month towards the repayment of arrears until the arrears are paid in full.

[35] JG must contribute to future dental costs related to the children, proportionate to the parties' respective incomes, upon proof of the actual expense and confirmation of DG's income for 2020. If the parties are unable to agree to a dollar amount in this regard, they may bring this narrow issue back before the Court for review and resolution.

Pamela A. Marche, J.