

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *I.C. v. M.C.*, 2023 NSSC 170

Date: 20230718

Docket: Halifax No. SFHPSA-124190

Registry: Halifax

Between:

I.C.

Applicant

v.

M.C.

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Samuel Moreau

Heard: January 4, 2023, in Halifax, Nova Scotia

Released to the Parties: May 31, 2023

Subject: Child support, spousal support, determination of income, imputation of income.

Summary: The father failed to provide proof of his income as directed by the court. The Court determined the father's income based on the available evidence and the imputed amount was used to determine his child support obligation and also in contemplation of the mother's request for spousal support.

Issues:

- (1) Determination of the father's income for the purposes of his child support obligation and in contemplation of the mother's request for spousal support.
- (2) Is the mother entitled to receive spousal support from the father?

Result:

The Court ordered the father to pay child support to the mother as per the guidelines based on an imputed amount. The Court found that the mother is entitled to receive spousal support from the father both on a compensatory and non compensatory basis.

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Counsel: I.C. , Self-represented

Leslie Hogg, for the Respondent

By the Court:

Introduction

[1] The Applicant, father, I.C. and Respondent, mother, M.C., are the parents of the children H. born in 2017 and M. born in 2018.

[2] The mother is from the Philippines. The parties were married there in October, 2013 and subsequently resided in Ontario until 2015. They separated on May 7, 2021.

History of Proceedings

[3] During the Settlement Conference held on February 28, 2022, the parties agreed to the terms of a Consent Order (issued April 20, 2022) addressing parenting arrangements and decision making responsibilities. They agreed to a shared parenting arrangement with exchanges occurring on a week about basis. In the event the father relocated to Ontario, the mother would have primary care and residence of the children. Major decisions are to be made jointly. Each parent has the ability to access third party information concerning the children, including medical and educational records.

- [4] During the Conference held on April 4th, 2022, the parties confirmed the outstanding issues as being child support and spousal support. They consented to participate in a second Settlement Conference, scheduled for June 23, 2022.
- [5] On June 23, 2022, the father informed the Court of his intention to retain other legal counsel and was not willing to proceed with the Settlement Conference. An award of costs in the amount of \$250 was ordered in favour of the mother and the matter was scheduled for a Pre-Trial Conference on July 6, 2022. On July 6, 2022, a half day trial was scheduled for September 15, 2022 and filing deadlines were provided. Notably the father was directed to file updated Statements of Income, Expenses and Property by August 6, 2022.
- [6] By mutual agreement the children were in the father's care from July 7th, 2022, to be returned to the mother by August 31st, 2022. He advised of his intention to relocate to Ontario and exercised the agreed upon block parenting time in that province.
- [7] Subsequently the father refused to return the children to the mother as per the agreed upon date (August 31st, 2022). The father's actions necessitated the mother travelling to Ontario and retaining legal counsel there in order to have

the children returned to her care. In early September, 2022, the trial was adjourned at the mother's request.

[8] The father commenced court proceedings in Ontario in an attempt to circumvent the April 20, 2022, Consent Order. In November, 2022, the Ontario Superior Court directed that the children be returned to the mother's care.

[9] On December 2nd, 2022, the mother filed a Notice of Motion for Interim Emergency Relief (Family Proceeding) which addressed the father's parenting time during the upcoming Christmas holiday. On December 22nd, 2022, this Court granted a Varied Interim Order pursuant to which the father's parenting time was to be supervised (by a supervisor mutually agreed to by the parties) and was to take place within the Halifax Regional Municipality (H.R.M.), pending further Order of the Court.

[10] The matter proceeded to trial on January 4, 2023. The parties were the only witnesses. The issues to be determined are the mother's requests for child support and spousal support.

The Father's Income

[11] The father never complied with the Court's direction given on July 6, 2022, to file updated Statements of Income, Expenses and Property.

[12] As such I shall determine the appropriate level of income to be assigned to the father for the purpose of child support and in contemplation of the mother's claim for spousal support.

Analysis

[13] After being married in the Philippines, the parties lived in Ontario until 2015, when the father obtained employment at the Irving Shipyards in Halifax. He has a red seal certificate in welding and was an Apprentice welder with the Irving Shipyards from 2015 to 2022. I am without any evidence as to why the father is no longer employed with Irving Shipyards.

[14] Prior to moving to Nova Scotia the parties resided on a farm in Ontario (the location where the father currently resides). During cross examination the father confirmed the following:

- The farm was purchased in 2011;

- He was a bee keeper;
- He had an industrial hemp license. (It is unclear whether this license remains valid);
- During the period in which the parties were in Nova Scotia as a family (2015 – 2022), the farm was rented to tenants;
- In 2019, he listed the farm for sale in the amount of \$490,000.00;
- He has purchased and sold three properties in Nova Scotia (ostensibly profiting from those sales, including the former matrimonial home) during the period 2015 to 2022;
- He is currently in receipt of monies from the Canada Pension Plan and an employment pension;
- He plans to put the farm “into production”.

[15] The mother’s Affidavit evidence describes the farm as a “business asset”, where the father kept animals, bees and grew hemp.

[16] In his Statement of Income sworn and filed on March 29th, 2022, the father states his total monthly and annual incomes as \$0.00. The attached Notices of Assessment indicate the following:

- In 2019, the father earned, \$77,550.00;
- In 2020, \$99,870.00; and
- In 2021, \$56,524.00.

[17] The father's Statement of Property sworn and filed on March 30, 2022, indicates ownership of an RRSP valued at \$30,000.00 and a life insurance policy with the face amount being £37,000 when he is 65 years old.

[18] The mother maintains that the father is intentionally underemployed and requests that income be imputed to him in the annual amount of \$99,870.00.

[19] In *K.H. v. K.N.*, 2022 NSSC 305, this Court addressed the issue of imputation of income. At paragraph 45, Justice Forgeron's synopsis of the jurisprudence in this area of family law from the case *Rideout v. Woodburn* 2016 NSSC 205 is quoted:

[45] Section 19 of the Federal Child Support Guidelines provides me the authority to impute income to the father. In *Rideout v. Woodman*, 2016 NSSC

205, Justice Forgeron provides a helpful synopsis of case authorities in relation to imputation of income. At paragraphs 29 and 30 she writes:

[29] Given these submissions, I must now determine if income should be imputed to Mr. Rideout since the 2005 court order. In **Smith v. Helppi**, 2011 NSCA 65(N.S. C.A.), para 16, Oland J.A. approved the factors outlined by Dr. Julien D. Payne, in *Imputing Income, "Determination of Income; Disclosure of Income"*, *Child Support in Canada*, Danrab Inc., August 3, 1999 as quoted by Martinson, J. in **Hanson v. Hanson**, 1999 CanLII 6307 (BC SC), [1999] B.C.J. No. 2532 and by Wilson J. in **Gould v. Julian**, 2010 NSSC 123(N.S.S.C.). These factors are as follows:

- 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." (*V. (J.A.) v. V. (M.C.)* at para 30.)
- 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 of work, freedom to relocate and other obligations.
- 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 the 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.
- Persistence in unremunerative employment may entitle the court to impute income.
- A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
- As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[30] In **Parsons v. Parsons**, 2012 NSSC 239, paras 32 and 33, this court distilled other principles applicable to s. 19 imputation claims as follows:

- The discretionary authority found in s.19 must be exercised judicially, and in accordance with rules of reason 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(N.S.S.C.).
- 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(N.S.C.A.).
- 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(N.S.C.A.); **MacGillivray v. Ross**, 2008 NSSC 339(N.S.S.C.).
- 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(N.S.C.A.); **Van Gool v. Van Gool** (1998), 1998 CanLII 5650 (BC CA), 113 B.C.A.C. 200 (B.C.C.A.); **Hanson v. Hanson**, 1999 CanLII 6307 (BC SC), [1999] B.C.J. No. 2532 (B.C.S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11(N.W.T.S.C.); and **Duffy v. Duffy**, 2009 NLCA 48(N.L.C.A.).
- 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** (2007), 2008 NSSC 11(N.S.S.C.).
- The test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[20] Sections 16, 17(1) and 19(1) of the Federal Child Support guidelines reads as follows:

Calculation of annual income

16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

Pattern of income

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

Imputing income

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

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[21] I find the evidence substantiates that imputation of income to the father is reasonable in this circumstance. I am satisfied he has the ability to earn an income in amounts greater than indicated in the available evidence.

[22] Income shall be imputed to the father for the following reasons:

- He has failed to disclose updated Statements of Income, Expenses and Property as directed by the Court;
- He has the professional qualification(s) to earn income as a welder;
- He owns and resides on a farm which was previously used in various income producing capacities. The father testified that he plans to put the farm “into production”;
- No evidence was provided as to why the father is no longer employed by Irving Shipyards; and
- The father adduced no evidence of ill health or any other reason why he would be unable to hold employment.

[23] The mother requests I impute income to the father in the amount of \$99,870.00, his line 150 income for the year, 2020. His line 150 income for the

years, 2019 and 2021 are \$77,550.00 and \$56,524.00, respectively. Given the varying sums, I am satisfied a reasonable approach would be imputation of an amount based on the average number for the years 2019, 2020 and 2021.

[24] Income in the annual amount of \$77,981.33 shall be imputed to the father for the purpose of determining the quantum of his monthly child support payments and in consideration of the mother's request for spousal support.

Child Support

[25] The mother's viva voce evidence confirmed she received \$36,507.45 from the father, that being her share from the proceeds of the sale of the matrimonial home. The father's cross examination of the mother appears to suggest (in his view) that same funds ought to satisfy her claims for child support and spousal support. Awarding prospective child support to the mother is not a discretionary consideration. Child support is the children's right. The children's right to support survives the breakdown of the parties' relationship.

[26] Based on an annual imputed income of \$77,981.33, the father shall pay child support to the mother in the guideline amount of \$1,182.00 per month as per the Ontario tables.

Spousal Support

[27] The mother advances a claim for spousal support commencing June, 2021, on both compensatory and non compensatory grounds.

Law

[28] The father's Notice of Application filed November 26, 2021, seeks relief under the *Parenting and Support Act*. The mother's Response to Application filed December 21, 2022, also seeks relief under the *Parenting and Support Act*. As such I shall consider the mother's claim for spousal support in accordance with the factors set out in section 4 of the *Parenting and Support Act*, which states as follows:

Factors considered

4 In determining whether to order a person to pay support to that person's spouse and the amount of any support to be paid, the court shall consider

- (a) the division of function in their relationship;
- (b) the express or tacit agreement of the spouses that one will maintain the other;
- (c) the terms of a marriage contract or separation agreement between the spouses;
- (d) custodial and parenting arrangements made with respect to the children of the relationship;
- (e) the obligations of each spouse towards any children;
- (f) the physical or mental disability of either spouse;
- (g) the inability of a spouse to obtain gainful employment;

- (h) the contribution of a spouse to the education or career potential of the other;
- (i) the reasonable needs of the spouse with a right to support;
- (j) the reasonable needs of the spouse obliged to pay support;
- (k) the separate property of each spouse;
- (l) the ability to pay of the spouse who is obliged to pay support having regard to that spouse's obligation to pay child support in accordance with the Guidelines;
- (m) the ability of the spouse with the right to support to contribute to the spouse's own support. R.S., c. 160, s. 4; 1997 (2nd Sess.), c. 3, s. 3; 2000, c. 29, ss. 5, 8; 2015, c. 44, s. 6.

[29] In *Morrison v. Morrison*, 2018 NSSC 119 Justice Gregan considered a claim for spousal support. At paragraph 48 he writes:

[48] Under the case authorities as well of **Bracklow v. Bracklow**, [1999 CanLII 715 \(SCC\)](#), [1999] 1 SCR 420 and **Moge v. Moge**, [1992 CanLII 25 \(SCC\)](#), [1992] 3 SCR 813, the courts have determined the 3 categories of spousal support on the basis:

- compensatory - which has been described as support to address economical advantages and disadvantages flowing from the marriage and the role adopted during the marriage;
- non-compensatory support which has been described as being to address the disparity between the needs and means of the parties and arising from the marriage breakdown; and
- contractual spousal support obligation either expressed or implied (which does not apply here).

Analysis

[30] This marriage was approximately 7.5 years in duration.

[31] The evidence substantiates the following:

- The mother was the children's primary care giver; she looked after their daily needs, including feeding, bathing and transporting them to daycare and medical appointments.
- While residing on the farm the mother helped with the daily chores including, but not limited to lawn care and gardening. She was also responsible for the general upkeep of the home and functions within, including, cooking meals, doing laundry and cleaning.
- While residing in Nova Scotia the mother's responsibilities within the home remained as in Ontario.

[32] During the marriage the father was the family's breadwinner. The mother was employed outside of the home for a very brief period (3 to 4 months), she stopped working due to being pregnant.

[33] The mother has the Canadian equivalent of a grade 10 level of education. I accept that since being in Canada, she has not been afforded the opportunity to continue or advance her educational status.

[34] The mother says the father was emotionally abusive during the marriage. Upon separating, he asked her to leave the matrimonial home. From May 7,

2021, to November, 2021, she resided at a women's shelter in the H.R.M. and from November, 2021, to June 7th, 2022, at local hotels/motels with the aid of the shelter. On June 7th, 2022, she moved into a three bedroom apartment.

[35] Subsequent to separation the mother was employed from June, 2021, to November, 2021 and from August, 2022, to the present. In 2021, she earned approximately \$1200.00 per month. Her current employment is as a cleaner at a local hotel. She earns \$15.60 per hour, working five hours per day, five days a week.

[36] Due to her level of education and very basic skills in the English language, the mother's employment opportunities are limited. She hopes to obtain her G.E.D. in the future. Once further settled, she shall consider enrolling in English classes through the Immigrant Services Association of Nova Scotia (ISANS).

[37] In analyzing the mother's claim for spousal support, I must first consider whether she is entitled to receive same from the father. If entitlement is established, I then consider the elements of quantum and duration.

[38] Important to examining the nature of the mother's compensatory claim is her role within the marriage and the functions she fulfilled. This marriage can be described as traditional: the father was the breadwinner and controlled the family's finances; the mother was the children's primary caregiver and looked after the running and functions of the home.

[39] As stated earlier, the father appears to be of the view that the mother's receipt of her share of the proceeds from the sale of the matrimonial home, ought to satisfy her spousal support claim, absolving him of any potential obligation. The mother's compensatory claim for spousal support is not "barred" or diminished by the fact she received her share of funds derived from a matrimonial asset (*Chutter v. Chutter*, 2008 BCCA 507. *MacDonald v. Macdonald*, 2005 BCCA 23).

[40] I find the mother has established an entitlement to receive spousal support from the father on both compensatory and non-compensatory grounds. The mother's responsibilities within the marriage restricted her ability to advance her level of education, thereby limiting the opportunities of achieving self sufficiency. The evidence demonstrates that as a result of the dissolution of the marriage the mother suffered a drop in her standard of living and experienced

economic hardship. As articulated by Justice Marche in *T.M. v. R.R.*, 2021 NSSC 156, the concept of need goes beyond the mother's ability to satisfy her basic needs. The standard of living enjoyed by the parties while together must also be considered.

[41] Given the circumstances of this marriage, the strength of the mother's compensatory claim and her means/needs, the duration of spousal support shall be for a period of four years.

[42] According to the Spousal Support Advisory Guidelines based on the father's imputed income of \$77,981.33 and the mother's income of \$20,264.40, monthly payments range from \$0.00 (low), \$81.00 (mid) and \$357.00 (high).

[43] The father shall pay spousal support to the mother in the monthly amount of \$357.00. I am satisfied the evidence substantiates the strength of the mother's compensatory claim for a monthly payment in that amount. I have considered the father's child support obligation and am satisfied he has the ability to pay spousal support to the mother in the amount as stated.

Conclusion

[44] On December 22, 2022, this Court approved a Varied Interim Order, addressing the father's parenting time. The mother requests that his parenting time remain as per the Varied Interim Order.

[45] During the trial on January 4th, 2023, the father failed to provide a position on the mother's request that his parenting time continue to take place in Nova Scotia and remain supervised.

[46] I have carefully considered the parties' viva voce and Affidavit evidence, applicable legislation, relevant case authorities and arguments. I find it is in the best interests of the children H. and M. that the following form the provisions of a Consolidated Order; combining the terms of the April 20th, 2022, Consent Order (Family Proceeding) with changes to paragraphs 3, 5 and 15, and addressing the findings of this decision:

Decision Making Authority

1. The parties shall have joint decision-making authority for major decisions regarding the children's education, health, religious upbringing and general wellbeing.

2. Each parent shall have access to third party information about the children. This includes without limitation, all medical and educational records.

Parenting

3. The mother shall have primary care and residence of the children.

Automobile

4. The father shall forthwith provide the mother with use of the Hyundai Elantra upon confirmation of payment that she has insured the car for her use.

Travel

5. The mother may travel internationally with the children with the written consent of the father, upon providing one month's notice with a detailed itinerary of travel, including contact information and proof of return tickets. Such consent shall not be unreasonably withheld.

Communication

6. Neither parent will speak negatively to, or about, the other parent or permit others to do so in the children's presence.
7. Neither parent will allow any person to make negative or disparaging comments to the children about the other parent or members of their family or household.

8. At all times, the parties will encourage the children to have a positive and respectful relationship with the other parent and members of the other parent's family and household.
9. Neither parent will discuss adult matters with the children or in their presence.
10. The parents will not question the children or comment to them about the other parent.
11. The parents will communicate civilly and will only discuss issues pertaining to the children.
12. Each parent can communicate virtually with the children at reasonable times by telephone, Facetime, Skype, or other means.

Parenting Time

13. The father shall have supervised parenting time with the children as follows:

- a.) Christmas: In odd years, the children shall be in the father's care from the end of school until December 27 at 2:00 pm. Thereafter, the children

shall be in the care of the mother until the return to school. This shall be reversed in even years.

- b.) The children shall be in the care of the father each summer, beginning one week after the end of school until one week before their return to school.
- c.) Additional parenting time for the father shall be made available upon 30 days notice should he decide to attend for a visit.
- d.) All parenting time exercised by the father shall be supervised by a supervisor mutually agreed to by the parties, pending further Order of the Court.
- e.) All parenting time exercised by the father will occur within the Halifax Regional Municipality, Halifax, Nova Scotia, pending further Order of the Court.

Transportation

14. The father shall provide transportation to and from the supervised parenting exchanges which shall take place in the building lobby or at the front of the mother's residence.

Passports

15. The parties shall cooperate to secure passports for the children and each shall provide any documentation or consents needed.

Child Support

16. The father shall pay child support to the mother in the guideline amount of \$1182.00 per month based on an annual imputed income of \$77,981.33.
17. The father's child support payments shall commence on January 1st, 2023, and continue on the first day of each month thereafter.

Spousal Support

18. The father shall pay spousal support to the mother in the amount of \$357.00 per month, commencing January 1st, 2023, and continuing on the first day of each month thereafter for a period of 4 years.

Payment of Child Support and Spousal Support

19. All support payments must be made payable to M.C.

20. The payments must be sent by I.C. to the Maintenance Enforcement Program, P.O. Box 803, Halifax, Nova Scotia B3J 2V2 while the order is filed for enforcement with the Maintenance Enforcement Program.
21. Both parties must advise the Maintenance Enforcement Program of any change to their address, within ten days of the date of the change.
22. I.C. must advise the Maintenance Enforcement Program of a change in location, address and place of his employment, including the date when his employment started or ended within ten days of the date of the change.

Enforcement Clauses

23. A requirement to pay money under this order, that is not enforced under the Maintenance Enforcement Act, may be enforced by execution order, or periodic execution order.
24. The sheriff must do such things as are necessary to enforce this order and, to do so, may exercise any power of a sheriff permitted in a recovery order or an execution order.

25. All constables and peace officers are to do all such acts as may be necessary to enforce the terms of this order and they have full power and authority to enter upon any lands and premises to enforce this order.

[47] Counsel for the mother shall draft the order.

[48] The parties may file written submissions addressing costs within 30 days following the order being issued.

Samuel C. G. Moreau J.