SUPREME COURT OF NOVA SCOTIA

Citation: Putnam v. Putnam, 2010 NSSC 115

Date: 20100331
Docket: 1207-002218
Registry: Truro

Between:

Carrie Mae Putnam

Applicant

v.

Shawn Wayne Putnam

Respondent

Judge: The Honourable Justice Arthur J. LeBlanc.

Heard: January 21, 2010, in Truro, Nova Scotia

Counsel: Peggy Power, for the applicant
Peter Lederman, Q.C., for the respondent

By the Court:

[1] This is an application to vary child support. The parties divorced on August 20, 2003. They agreed to share custody and primary care of the children of the marriage, David (March 22, 1994) and Shania (May 25, 1996). Since March 2009, Shania has been in primary care of the applicant while David has continued in the shared custody arrangement. Mr. Putnam re-married and has two children from his second marriage. Mrs. Putnam has established a new relationship with Craig McLaughlin. They have no children.

[2] When the parties separated and subsequently divorced, the children of the marriage spent equal time with each parent. Their respective residences were close to each other, enabling the children to go easily from one household to the other. The children could get on the school bus at either house, permitting them to be in each home about half the time.

[3] Under the original arrangement, Mr. Putnam paid child support of $425.00 per month under the *Federal Child Support Guidelines* and covered section 7 expenses. He also agreed to maintain the two children on his medical and dental plan. He also paid costs of hockey, soccer and other extracurricular activities, as well as excess orthodontic and dental expenses.

[4] At the time of the divorce Mr. Putnam was earning about $44,000 annually as a manager of a family-owned cement operation. He had an ownership interest in the business. The business was sold in 2006, and Mr. Putnam continued to be employed as Operations Manager. In 2006, in addition to his salary, he received a one-time signing bonus of approximately $55,000. He is provided with a vehicle and gasoline, paid for by the business.

[5] The respondent and his brother co-own a gravel pit and a rental property. Since 2006, the respondent has received significant royalty payments from the sale of gravel. These payments are shared equally with his brother.

[6] In 2004, Mr. Putnam bought a farm from his uncle, intending to develop a beef cattle operation. After concluding that this enterprise would not succeed, in 2005 he became involved in raising and breeding horses, making significant investments to buy stallions, and obtaining significant loans to this end. He also improved the farm. He claims that he has one of the best stallions in the Maritime Provinces, and has used it for breeding purposes. He stated that he had several yearlings for sale. One of the young horses is primarily for the benefit of his son. Mr. Putnam has lost money running the horse operation. His expenses include interest, supplies, legal and accounting fees, property taxes and insurance. He has attempted to increase the farm revenue by starting a “mud bog event” where

competitors and the public pay an admission fee. He has also attempted to lease part of the farm land, to only marginal effect.

[7] Ms. Putnam works as a waitress, earning about $2400.00 monthly, including tips and a payment from her partner's company, for which she does some additional work. This is how Mr. McLaughlin pays his share of household expenses. Ms. Putnam also receives the child tax credit for the two children.

[8] Ms. Putnam maintains that the Mr. Putnam has not increased the *Guidelines* child support payments since the Corollary Relief Judgement. She says she has contributed to the costs of some of the extracurricular activities, such as hockey, has driven the children for appointments, including medical, dental and orthodontic appointments.

[9] Mr. Putnam has reported the following income in 2006 to 2008 inclusive:

Year	Item	Amount
2006	Income	$105,973
	Rental income	$23,313
	Total	$129,300
2007	Income	$54,000
	Rental income	$102,814
	Total	$156,800
2008	Income	$58,900
	Rental income	$49,562
	Total	$108,400

[10] Mr. Putnam has reported losses of $112,000, $120,000 and $65,000 respectively, in the years 2006, 2007 and 2008. These losses are attributable to his farming operation, and has the effect of reducing his annual income by a significant amount. Ms. Putnam argues that I should reject any deduction for farming losses and impute income to Mr. Putnam under s. 19 of the *Child Support Guidelines*.

[11] Mr. Putnam says there is no hidden motive underlying the farm losses, that is, the losses are not evidence of an attempt to minimize the amount of child support he pays. Rather, he insists, these are legitimate expenses and real losses, recognized by the Canada Revenue Agency.

[12] The pertinent provisions of the *Federal Child Support Guidelines* include sections 1, 15, 16 and 19. Those sections state, in part:

> 1. Objectives
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> 1. The objectives of these Guidelines are
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> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
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> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) to ensure consistent treatment of spouses and children who are in similar circumstances.

....

15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

....

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.

....

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:

....

(d) it appears that income has been diverted which would affect the levels of child-support determined under these Guidelines;

(e) the spouse's property is not reasonably utilized to generate income;

> (g) the spouses unreasonably deducts expenses from income;
>
> ....
>
> Reasonableness of expenses
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> (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

[13] The respondent is making a genuine attempt to run a successful farming operation. He quickly realized that the beef operation would not be profitable, and turned his attention to raising and breeding horses, acquiring an expensive stallion for this purpose. He has found that the stud business is very competitive, and has had to lower his fees in the face of competition. He has sold some of the offspring and several more await sale. He has started to build stables to house other horses, and to develop a practice barn and ring. He has even attempted to develop his property as a place to compete with off-road vehicles. There is no indication when the farming operation might turn a profit, but the respondent concedes that the 2009 results will likely be the same as 2008.

[14] Child support payments are based on the income of the payor spouse. In the event that there is evidence that not all of the payor's income is being made available for the purposes of child support, the court can consider whether this is as result of an unreasonable decision by the payor. The leading decision in Nova Scotia on imputing income and the reasonableness of the conduct of a payor spouse is *Montgomery v. Montgomery*, 2000 NSCA 2, 182 N.S.R. (2d) 184. The payor, who had been a director in a government department, resigned his position in order to complete a 12-month articling period so that he could be admitted to the Bar. He had been earning $60,000 annually, and took a considerable reduction as an articled clerk. He sought a reduction of his child support payments, claiming he had the potential to earn higher income into the future. The Court, *per* Pugsley, J.A., stated at paras. 35-37:

> [35] Section 19 does not establish any restriction on the court to imputing income only in those situations where the applicant has intended to evade child support obligations, or alternatively, recklessly disregarded the needs of his children in furtherance of his own career aspirations.

> [36] The critical word, in my view, is the word “reasonable”. It is only the “reasonable” educational . . . needs of the spouse” which should be taken into account.
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> [37] The issue of reasonableness, in my opinion, should not be confined to an examination of the circumstances surrounding the applicant alone, but of all the circumstances, including the financial circumstances of the children, in order to ensure that they receive a fair standard of support as set out in the objectives to the Guidelines.

[15] While the payor spouse contended that short-term pain would result in long-term gain for both himself and his dependents, he acknowledged that it might take ten years after his admission to the Bar to reach his previous income level. The court said, at para. 41:

> The appellant suggested that if he was successful in securing a position in private practice after he completed his articles, his prospective earnings could exceed very shortly the salary he received from the Department of Environment. However, there was no evidence before the Chambers judge of the likelihood of this scenario. If it was a realistic game plan, one wonders why there is no evidence the appellant had made any attempt to arrange bridge financing from a financial institution before the one-year period.

[16] **The Court of Appeal affirmed the chambers judge’s dismissal of the payor’s application to decrease his child support obligation.**

[17] Without meaning to second-guess the business decision of the payor spouse, he remains under an obligation to pay child support. The Court has a duty to determine whether the decision to purchase the farm and start a beef cattle operation, and then a horse breeding operation, was reasonable in the circumstances.

[18] Two Saskatchewan decisions are pertinent to the question of the deductibility of farming losses when considering income for child support purposes. I n *T.L.K v. D.N.K.*, [1999] S.J. No. 401, 182 Sask.R. 318 (Sask. Q.B. (F.L.D.)), in determining the father's income for the purpose of child support, the court discussed the non-deductibility of farm losses from off-farm income. McIntyre, J. stated, at para. 43:

> The respondent has in the past had off-farm income, which in some years has been significant. While offsetting farm losses provides an advantage to the respondent of lowering the tax to be paid on the off-farm income, those losses should not, as a rule, be used to reduce the recognition of off-farm income as income for the purposes of the *Federal Child Support Guidelines* [SOR/97-175, as am.] (the "Guidelines"). Off-farm income should prima facie represent income from which child support may be paid.

[19] This approach was endorsed by the Saskatchewan Court of Appeal in *Myketiak v. Myketiak*, 2001 SKCA 17, 13 R.F.L. (5th) 431. In that case, the father sought a reduction of his child support obligations, which was set in accordance with an income of $46,500, to a level in accord with an income of $28,000. The basis for the reduction in income was a series of annual farming losses that offset the father's employment income. The Court of Appeal said, at paras. 19 and 20:

> [19] In this case the appellant relied upon continuing farm losses starting in 1996 as a basis for deducting all of these losses from "employment income" for the purposes of computing child support. The testimony at trial indicated that such losses were likely to continue unless the appellant rearranged his affairs. In the circumstances it was open to the trial judge to rule as he did. Furthermore the appellant's father testified that renting farm land is an option where farming operations are "consistently losing money".
>
> [20] If the appellant chooses to operate his farm at a loss over such an extended period, he cannot expect his former wife and children or the public to subsidize such operations when there are reasonable alternatives open to him.

[20] The trial judge in *Myketiak* had concluded that "the *T.L.K. v. D.N.K.* case approach to the non-deductibility of farm losses against off-farm income is the appropriate approach" in the circumstances. The trial judge stated at para. 41 (cited by the Court of Appeal at para. 18):

> [41] In the absence of evidence or argument dealing with these farm expenses and the various inventory adjustments and their treatment as a function of costs

> and expenses actually incurred in the crop year it is difficult and inappropriate to speculate as to the actual impact that the farm operations should have upon the determination of Wesley's income for guideline purposes. This is particularly so when one considers the tax refund which was received annually, but will not now be received and its impact upon Wesley's overall income....

[21] In *Motyka v. Motyka*, 2001 BCCA 18, 12 R.F.L. (5th) 421, the British Columbia Court of Appeal considered an appeal in an application for relief from child support obligations in light of losses sustained in pursuit of a real estate venture in the United states. Finch, J.A. stated, at para. 18:

> These arguments, in my respectful view, do not relieve Mr. Motyka of his obligation to provide appropriate financial support for his children. By pursuing real estate development in the way described, Mr. Motyka is effectively deferring income until such time as the project is complete and producing revenue. It is his choice to work for future rewards, and to pay his present living expenses from capital and repayment of shareholder loans. His children, however, have present needs and expenses, and his obligation as a parent is to contribute to their support. As a person with professional qualifications and experience he has the ability to meet that obligation.

[22] The Ontario decision of *David v. David*, [2004] O.J. No. 5022 (Ont. Sup. Ct. J.) involved a situation where a father expanded his dental practice from one to three locations after separation. The expansion had not been profitable, with the father paying large amounts of debt on these offices. The father argued that he should not be punished for attempting to improve, over time, his financial situation. Olah, J. stated, at para. 95:

> Not reflected in the above add backs is the fact that the husband opened 2 practices, Fairview and Waterloo, after the separation. It is not sufficient or appropriate to pass such arrangement off as merely poor business judgement. The evidence points to the fact that Dr. David arranged his business affairs to increase his debt load and to decrease his income. He knew what he was doing and he knew that to do so would apparently decrease his bottom line from which a court could determine appropriate child and spousal support. To add insult to injury, he now concedes that he will sell both Fairview and Waterloo to eliminate the income drain. The court can only conclude from this contrivance that the husband consciously diverted his income potential from the Thornhill practice to Fairview and Waterloo in the imputed amount of $20,000 per annum.

[23] It is clear from *Montgomery*, and the other cases discussed above, that there need not be an intention to frustrate or avoid one's child support obligations in order for the court to impute income pursuant to section 19. Rather, financial decisions are to be assessed by a standard of reasonableness. Here, the respondent did not do any planning, nor did he obtain the services of outside consultants in order to determine whether the beef cattle and horse breeding operations would have any chance of success. In short, **it appears that he did not undertake any degree of due diligence before he began the horse operation.** Some of the farm-related expenses are legitimate in the sense that they will continue to be incurred in the coming years whether the farm is in operation or not. There was no specific categorization of these expenses, but I believe, based on a review of the income tax returns, that these expenses will continue into the future.

Mr. Putnam is entitled to deduct these legitimate fixed expenses from his other sources of income. Consequently, I fix his income for the purpose of determining child support at $75,000 per annum.

[24] Mr. Putnam will pay child support for one child based on an income of $75,000, effective the date Ms. Putnam filed her application. If he were paying child support for two children on this income, he would pay $1,045 per month. For one child he would pay $648 per month. As he has shared custody of his son, David, order him to pay $900 per month for child support, effective the date of the filing of the application.

[25] I have not done a complete analysis required under s. 9 of the Guidelines because there was not sufficient evidence before the Court on which to assess the factors set out in ss. (9)(b) and 9(c). I am also mindful that Mr. Putnam has two children with his present spouse. However, I have taken into account that Mr. Putnam is earning the equivalent of three times the amount Ms. Putnam is earning.

[26] In addition, I am also requiring Mr. Putnam to pay 75 per cent of the cost of extracurricular activities, specifically hockey registration and equipment for David,

skiing expenses for Shania and school registration, clothing, school supplies and school lunches for both children. I am also directing Mr. Putnam to maintain the children on his drug and medical plan.

[27] There will be no costs awarded to either party.

J.