

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Hardie v. Hardie*, 2014 NSSC 123

Date: 20140403
Docket: 1201-56774
Registry: Halifax

Between:

Treena Lee Hardie

Applicant

v.

Stewart Ian Hardie

Respondent

Decision

Judge: The Honourable Justice Moira C. Legere Sers

Heard: March 25th, 2014, in Halifax, Nova Scotia

Counsel: Treena Lee Hardie, Self-Represented
Elizabeth Newton for Stewart Ian Hardie

By the Court:

[1] On October 15th, 2013, Ms. Hardie filed an application to vary the latest variation order dated April 15th, 2013. She advises that there has been a significant drop in her income since returning to Nova Scotia and wishes her obligations to be based on her actual income.

[2] She seeks an extension of the time set out in the order to pay the arrears and a reduction of arrears based on her actual income.

[3] In this latest variation order the Court determined Ms. Hardies' income to be \$128,781.50 by averaging her 2008, 2009, and 2010 income. The Applicant had not provided the Court her 2011 and 2012 income tax returns or reliable income information.

History

[4] Understanding the recent history will assist in addressing the variation application.

[5] The parties married on the 5th of October, 1991 and were divorced on the 23rd of October, 2006.

[6] There are three children, Kayla born Feb 2nd, 1995 (19); Rebecca born November 6th, 1997 (16); and, Amanda born June 9th, 2000 (13).

[7] There are Minutes of Settlement dated October 30th, 2002.

[8] The Corollary Relief Judgement dated September 21st, 2006 incorporated Minutes of Settlement entered into between the parties on November 28th, 2008 as varied by orders issued March 15th, 2004 and November 5th, 2004.

[9] There have been multiple changes and court orders over the history of this case.

[10] Post separation and divorce the children lived with the mother.

[11] In 2008 Kayla moved back to Nova Scotia to live with her father. In 2010 the mother moved to Nova Scotia. Kayla moved back in with her for one year and returned to live with her father on November 29th, 2011. Rebecca moved in with her father at the same time.

[12] On December 2nd, 2011 Amanda moved in with her father.

[13] In her decision Beaton J. found that by December 2011 all children were living with their father and have remained there since then.

Deemed Income 2011-2012 Forward

[14] As a result of these changes and with the limited income information on income confined to historical income the Court averaged her previous three years income with the unverified 2012 income and determined her current and prospective yearly income to be \$128,781.50.

[15] The Notice of Assessment for 2008 evidenced the Applicant's total income at \$137,575.00 of which \$31,570.00 represented commission income.

[16] In 2009 the Notice of Assessment indicated income of \$144,985.00 inclusive of \$29,781 in commission income.

[17] In 2010 the assessment evidenced income of \$145,566.00 including RRSP funds in the amount of \$22,623.00.

[18] In that proceeding, despite directions to disclose, the Court did not have the mother's 2011 or 2012 income tax return or Notices of Assessment.

[19] In reviewing the oral decision the Court did have the Applicants statement of income (an estimate) reflecting a 2012 income of \$87,000. With no verification and even though there were concerns about the reliability and the lack of variation

the Court gave the Applicant the benefit of using the 2012 lower income in averaging. 2011 income figures were not available.

[20] The Respondent's income particulars were also wanting. Beaton J. noted that she was unprepared to address Section 7 expenses in the absence of appropriate disclosure from the Respondent including income tax returns etc.

[21] Consequently the Applicant was ordered to pay child support to the Respondent in the amount of \$2,211.00. The Applicant was given a credit for support paid.

[22] The Court determined that child support owing for February 1st, 2012 up to and including February 1st, 2013 was \$26,743.00; payable in full on or before February 1st, 2014 or at the closing of the home sale then on the market; whichever date was earliest.

[23] The Applicant was ordered to pay the sum of \$2,211.00 from March 1st, 2013 forward.

Appeal

[24] Although the Applicant commenced an appeal she did not perfect the appeal.

[25] She testified before me that she was asked to pay a retainer of \$5,000.00 in legal fees to pursue the appeal with an estimate of a final cost of appeal in the vicinity of \$25,000 and believed that 98% of appeals are not successful. She decided she could not afford to appeal. This is entirely understandable.

Current Variation

[26] In this application the Applicant has filed multiple affidavits and letters, some before the hearing, and at the direction of the Court, further disclosure after the hearing. It took repetition of instructions to finally obtain income information confirming her submissions as to the material changes.

[27] In this proceeding the Respondent did not provide such verification and has not filed his income tax returns for a number of years. He argues that he cannot pay his accountant to finalizing and file his returns.

[28] I will proceed with what I have.

Facts/History

[29] The Applicant's 2011 Notice of Assessment shows employment income of \$120,862.18, inclusive of \$13,776.00 in commissions and RRSP income of

\$32,267.06. She advises she took the children to the Dominican Republic in March of 2011 using her RRSP funds.

[30] The RRSP funds were unavailable to her by the time the children moved into the Respondent's home late in 2011

[31] In August 23rd, 2011 the Applicant lost her job of 20 years. She was unemployed for a short period of time (approximately 5 weeks according to her). Her 2011 income tax summary filed post hearing shows RRSP funds.

[32] She advises she incurred legal fees of \$10,000 in a DUI matter.

[33] She became re-employed shortly thereafter in Nova Scotia.

[34] The income used to calculate child support in the last variation order determined by averaging was based on her past income was \$128,781.50. This was \$7,919.32 in excess of her actual 2011 income.

[35] The parties agree that her 2012 income was \$87,971.00 and \$93,622.29 for 2013.

[36] The Applicant earned \$40,810.00 less in 2012 than the average established in 2011 and \$35,159 less than that which she earned in 2013.

[37] The Applicant projects her base income at \$75,000.00 for 2014 forward with a possible commission of \$5000.00. She is not certain she will be able to sustain her employment if she cannot travel for business.

[38] Maintenance Enforcement has begun to enforce the last variation order due to non-payment.

[39] On the issue of enforcement of arrears calculated by Beaton J. for the period from February 2012 to February 2013; had the Court has access to the correct 2011 salary; the Applicant would have paid \$2,087.00. The difference in her payments would have been \$124.00 a month for a total of \$1,488.00 less per year.

[40] The RRSP funds available in 2011, would not necessarily be repeated or available in 2012 and subsequent years. To use those funds as an indication of future earnings would inflate the annual income picture unrealistically. I decline to use those in calculating prospective child support.

[41] On her actual 2012 income the difference is greater.

[42] It must be remembered that all three children did not move into the Respondent's home until December 2011.

[43] The 2012 child support obligation would, in the ordinary course, be based on 2011 income unless there was a material change in circumstances. In that case an application to Court could, if successful, result in a court order based on the actual income earned for the 2012 year.

[44] Had the Applicant provided her true 2012 income in a credible fashion the award of support from February 2012 to February 2013 would be based on \$87,971 for a monthly payment of \$1,570.92 which would have resulted in a lump sum payment of \$20,421.96 rather than the \$26,743.00.

[45] The arrears represent child support for the month of February 2012 to and including February 2013. By this time there were material changes in the Applicant's income. The mother should have paid in accordance with the guidelines the sum of \$1,570.92.

[46] This discrepancy resulted from the Applicant's failure to provide the Court with accurate, verifiable information.

[47] The other difference between the Applicants situation then and now is the downward trend in her income since she moved to Nova Scotia due in part to her employment and personal circumstances. The Court in her previous application

had an historical trend that, but for 2012, was significantly higher than the trend since 2012. On the evidence before me that trend appears to have been broken.

D.B.S. v. S.R.G. Factors (2006 SCC 37)

[48] Should the court retroactively vary the previous court order in these circumstances?

[49] The last order is to be respected unless amended by the Court Of Appeal.

[50] I do not intend to go behind the previous order. I have insufficient evidence to justify a retroactive re-evaluation.

[51] *D.B.S v. S.R.G.* may give the Court some leeway to retroactively vary or forgive or prevent enforcement of previous orders where justice demands.

[52] However the Court in *D.B.S.* determined the factors the Courts must consider and spoke specifically to situations where arrears existed.

[53] The Applicant in this case simply did not respond to the directions to disclose. This conduct would be considered blame-worthy.

[54] The Applicant has tended to make pleas and submissions about her income rather than provide to the Court actual verification.

[55] It was only after this hearing that the Court received verification of her 2011 income.

[56] The ability to supply verification income lies with Applicant. She has had difficulty organizing her efforts to put the Court in the position of making a viable award based on a true reflection of her circumstances.

[57] It would offend the concept of finality if a litigant could simply fail to provide the required documentation and demand a rehearing when they finally submitted information that was well within their control.

[58] The Applicant argues that the lump sum award will not benefit the children; rather it will be paid towards the Respondent's legal fees. The payment of child support will clearly benefit at least the two younger children who are well within the bounds of dependency. It will also assist to stabilize the household which will benefit the oldest child.

[59] As a final consideration in assessing whether the arrears as decided at the previous variation should be varied, reduced or stayed I consider the issue of costs. The failure to provide necessary information at the last variation resulted in an order. Beaton J. considered the question of costs, found that each party was successful on some points and directed that each bear their own.

[60] The actions or failure of the Applicant to properly disclose in the previous variation resulted in this application. The Respondent retained counsel. The parties have had to appear twice before this court.

[61] Should costs be considered here certainly the Court would be justified in assessing costs to reflect the late disclosure even when the Applicant has been partially successful.

[62] Thus taking a global view if I were to justify reducing the award based on the Applicant's actual salary I would also have to consider why this occurred and was it preventable. Certainly it was.

[63] While the mother may pay more on those 13 months she will not be burdened with an award of costs.

[64] The Respondent may benefit from child support based on an income higher than that which existed but he may well be entitled to costs. Having said that he has not provided adequate information to decide Section 7 expenses.

[65] The Applicant will be able to pay this award out of the proceeds of the sale of her home particularly should she get the best price possible in the best market

available for her home. She will also be able to use the remaining funds towards her own indebtedness.

Post April 2013 Order

[66] It is not appropriate however to continue to calculate child support on an income that does not exist.

[67] Clearly, whether one uses the average or actual income going forward for 2012, 2013 and 2014, her earning potential is materially different from the income she earned in Ontario both as to base amount and commission.

[68] In 2013, following the court order from May 1st 2013 onward, the sum of \$1,659.83 per month is the proper amount of child support based on the Applicant's actual income. This is \$551.17 less than what was previously ordered.

[69] From May to December, 2013 her arrears shall be reduced accordingly.

[70] In 2014, based on a projected income of \$80,000, she should be paying \$1,441.00, a difference of \$770.00 per month commencing in January 2014.

[71] I have considered whether to include her anticipated commission income in her annual salary. I have decided to do so, based upon her historical earnings in

which commission income has played a part. In doing this the onus is on the mother to advise and disclose should her commission income change.

[72] The figure reflecting her anticipated commission of \$5,000.00 came from the mother.

[73] I will rely on those submissions with the caveat that the mother shall verify her actual total income and provide that to the Respondent and to Maintenance Enforcement on or before December 31st, 2014 or before the equity in the home is disbursed, whichever is earlier.

[74] She must verify the actual commission at the end of the year for a retroactive adjustment.

[75] Maintenance Enforcement shall recalculate the arrears based on an obligation to pay child support of \$1,659.00 per month for May 2013 to year end.

[76] For the 2014 year she shall pay commencing in January 2014 the sum of \$1441.00 per month on the 1st of each month until further order of the Court.

[77] Should there be a material change in her circumstances the onus rests with the mother to make a timely application, to adequately disclose her circumstances, to advise the father forthwith of those changes, to avail the parties of the

opportunity to adjust their expectations accordingly and to enter into consent or to put the matter before the Court in a timely fashion.

[78] Should, through matters beyond her control, she have overpaid based on her actual income that overpayment may be considered again arrears owing and applied as a set-off.

The Sale of the applicant's Home

[79] The Applicant's home was purchased when she returned to Nova Scotia for \$400,000. When she returned to Nova Scotia the children were living with her.

[80] At the time of the February 2012 hearing the Applicant's home was for sale.

[81] In 2012 the listing price was \$435,000. No offers were received.

[82] After the first listing agreement expired the Applicant listed the property with another realtor for one year. Half way through the year reduced the price to \$425,000.

[83] After this listing agreement expired she contracted with a third realtor for a 90 day contract at the same price.

[84] It has been suggested she drop the price again. She wishes to wait until spring (the month of April) hoping for an improved market. If she receives no offers she proposes to drop the price again to \$415,000 and thereafter to \$408,000 mid May 2014.

[85] I have no information that would cause me to believe that the Applicant is unreasonably prolonging sale. Indeed a sale would ease the financial pressure and will allow her to catch up and more easily cover her expenses.

[86] If the home were to sell for \$400,000, she may be able to satisfy the arrears of her two mortgages, real-estate fees, HST legal fees, the Irving, water account, power and lawn account and have less than \$10,000 to address some of her own overdue bills.

[87] The Court is not in a position to demand that the property be listed at a certain price without sufficient evidence of market value.

[88] The Applicant seeks to extend the time period to pay the arrears.

[89] She is unable to obtain credit. She has provided evidence of CitiFinancial's refusal of her request to add to her loan, a second mortgage on the property.

[90] Her car payment, oil bill, water bill and lawn maintenance bill are in arrears. These bills will need to be satisfied to facilitate sale.

The Oldest Child

[91] Currently the oldest child is not in school and has deferred her bursary and acceptance from September 2013 to September 2014. Both parents are aware that the oldest child currently has special needs. The mother is agreeing to continue to pay in spite of the fact she is not attending school to encourage her to recovery sufficiently to enter university in September 2014.

[92] Were she to insist the oldest child be removed from the order her payments would be \$387.00 less. She has not done so.

[93] The Respondent shall forthwith advise the Applicant when the child's plans to attend university are solidified, advise her by copy of her letter of acceptance and registration and keep her informed as to her attendance. In particular, he is to advise the mother immediately should she withdraw.

[94] Failing this the parties may apply to vary the order to reflect payment for the children dependant after September 2014.

[95] I am mindful that the goal is to keep the mother appropriately employed to ensure she is in a position to support her dependent children.

Extension

[96] It is reasonable to allow an extension to August 1st, 2014 on the payment of lump sum arrears. This does not prohibit enforcement of current monthly payments.

[97] The Respondent is entitled to secure his current lump sum arrears. The Applicant shall cooperate to ensure this security is provided.

[98] Thereafter, whether the home is sold or not the Respondent can seek to have judgement in addition to any other legal remedy available to him.

[99] The Applicant shall ensure the lump sum support is paid out after secured mortgages with the ordinary disbursements and before her other indebtedness.

[100] In the meantime the suspension on enforcement will continue and end on August 1, 2014 at which time it will be automatically lifted.

[101] The Applicant will have by this extension, time to consider a reduction in price, time to have the home on the market with a reasonable price and effect sale

within a timely fashion that will not overly prejudice the respondent and will allow her ample time to effect the reductions necessary to effect a sale and put her finances in order.

[102] Counsel for the Respondent shall draft the order.

Legere Sers, J.