

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Day v. Day*, 2023 NSSC 186

Date: 20230619

Docket: SFHMCA No. 101059

Registry: Halifax

Between:

Vince Day

Applicant

v.

Christine Day

Respondent

LIBRARY HEADING

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: May 5, 2022

Summary: Income was imputed to the payor in 2019. The payor's request to eliminate the arrears of child support was dismissed. There was no reason to vary the arrears of child support calculated on imputed income.

Key words: Family, child support, imputed income, retroactive support, undue hardship, application to vary,

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Heard: May 5, 2023, in Halifax, Nova Scotia

Counsel: Vincent Day, self-represented
Christine Day, self-represented

By the Court:

[1] Vincent Day applied to the court to lower his child support. He advised the court that he was unable to pay the child support arrears. Mr. Day also testified that his income was not as high as the income imputed to him by the Court in 2019 and wanted the Court to adjust his child support retroactively based on income tax returns.

[2] Christine Day wants the arrears of child support to remain. She disputes the income disclosed by Mr. Day. She testified that he was capable of earning the income imputed to him. Ms. Day also testified that Mr. Day had received cash payments for some of his work and that his income tax returns did not accurately reflect his total income.

[3] The arrears of Mr. Day will not be varied. He has not provided evidence that the imputation of income was inappropriate. Income was imputed to Mr. Day of \$35,000 in 2019. It was based on the following information:

- 1) Mr. Day's income in 2018 was found to be \$45,000.
- 2) He was employed as a truck driver earning approximately \$38,000 and voluntarily left that employment as a result of "transportation issues".
- 3) The court found that his job search efforts were unreasonable and that he was intentionally underemployed.
- 4) Mr. Day had not been diligent in his job search in Nova Scotia in the hopes of returning to more lucrative employment in the West. The Court found that his job search efforts were not reasonable.

[4] Mr. Day asserts that he is in dire financial circumstances. He states that he has declared bankruptcy and is unable to meet his monthly expenses. His Statement of Income discloses an annual income of \$40,440. At one point in the proceeding, Mr. Day testified that if the arrears were to remain in place, he wished a reasonable repayment schedule.

[5] Mr. Day did not voluntarily pay his court ordered child support. As a result, there is currently a garnishee with Mr. Day's employer. Ms. Day is now receiving child support. There is also a garnishee with respect to any monies due to Mr. Day from the Federal Government.

LAW & ANALYSIS

[6] The case of *Trang v. Trang*, 2013 ONSC addressed the issue of retroactive variations when the payor has had income imputed to them. There were five questions posed by the court (as noted in paragraph 46 of the Trang decision):

- 1) Why did income have to be imputed in the first instance?
- 2) Have those circumstances changed?
- 3) Is it still appropriate or necessary to impute income, to achieve a fair result?
- 4) How exactly did the court quantify the imputed income?
- 5) What were the calculations and are they still applicable?

[7] The answers to those questions in the present case are:

- 1) Income was imputed to Mr. Day as a result of his failure to make reasonable job efforts.
- 2) The circumstances have changed in that Mr. Day has now secured full time employment earning a higher income than that which was imputed to him.
- 3) If there was any adjustment to be made to the child support quantum, it would be to increase the support to accord with the disclosed income of \$40,400.
- 4) The court imputed income to Mr. Day in the approximate amount of the income he earned at his previous employment. Having voluntarily left that employment without reasonable excuse, the court imputed roughly equivalent income to him.
- 5) Mr. Day earned approximately \$38,000 at his previous employment. The court found that imputing income to him of \$35,000 was reasonable in the circumstance.

[8] The court in *Power v. Power*, 2015 NSSC 234 dealt with a claim of retroactive variation where income was imputed to the payor. Justice Jollimore thoroughly reviewed the principles applicable to such claims. As noted in the *Power* decision, supra, at paragraph 14:

“Because Justice Lynch made a determination of fact, if Mr. Power believes that income was wrongly imputed he has two options: appeal the decision or bring a

motion to set aside the order based on mistake or misrepresentation. According to the Court of Appeal in *Gaetz v. Jakeman*, 2005 NSCA 77, a variation application is neither an appeal nor an opportunity to re-litigate the prevailing order. A variation application proceeds on the basis that the prevailing order was correct when it was made, and that it has been superseded by later events.”

[9] The principles in *Power* were cited with approval in the recent decision of *Currie v. Currie*, 2022 NSSC 23.

[10] I have taken into account the evidence and the relevant legal principles. Mr. Day’s arrears of child support will not be adjusted. There is nothing in the evidence before me to disclose that there was a material change in Mr. Day’s income to warrant any adjustment of the arrears owing.

CONCLUSION

[11] The arrears of child support were \$7,410.46 as of April 4, 2023 (as noted in the Record of Payments of the Maintenance Enforcement Program). Mr. Day’s income is garnisheed through his present employer and there is a garnishee with the Federal Government. Because Mr. Day did not voluntarily pay the child support, the garnishees will remain in place.

[12] Mr. Day will continue to pay the regular child support of \$523 per month. He will also pay the sum of \$300 per month towards the arrears. The garnishee in place with his current employer will be to a maximum of \$823 per month until the arrears are repaid. Additional amounts towards the arrears received by the Maintenance Enforcement Program from the Federal Government garnishee will continue to be collected and remitted to Ms. Day. This will result in the arrears of child support being repaid in approximately two years, or sooner dependent on the monies received pursuant to the Federal Government garnishee.

Chiasson, J.