SUPREME COURT OF NOVA SCOTIA

(FAMILY DIVISION)

Citation: *James v. Lapenna*, 2014 NSSC 161

Date: 20140508

Docket: 1201-063289 (SFHD-062696)

Registry: Halifax

Between:

Frederick Mark James

Applicant

v.

Beverly Marilyn Lapenna

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: April 8, 2014 in Halifax, Nova Scotia

Counsel: Eugene Tan, counsel for the Applicant

Beverly Lapenna, self-represented

By the Court:

[1] In this decision I have not named the companies contracting with Mr. James because with the advent of internet publication personal information becomes accessible to anyone with a search engine. I do not consider it appropriate for the public to know the names of those companies nor what each paid Mr. James.

[2] On May 13, 2013 Mr. James filed an application requesting a variation to a Consent Variation Order issued March 22, 2012. He also requested changes in respect to custody and access but he has abandoned that request at this hearing. His primary focus was to change the amount of child support he was required to pay including section 7 expenses. The alleged changes in circumstances are the reduction in his annual income and the eldest child's non-attendance at University for a semester.

[3] The Order issued March 22, 2012 required Mr. James to pay table guideline child support for three children in the amount of $2,303.00 each month and, in addition, $319.19 each month as his proportional share of the following section 7 expenses: child care for the summer and during March break for two children, boys and girls club after school care for one child, return flights for the eldest child to come home from university on three occasions during the school year, cheerleading for one child, glasses for one child, lunch program for two children,

hockey dues for one child. No change was made to the requirement in the Corollary Relief Order dated October 6, 2010 that Mr. James "must pay all hockey expenses for one child when they are due" and "any other section 7 expenses the parties shall mutually agree upon". The Order did not define "hockey expenses".

[4] When Mr. James and Ms. Lapenna consented to the Variation Order Mr. James, who is a self-employed consultant, was working under contract with "A" company. The parties agreed his yearly income for the purposes of child support would be $135,000.00. The beginning of the problem resulting in this court application originated with the assumptions the parties made based upon that contract. Neither considered the possibility the contract would end and that Mr. James would be unable to obtain new contracts that would pay him a similar income.

[5] In July 2012 the Atlantis contract was not renewed and although Mr. James negotiated a contract with "M" company, his total yearly income for 2012 was, according to the Income Tax Return he filed with the court, $78,500.00, not the expected $135,000.00. If the invoices he filed do represent all the income he received in 2012 there appears to be an error in his math. With exception of the amounts paid for HST the total amounts reflected in those invoices is $68,000.00. If you include the HST component the total amount is $78,200.00.

[6] The parties in previous negotiations had deducted some amount from gross sales to reflect the expenses Mr. James would have as a self-employed person. The 2012 Income Tax Return he filed does not reflect a deduction for the HST shown on the invoices. He did not attach a Statement of Business Activity that is to be filed by the self-employed. If he is required to remit the HST to the Canada Revenue Agency that may represent an appropriate reduction to gross income when calculating child support. If this is not taken into account these parties will very shortly be back before me or some other judge to readjust their affairs because there is not enough money to make expected payments. I have considered this dilemma in my evaluation of the retroactive recalculation claims and I have used the invoiced amounts less the HST in my calculation of Mr. James annual income.

[7] In May 2012 Mr. James was informed the parties' eldest child intended to sit out a semester from her university and she did so from September 2012 until January 2013. He considered her no longer to be a dependent from May 2012 until January 2013 and had discussions with Ms. Lapenna about a reduction in his child support payments to reflect his reduction in income and the change in the status of the eldest child. Ms. Lapenna did agree to a reduction but neither party agreed on the same terms for that deduction. Eventually, because she was not receiving what she expected, Ms. Lapenna requested enforcement of the original amount of child

support through the Maintenance Enforcement Program resulting in Mr. James loss of his driver's license. He requires that license to perform his work. The enforcement proceedings prompted Mr. James' application. The Maintenance Enforcement collection efforts were suspended pending other resolution of this matter. Mr. James has continued to pay child support although not in the amount originally required by the Consent Variation Order.

[8] From January 2013 until May 2013 Mr. James total income was, according to the invoices he provided, exclusive of HST, $27,500.00. This income came from his contract with "M" company. That contract expired on May 30, 2013. Since that time Mr. James has not received any income even though he negotiated a contract for services with "E" company effective October 1, 2013. That contract will not provide him income until he brokers sales of its products. He will receive 5% of total sales concluded. There is no permanency in this arrangement. He does expect to receive income from sales resulting from a contract his is now pursuing on behalf of "E" company. Because of this he has suggested his 2014 income should be assessed at $66,000.00. I do not know how he come up with that number and I am concerned, if by next year he has not reached this goal, Ms. Lapenna will be faced with another variation application. There appears to be nothing I can do to remedy this situation because Mr. James has not presented anything more than

expectations. These have failed both parties in the past. The reality is Mr. James is working in a precarious industry and his income will remain uncertain from year to year.

[9] Who should bear the consequences of his present and possibly future decrease in income? Neither party contemplated the possibility of his reduction in income at the time they entered in to the consent order although perhaps they should have. Should the court now recalculate based on the actual income earned by Mr. James or should it expect Mr. James to make the necessary financial adjustments to deal with his failure to reach his level of expected income and if so for how long should the court ignore his decreased income?

[10] Ms. Lapenna argues I should ignore the decreases in Mr. James income and impute income at $135,000.00. I should order him to pay all the hockey expenses as required by the Consent Variation Order, order him to comply with paragraph 5 of the Consent Variation Order and paragraph 5 A of the Corollary Relief Order issued October 6, 2010.

[11] Paragraph 5 of the Consent Variation Order states:

> Frederick Mark James is to obtain a policy of life insurance at a sufficient amount of replace his child support obligations upon his death, for so long as he is obliged to pay child support.

[12] Mr. James has no life insurance. He asserts he cannot afford to purchase life insurance based upon his present circumstances. I have no evidence before me about the cost to obtain this insurance. It remains as a requirement of the previous order. He suggests he will earn $66,000.00 this year. He has not convinced me that I should vary that provision because of his inability to obtain that insurance. If he continues to be in violation of this provision the only recourse for Ms. Lapenna is to make an application to enforce this provision of the order.

[13] Paragraph 5A of the Corollary Relief Order states:

> Frederick Mark James must continue to provide medical, dental, and drug plan coverage for the children and Beverly Marilyn Lapenna available through his present or subsequent employer and Frederick Mark James must see that the other party is reimbursed without delay after a receipt is delivered by the other party for submission to the insurer.

[14] This provision was inserted at a time when Mr. James was an employee. He is now self-employed. He has no medical, dental or drug plan of any kind. I am asked to order him to obtain this coverage. It is doubtful he can obtain coverage for Ms. Lapenna. He says he cannot afford to buy any plan even a plan to cover the children's needs. Neither party provided information about the cost of such a plan for an individual. Mr. James has proven a material change in his employment situation. He has not failed to abide by the requirements of paragraph 5A. It is Ms.

Lapenna who now requests the variation to require him to independently purchase a medical, dental and drug coverage plan. I have no information from her about the availability of these plans or the likely cost of coverage. She carries the burden of proof in this instance. I will not require Mr. James to purchase this coverage at this time. She is always free to pursue a section 7 claim for any of these expenses that meet the section 7 criteria for a proportional sharing of the expense.

[15] Section 19 (1) of the *Federal Child Support Guidelines* permits a Court to impute such amount of income to a spouse "as it considers appropriate in the circumstances," which circumstances include 9 defined situations. The defined situations are not an exhaustive list and the section gives the court a significant amount of discretion in imputing income. The enumerated circumstances that may be relevant in this case are:

> (a) the spouse is intentionally underemployed or unemployed, other than where the underemployment or unemployment is required by the needs of the child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so;

[16] These provisions effectively require court not only to consider the amount of income a spouse actually earns but also the amount of income that spouse could

earn if he or she was working to capacity. The age, education, experience, skills and health of the payor are factors to be considered in addition to such matters as the availability of work, the freedom to relocate and other obligations. However, persistence in unremunerative employment may entitle a court to impute income. The financial obligation to support children should not be reduced to assist a parent who is pursuing unrealistic or unproductive career aspirations.

[17] Courts in Nova Scotia and some other provinces have concluded that this section of the guidelines is not confined to circumstances where a parent deliberately seeks to evade his or her child support obligations or recklessly disregards his or her children's financial needs while pursuing his or her personal choice of employment or lifestyle. It also applies to those who have not taken reasonable steps to secure or maintain employment commensurate with his or her age, health, education, skills and work history.

[18] The argument Ms. Lapenna has put forward to suggest income should be imputed essentially is as follows:

> This is not the first time Mr. James has come to court arguing that his income is reduced. On previous occasions, as in this case, he has permitted his child support to go into arrears only to be required to pay back those arrears because it became apparent he did not have a decrease in income. He has not produced appropriate financial records. He has not filed his 2012 Income Tax Return with the Canadian

> Revenue Agency and anything he produces should be suspect. He has bullied me in the past to have me agree to reduce his child support and then he does not live up to his promises. He has been able to pay his own expenses even when he says he has no income and this suggests he has access to income he has not declared.

[19] In answer to this, my understanding of Mr. James' reply is:

> We as a family lived beyond our means. At our Divorce I took over more debt than I could pay and as a result I declared Bankruptcy in 2011. This delayed preparation of my 2012 Income Tax Return. In the previous variation, I did not know where my income would come from but in the course of my variation request I obtained the contract with " A" company. I did not consider what would happen if that contract was not renewed and did my best to find other businesses that would contract for my consulting service. I continue to seek out additional contracts. I am 55 almost 56 years old and I am doing what I can to earn income with the skills I have. My partner has been supporting me when I have no income to contribute to our joint living expenses. I have given this court everything I have to confirm all the money I have earned to date.

[20] The discretionary authority to impute income must be exercised judicially in accordance with the rules of reason and justice. It is not to be exercised arbitrarily.

There must be a rational and solid evidentiary foundation in order to impute income. The burden of proof rests with the person seeking to impute income. In this case that burden rests upon Ms. Lapenna. Other than the fact that Mr. James was once employed by the Provincial Government earning $93,000.00 and obtained two contracts in 2012 for the provision of services that provided him a total annual income of $68,000.00 I have no evidence about his education, training, and experience except in respect to a question I asked him about what it is he does to earn a living. I do not know whether his skill set would make him employable elsewhere. His answer to my question suggests his skills may not be highly sought after and this observation may be supported by the fact his previous contracts have not been renewed. I have no information to determine whether there is other work likely available to him that he should be pursuing. I cannot make the finding he is intentionally unemployed or underemployed.

[21] Mr. James has suffered a decrease in his income. He has disclosed all sources of income to date. I will not impute income to Mr. James but I will accept what he suggests he will earn in 2014. I have no other means by which to determine his income. This will represent a decrease in the table guideline amount of child support payable to Ms. Lapenna. The monthly amount required for three children will be $1,202.00 commencing January 1, 2014.

[22] Ms. Lapenna claims for section 7 expenses, retroactively and prospectively. The problem with these expenses is they can change from year to year and disputes arise as a result. Disputes also arise when the parties' incomes change. Most parents do not sit down each year to recalculate these expenses and then file consent variation applications. Instead the court is faced with retroactive recalculation applications for past section 7 expenses often without appropriate supporting documents and after tax calculations. While proportional sharing appears fair and just in theory, it is impractical for most parents and causes more disputes than it resolves. In this case the parties have argued about whether "all the hockey expenses" includes training camps, tryouts and purchase of a team jacket. The annual section 7 expenses claimed by Ms. Lapenna total $3,775 for 2012, $3,354.00 for 2013 and $3,015.00 for 2014. I was provided a statement for 2012, and 2013 produced by the software program known as ChildView for the purpose of calculating the net cost of the section 7 expenses. Unfortunately the 2012 and 2013 income amounts for Ms. Lapenna do not match the line 150 income on her Notices of Assessment from the Canadian Revenue Agency even after deducting the R.R.S.P. income. I consider it appropriate to deduct R.R.S.P. income because it is not a continuing source of income. Doing so may not be appropriate in every case. In 2012 Ms. Lapenna's earned income was $36,253.00 and in 2013 it was

$39,967.00. In 2014 she estimates her income will be $40,735.00. Both the 2012 and 2013 ChildView calculations were based upon an income of $40,735.00.

[23] I do not know what Mr. Lapenna's 2014 section 7 expenses will be except to observe that given the age of the two younger children, those expenses likely will be similar to 2013. Using those expenses for child care and extracurricular expenses including one child's hockey expenses, Mr. James income at $66,000.00 and Ms. Lapenna's income at $40,735.00 I have determined that Mr. James monthly share of the net cost of those expenses is $130.00. He will commence paying that amount January 1, 2014. It includes his contribution to Hockey expenses as they have been calculated by Ms. Lapenna. Although the Corollary Relief Order required him to pay all the hockey expenses in this proceeding she proceeded on the basis of proportional sharing to ensure she would receive some regular contribution toward this expense, which may require different amounts from year to year. If she remains unable to financially support this recreation she may be forced to make the difficult decision to remove the child involved from this sport.

[24] Both parties have requested a retroactive recalculation of the table guideline and section 7 child support. The Supreme Court of Canada in *S.(D.B.) v. G.(S.R.)*

2006 SCC 37, (D.B.S.) described the factors the court is to consider when a retroactive variation of child support is requested; they are:

1) whether there is or is not an existing court order or agreement
2) status of the child/children
3) delay by the recipient in seeking the award
4) conduct of the payor parent
5) financial circumstances of the child/children
6) hardship imposed by a retroactive award

[25] The Supreme Court addressed the quantum to be awarded retroactively and agreed that the quantum must fit the circumstances. *"Blind adherence to the amounts set out in the applicable Tables is not required ---- nor is it recommended." (para.128)*. The presence of undue hardship can yield a lesser award. Sections 3(2), 4 and 9 are other areas where there is discretion to determine quantum.

[26] In *DBS* the court directed that "a broad consideration of hardship" is appropriate. Calculations required by section 10 of the child support guidelines are not mandated. One essential question is whether there is a capacity to pay the

retroactive award taking into account the ongoing child support payments and the payor's legitimate requirement for sufficient financial means to support himself and exercise the parenting considered appropriate in a parenting plan. This generally requires an examination of the payor's expenditures, for housing, food, recreation, transportation etc. that will of necessity be higher than the expenditures made by a single person with no dependents.

[27] Because I have decided not to impute Mr. James' annual income for 2012 and 2013 in the amount of $135,000.00, Ms. Lapenna's retroactive recalculation claim is dismissed.

[28] I prepared a chart attached as Schedule "A" to assist me in evaluating Mr. James request for a retroactive recalculation. I have used the income received by Mr. James excepting the HST for 2012 and 2013 and, in determining his portion of the section 7 expenses, I have used the incomes I calculated for Ms. Lapenna excluding her R.R.S.P. income. I have used Ms. Lapenna's calculations of the section 7 expenses for 2012 and 2013 and calculated the net cost of those expenses to determine Mr. James proportional share. As will be seen from the chart, a retroactive claim would require Ms. Lapenna either to pay money back to Mr. James or wait until his overpayment was corrected over time by applying a credit to the prospective child support he is required to pay.

[29] There is a pre-existing court order requiring Mr. James to pay child support. The status of the oldest child was questioned by Mr. James. I find that, although she did not attend a semester at her university, she was not self-supporting during the months she resided with Ms. Lapenna. Her employment income did not permit her to "withdraw from her parent's charge or obtain the necessities of life". She remained a dependent child and will continue to be a dependent child while enrolled in university until she completes her degree.

[30] Although Mr. James did not file an application to vary as soon as it was apparent he would have a decrease in income, his failure to do so does not constitute the type of delay that has been considered significant to an assessment of a retroactive claim.

[31] Mr. James did try to negotiate a change in child support to avoid a court application. However, he did not disclose to Ms. Lapenna exactly what was contributing to his decrease in income or how he was supporting himself in the meantime. She eventually believed he was lying to her about his circumstances. His behaviour may, by some, be described as blameworthy but I do not consider that his behaviour justifies a dismissal of his retroactive claim.

[32] The most important factors in reaching my decision are the considerable reasonable financial needs of these children and the limited financial means

available to Ms. Lapenna. The financial cost to provide the necessities and the children's recreation is beyond her means. These children have always been able to engage in recreational activities, including hockey, prior to their parents' separation. They will be the persons who will suffer if resources cannot be found to continue the life they knew before the separation. Ms. Lapenna will have continuing difficulty budgeting for those expenses because an income tax reduction does not put actual cash in her pocket unless she is entitled to an income tax refund. However that refund is not immediately available to pay for the recreational expenses. Ms. Lapenna cannot meet the children's financial need if she does not receive monthly child support. Granting Mr. James request for a retroactive recalculation would cause her and the children considerable hardship. They should not bear the burden of Mr. James inability to find remunerative employment. He has found the money to pay what he has since July 2012. That money has been spent for the benefit of these children. I dismiss his claim for a retroactive recalculation.

[33] Counsel for Mr. James is to prepare the Order incorporating my decision. Neither party has been the "successful" party and as a result each shall bear his and her costs incurred in this proceeding.

Beryl A. MacDonald, J.

Schedule "A"

Month	Yearly Income	Table Support	Section 7	Actually Paid
July 2012	$68,000.00	$ 1,237.00	$ 143.00	$ 2,664.78
Aug 2012	$68,000.00	$ 1,237.00	$ 143.00	$ 5,201.77
Sept 2012	$68,000.00	$ 1,237.00	$ 143.00	$ 3,500.00
Oct 2012	$68,000.00	$ 1,237.00	$ 143.00	$ 3,000.00
Nov 2012	$68,000.00	$ 1,237.00	$ 143.00	$ 500.00
Dec 2012	$68,000.00	$ 1,237.00	$ 143.00	$ 1,250.00
Jan 2013	$27,500.00	$ 543.00	$ 86.00	$ 0.00
Feb 2013	$27,500.00	$ 543.00	$ 86.00	$ 1,202.00
March 2013	$27,500.00	$ 543.00	$ 86.00	$ 0.00
April 2013	$27,500.00	$ 543.00	$ 86.00	$ 1,311.10
May 2013	$27,500.00	$ 543.00	$ 86.00	$ 8,805.59
June 2013	$27,500.00	$ 543.00	$ 86.00	$ 0.00
July 2013	$27,500.00	$ 543.00	$ 86.00	$ 1,202.00
Aug 2013	$27,500.00	$ 543.00	$ 86.00	$ 0.00
Sept 2013	$27,500.00	$ 543.00	$ 86.00	$ 300.00
Oct 2013	$27,500.00	$ 543.00	$ 86.00	$ 300.00
Nov 2013	$27,500.00	$ 543.00	$ 86.00	$ 500.00
Dec 2013	$27,500.00	$ 543.00	$ 86.00	$ 0.00
Jan 2014	$66,000.00	$ 1,202.00		$ 0.00
Feb 2014	$66,000.00	$ 1,202.00		$ 1,202.00
March 2014	$66,000.00	$ 1,202.00		$ 1,202.00
Totals		$17,544.00	$1,890.00	$32,141.24