

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Walker v. Wilkie*, 2023 NSSC 189

Date: 20230612

Docket: No. 1206-07257

Registry: Sydney

Between:

Steven Walker

Applicant

v.

Paula Wilkie

Respondent

Judge: The Honourable Justice MacLeod-Archer

Heard: May 15, 2023, in Sydney, Nova Scotia

Counsel: Steven Walker, self-represented
Paula Wilkie, self-represented

By the Court:

Background

[1] This is a decision arising from Mr. Walkers' variation application filed on September 11, 2020. He seeks to vary the amount of child support payable to Ms. Wilkie for the two children of the marriage named in their Corollary Relief Judgment (CRJ).

[2] Ms. Wilkie initially claimed support for both children, but clarified at the hearing that she is not seeking support for the older child, who is now independent. She also clarified that she is only seeking a contribution to their daughter's braces, and no other section 7 expenses are outstanding or anticipated.

[3] The CRJ requires Mr. Walker to pay \$1,746.39 per month in child support, based on an annual income of \$129,745.00 in 2018. He was also required to contribute towards section 7 expenses. An interim variation order (a holding order made without prejudice) was granted on December 14, 2020 reducing Mr. Walker's support to \$178.00 per month based on his Canada Emergency Response Benefit (CERB) income of \$24,000.00 per annum.

[4] A focused hearing on child support was held on May 15, 2023. Both parties presented evidence and took the opportunity to ask the other questions.

Change in circumstances

[5] Mr. Walker says that the Covid-19 pandemic created a change in circumstances which justifies variation of child support payable. Although she didn't expressly argue that point, Ms. Wilkie disagrees that child support should be reduced, so I infer that she doesn't agree there's a material change in circumstances.

[6] I accept that the pandemic impacted Mr. Walker's income and constitutes a material change in circumstances. He was laid off, and then terminated from his overseas employment on June 30, 2020. At one point he was entirely reliant on CERB income of \$2,000.00 per month, which was significantly less than what he'd earned working in Saudi Arabia.

Imputing income

[7] Ms. Wilkie asks the court to impute \$150,000 per year as income for Mr. Walker, effective in 2020 and each year since. She bases this on his reported income in 2020 as well as his income history over the past 25 years working in the

oil fields. She does not accept that he's been unable to earn an equivalent income since 2021.

[8] I accept Mr. Walker's evidence that when the pandemic hit, he was initially laid off and then eventually let go by the company he was working with on June 30, 2020. I also accept his evidence that when he eventually traveled to Saudi Arabia to return to work, he ran into difficulties with his work visa and was deported. He was banned from returning to Saudi Arabia for three years. That ban ends this year.

[9] Mr. Walker did not increase the amount of child support he was paying when he obtained his job at the casino, even though it pays more than CERB. He testified that he generally works at least 40 hours per week, even though he is only guaranteed 24 hours each week, because the casino is short staffed.

[10] Mr. Walker's 2020 notice of assessment from Revenue Canada (exhibit #3) shows line 15000 income of \$150,600 from employment, employment insurance benefits, other income, and RRSP income.

[11] In 2021 his notice of assessment (exhibit #4) shows line 15000 income of \$52,413.00 which includes employment income and employment insurance benefits.

[12] Mr. Walker's 2022 income tax summary (exhibit 5) shows line 15000 income of \$49,567.43, which includes employment income, RRSP income, and net self-employment income. He did not produce his complete tax return, which would show what business expenses were deducted from the gross business income reported. I therefore can't analyse whether any sums should be added back to his income for deductions that personally benefit him.

[13] Mr. Walker didn't expressly address the imputation argument but he says that his child support should be set at no more than \$200 per month total, as that is the maximum amount he can afford to pay. In his affidavit (exhibit #1) filed on September 11, 2020 he stated that, in addition to the child support payable under the CRJ, he was supporting another child from a different relationship. At the time he filed his affidavit he was receiving CERB.

[14] The law on imputation of income was outlined by Forgeron, J. in **Standing v. MacInnis**, 2020 NSSC 304:

20 Section 19 (1) (a) of the *Federal Child Support Guidelines* provides me with the authority to impute income if the payor is under-employed provided the underemployment does not arise because of the needs of a child or the payor's reasonable educational or health needs.

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 reasons and justice, not arbitrarily. 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 asserts that his/her income has been reduced or his/ her income earning capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivray 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. The court must also look to objective 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 (S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.
- e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning 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.

22 In **Smith v. Helppi**, 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. in **Gould v. Julian**, 2010 NSSC 123. Oland J.A. states as follows:

16 Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in **Gould v. Julian**, 2010 NSSC 123 (N.S.S.C.), where Justice Darryl W. Wilson stated:

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, supra*.

24 In *Drygala v. Pauli*, [2002] O.J. No. 3731, the Ontario Court of Appeal confirmed a three-pronged approach to determine under-employment. I will now follow that approach. First, I will decide whether Mr. Standing is under-employed. Second, I will canvas whether this is caused by any identified s.19(1)(a) needs. Third, I will decide what quantum of income should be imputed.

[15] I find that Mr. Walker's inability to work in Saudi Arabia is not self-imposed. He was laid off and then terminated due to restrictions on travel during

the early stages of the Covid-19 pandemic. Then his visa was revoked, and he was banned from travel.

[16] However, these findings do not excuse Mr. Walker from resuming work in his field outside of Saudi Arabia after the pandemic travel restrictions eased.

[17] For the year 2020 there's no need to impute income to Mr. Walker. His reported income that year was higher than what is reflected in the CRJ. It's on the basis of that year's income that Ms. Wilkie asks me to impute income of \$150,000.00 since 2020.

[18] Mr. Walker's income in 2020 was \$150,600.00. He will pay child support under the Nova Scotia table for two children up to, and including, August, 2020. Thereafter he will pay support for one dependent child for the rest of 2020.

[19] In 2021 and 2022 Mr. Walker earned a fraction of that amount. There's no evidence that he was limited in his job search by the needs of a child, or for health reasons. Evidence on the impact of the pandemic is limited and does not provide an explanation or excuse for Mr. Walker's reduced income.

[20] Mr. Walker testified that he's looked for alternative employment in his field and that "if the right opportunity" arises, he intends to take "steady work". That's

an ambivalent response, given his responsibilities to his children and the fact that he owes tax arrears to Revenue Canada of almost \$13,000.00.

[21] Despite that ambivalence, I find that it's not appropriate to impute income to Mr. Walker in 2021, as that's the year he tried to return to work in Saudi Arabia but ran into visa problems. He will pay child support in 2021 for one dependent child under the NS table based on his actual income of \$52,413.00.

[22] The years 2022 and 2023 are different. Although Mr. Walker could not work in Saudi Arabia, I accept Ms. Wilkie's argument that he is qualified to work elsewhere, so he is underemployed. By 2022, pandemic travel restrictions wouldn't have prevented him from traveling to work in his field, especially within Canada. There is no evidence of health or other reasons for his failure to resume work in a more remunerative position.

[23] As such, I find that it's appropriate to impute income to Mr. Walker in 2022 and 2023. The next question is what sum is appropriate to impute? Ms. Wilkie's figure is based on Mr. Walker's work in Saudi Arabia, but there's no evidence that he could start with a new company at the same pay level.

[24] However, Mr. Walker is highly qualified. He moved up through the ranks to a supervisor's position. He's got 25+ years of experience in the oil fields and it's

not unreasonable to think he could earn at least \$100,000.00, without having to leave Canada. I have considered the fact that Mr. Walker's 2020 income included RRSP income, which I haven't included for imputation purposes.

[25] I therefore impute income to Mr. Walker in the tax year 2022 and 2023 in the amount of \$100,000.00 per annum. He will pay Ms. Wilkie child support based on the NS table for one child based on that imputed income. Sums paid under the interim order will be a credit towards any arrears he will owe.

Section 7 expenses

[26] Under the CRJ, Mr. Walker is required to equally share the uninsured portion of the child's orthodontic expenses. He is also required to maintain a health plan (medical and dental) for the child. I accept that Ms. Wilkie paid the full amount of \$1,780.00 for the child's spacer because Mr. Walker didn't submit the claim to his health insurer. He is therefore responsible to reimburse Ms. Wilkie 50% or \$890.00 forthwith.

[27] The child is still wearing braces. Mr. Walker does not have a health plan. Ms. Wilkie is now carrying health insurance to cover some of the orthodontic expense, but even then, Mr. Walker has not contributed to the cost.

[28] I therefore direct that he reimburse Ms. Wilkie for his equal share of the uninsured portion of orthodontic expenses she's paid to date. She must send him a statement from her insurer showing what sums were claimed, what was paid by insurance, and the balance she paid. Any amount not paid by Mr. Walker within 30 days will be collected through the Director of Maintenance Enforcement (MEP).

[29] In addition, Mr. Walker will be responsible to pay 50% of the uninsured orthodontic expenses incurred in future for maintenance, adjustments, x-rays, etc. Ms. Walker asks that future payments be enforced through MEP, but the difficulty is that they can only enforce specific sums set out in an order. Ms. Wilkie did not tender a copy of the schedule of payments in evidence, so I cannot enumerate the specific sums due. Nor do I have evidence of what portion would be covered by insurance.

[30] I therefore direct that the CRJ be varied to require Mr. Walker to pay his 50% share of uninsured orthodontic expenses incurred in future for the child directly to Ms. Wilkie. He must reimburse Ms. Wilkie within 7 days of receipt of an insurance statement showing the uninsured balance she paid. That statement can be sent via email and will be considered delivered the day it is sent.

Costs

[31] Success on the application was mixed, and neither party retained legal counsel so there are no legal accounts to consider. I direct that the parties each bear their own costs.

[32] Court staff will prepare the order.

MacLeod-Archer J.