NOVA SCOTIA COURT OF APPEAL
Citation: *White v. White*, 2015 NSCA 52

Date: 20150602
Docket: CA 434786
Registry: Halifax

Between:

James Dennis White

Appellant

v.

Helen Jane White

Respondent

Judges:	Fichaud, Scanlan and Bourgeois, JJ.A.
Appeal Heard:	May 12, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Scanlan, J.A.; Fichaud and Bourgeois, JJ.A. concurring.
Counsel:	Janet M. Stevenson, for the appellant Patrick J. Eagan, for the respondent

Reasons for judgment:

[1] At the end of a three day trial, Justice Carole A. Beaton, of the Nova Scotia Supreme Court (Family Division), rendered an oral decision dealing with a number of issues related to the divorce proceedings as between the above-noted parties. The decision considered the issue of the appellant's income as it related to the matters of child and spousal support. The trial judge held that Mr. White's income reported in his 2013 income tax return was $85,463.00. She also imputed an additional $30,000.00 to Mr. White's income and consequently considered his income as $115,463.00 for the purposes of determining child and spousal support

[2] The appellant suggests that the trial judge erred in imputing $30,000.00 per year income arguing that she made a palpable and overriding error. He asks this Court to review the evidence related to income earned outside his regular employment and set aside the trial judge's decision as to the amount he earned in addition to his regular employment income. He asks this Court to vary the child and spousal support to reflect the correct income amounts.

[3] For the reasons below I am satisfied the trial judge committed a palpable and overriding error in finding that the evidence established that the appellant had unreported income of $20,000 to $25,000. This error was compounded when the trial judge then "grossed up" that amount to $30,000 for the purpose of calculating child and spousal support. The appeal should be allowed.

Standard of Review

[4] The standard of review in family matters is set out in **Hickey v. Hickey**, [1999] 2 S.C.R. 518 where the Court noted that trial judges have considerable discretion to decide support obligations based on certain objectives, values, factors and criteria.

[5] The determination of appropriate support obligations involves an exercise of considerable discretion. As such trial judges must be given considerable deference by appellate courts. The Court said at ¶11-12:

> 11 Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.
> …

> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though **an appeal court must intervene when there is a material error, a serious misapprehension of the evidence,** or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
>
> [Emphasis added]

[6] This approach has recently most been applied by this Court in **Weatherby v. Muise**, 2015 NSCA 42 and **Doncaster v. Field**, 2014 NSCA 39.

Background

[7] The parties married in 1992 and separated 20 years later. There were two children of the marriage. The parties have joint custody of those children, their primary place of residence is with the respondent. The trial judge ordered child maintenance in the amount of $1,538.00 per month based on an income of $115,400.00. That income was based on the appellant's 2013 tax return which had a reported income of $85,400 plus an imputed income of $30,000.00. The Corollary Relief Judgment suggested the respondent had an annual income of approximately $42,000.00.

[8] The Corollary Relief Judgment ordered that the parties would proportionately share any children's medical and dental expenses at a rate of 73% for the appellant and 27% for the respondent, based on ratios of their respective incomes calculated using the income imputed to the appellant.

[9] The evidence before the trial judge showed the appellant worked as a firefighter and at various other jobs during his time off. He was able to do this because his work cycle provided that, for each eight day cycle, the appellant would normally receive six days off.

[10] The appellant is trained as a licensed mechanic and a welder, but the evidence suggests that in the recent past he has not done much with either trade to earn an income. In the recent past, he has done several projects involving his

carpentry skills. He is self-described as a handyman. Money from this extra work may not always have been reported on his income tax returns. This pattern of doing extra work existed throughout the marriage. Although the trial judge commended the appellant for his work ethic, it is clear from the record, all the extra work exacted a toll on the marriage and the family.

[11] There was a single year (2011) when the appellant worked out West. He was able to do this only by arranging with his co-workers and fulltime employer to work extra regular shifts and bank a block of time. This was an anomaly and the appellant was able to earn substantial income while working out West. According to the respondent's affidavit (Trial Exhibit 3) ¶13 the appellant's total gross income for that year was $114,668.00. The extra monies were used to pay a trustee in bankruptcy so as to allow the parties to proceed through a bankruptcy at the end of their marriage. Working out West was not something the appellant enjoyed nor is it something he wishes to repeat.

[12] In addition to the paid work that the appellant did out West, there was evidence that he was also able take a block of time and travel to Newfoundland to assist a family member in building a home. The appellant suggested to the trial judge that he did not get paid for that work although, according to the trial judge, he was putting in approximately 40 hours per week.

[13] Although it was clear that the appellant worked substantial amounts of time when he was not at his regular place of employment, evidence as to how much he earned at these various jobs was severely lacking. For some jobs the appellant suggested he was paid relatively small amounts. For example, a roofing job may net him only $100 or so. Work was not always available.

[14] There was evidence that he worked as a mechanic and earned approximately $8,000.00 for five months work in 2008. He was fired from that position because he did not show up for work.

[15] The respondent testified as to how much the appellant earned outside his regular employment. Although she had limited information as to the exact amounts he may have earned over the years she submitted an affidavit at trial saying:

> 14. I do not know how much additional unreported income the Respondent earned when he was here in Halifax in 2011, but he has told me, in past years, that he has earned at least $15,000 to $20,000 cash over the course of the year, which he deposited into our joint account. (*See: paragraph 14 trial exhibit #3)*

[16] That is the only evidence which gets the appellant's income to historical highs of as much as $20,000 over his regular employment income.

Analysis

[17] Section 19 of the *Federal Child Support Guidelines* does permit a trial judge to impute income to a party to a divorce proceeding. The imputation of income is discretionary, but it must not be arbitrary. The discretionary authority must be exercised judicially, based on a solid evidentiary foundation (see: **Coadic v. Coadic**, 2005 NSSC 291).

[18] When determining income, current income figures are to be used. This principle is found in s. 3 of the *Guidelines*. As noted by Forgeron J., in **MacDonald v. MacDonald**, 2009 NSSC 214 (affirmed on appeal **MacLellan v. MacDonald**, 2010 NSCA 34):

> [10] Reliable, current information is to be used in the establishment of income for child support purposes. Historical data can often be helpful, but it is still not determinative. Where historical data is not consistent with the payor's future income earning potential, the historical data must be adjusted. One must always look to the factual circumstances existing at the time of the trial. Speculation and crystal ball gazing are not appropriate functions of the court.

[19] Although the trial judge's reasons are not clear, as I will discuss below, I understand her to have been imputing income so as to reflect what the appellant actually earned, not what he could earn.

[20] This was not a case of the appellant asserting that his income earning ability was reduced. (see: **MacDonald v. MacDonald**, **supra**; **MacGillivary v. Ross**, 2008 NSSC 339) Nor was this a case of the respondent arguing that the appellant was capable of earning a higher income but chose not to.

[21] In the present case it is clear that the appellant had a history of working extra jobs on his time off. Even though the trial judge used the words "Mr. White can earn" this case does not turn on how much he could work at those extra jobs. Clearly, the trial judge was impressed by the appellant's work ethic. He did not shy away from hard work, sometimes working the equivalent of two full time jobs for parts of the year. That would be more than we would expect or require of most people. In the present case, as in the **MacDonald** case, it cannot be expected that the appellant work excessive amounts. In **MacDonald** the trial judge referenced the payor as working "astonishing amounts of overtime" which he could not be

expected to continue even if he ¶11 "…is physically and emotionally able to work such gruelling hours…". In the case now on appeal it would be unreasonable for the respondent or the court to expect the appellant to work the equivalent of two jobs, or anything close so as to achieve the income levels imputed by the trial judge.

[22] The issue should be: what did the appellant make from that secondary employment? In that sense the case is more about a determination of his income than one of imputing income where he refuses to work.

[23] There was limited evidence as to what the appellant actually made from those second jobs. I already referenced the period of five months when he earned approximately $8,000 as a mechanic in 2008. He was fired from that job many years before the trial.

[24] There was other evidence as to various amounts earned from jobs but none of that evidence came close to providing a foundation for the trial judge to say the appellant had earnings of $20,000 to $25,000 in addition to his regular employment income in 2013. One piece of evidence that could have been used to calculate the appellant's income was the respondent's affidavit which I have quoted at ¶15 above. As general as that evidence was, it was the only evidence upon which the trial judge could have concluded that the appellant's income from sources other than his regular employment income was as much as $20,000 per year.

[25] In spite of that lack of evidence, the trial judge said (and I quote from ¶55 of the oral decision as transcribed):

> [55] I'm prepared to exercise my discretion to accept that Mr. White can earn somewhere between $20,000 and $25,000 in addition to his fire-fighting income, which should properly be grossed up. I'm going to gross it up to $30,000, therefore his 2013 income was $85,463 from the sources reported in his income tax return. His Notice of Assessment is found at Exhibit 1, Tab 5. And I find for the purpose of calculating going forward, the question of the child support obligation and the spousal support obligation, if any, a total imputed income of $115,400 is appropriate to be used for the calculation.

[26] It was a palpable error for the trial judge to have imputed the appellant's income from sources other than his regular employment at $20,000 to $25,000. That error was compounded when the trial judge then grossed the $20,000 or $25,000 up to $30,000.

[27] The one year the appellant worked out West was an anomaly in the work pattern of the appellant. Throughout the history of this marriage the appellant did not arrange block periods of time off his regular job so that he could go out West for the purposes of obtaining additional employment. This was a one-time occurrence made necessary by the appellant having to raise money to fund the trustee in bankruptcy. It would be unreasonable for the court or the respondent to require the appellant to work extra shifts on a regular basis so that he could go anywhere to work what would amount to a second full time job so as to pay increased child or spousal support.

[28] As noted, the only evidence in terms of how much money the appellant did earn came through the respondent's affidavit presented at trial. In the affidavit the respondent indicated:

> 14. I do not know how much additional unreported income the Respondent earned when he was here in Halifax in 2011, but he has told me, in past years, that he has earned at least $15,000 to $20,000 cash over the course of the year, which he deposited into joint account. (AB 173, ¶14, Affidavit dated May 22, 2012)

[29] In view of the lack of any other evidence as to the extra income earned, it was a palpable and overriding error for the trial judge to have found the appellant earned between $20,000 and $25,000 which the trial judge then grossed up to $30,000. The trial judge seriously misapprehended the evidence on a material fact. The best, and only evidence that could be used to calculate earnings over and above the appellant's regular earnings was the respondent's affidavit. It suggested $20,000 per annum as the upper range. That therefore is the upper limit of income which the trial judge could impute to the appellant.

[30] The appellant says that he does not want to work as much as he has in the past. The parties and the court appear to have been in agreement that the amount of extra work the appellant did affected the marriage and his family life in a negative way. I do not understand the trial judge to be saying the appellant must work even more now than he did during the marriage. A reasonable interpretation of the trial judge's words are that she was attempting to ascertain what the appellant's income was outside of his regular employment.

[31] I am satisfied that for the purposes of calculating child maintenance and spousal support reference should be made to the appellant's regular earnings from employment which are $85,463. It appears that the trial judge erred in failing to deduct union dues from that amount. Reference to the appellant's T-4 slip for

2013 shows that union dues for that year were $765. The corrected amount, for the purposes of calculating child and spousal support would be $84,692 plus a maximum imputed income of $20,000. I, therefore, use the sum of $104,692 for the purposes of calculating support obligations.

[32] Using the income as noted above the table amount for two children is $1,407.58 per month child support.

[33] It is necessary that there be an adjustment of the contribution to the children's medical/dental expenses referred to in paragraph 6 of the Corollary Relief Judgment. Based on the $104,692 amount of the appellant's income, the parties respective contributions to those costs are now 71.5% for the appellant and 28.5% for the respondent.

[34] The child maintenance amounts will be adjusted to the date of the trial judge's original decision.

[35] I now turn to the issue of spousal support. The income amount as noted above was also used by the trial judge when she determined the appropriate amount of spousal support.

[36] On the issue of spousal support the trial judge noted that, including a period of cohabitation, the parties were together approximately 24 years. The appellant had traditionally been the higher wage earner in the marriage but even with a combined income of between $150,000 and $190,000 per year the parties ended the marriage by going through formal bankruptcy proceedings. Pensions and assets were divided. Neither of the parties left the marriage with substantial assets.

[37] The trial judge said she considered the factors set out in s. 15(2) of the **Divorce Act**, R.S.C. 1985, c. 3 (2nd Supp.) and exercised her discretion in requiring payment of spousal support in the amount of $1,000 per month, on an indefinite basis going forward, effective November 1, 2014. The trial judge refused to order retroactive payments of spousal support.

[38] The trial judge indicated that the respondent was entitled, at least on a non-compensatory basis, to spousal support. She referenced the Interim Order for spousal support in the amount of $500 per month, commencing August 1, 2012. The trial judge did not feel bound by that interim order.

[39] The trial judge noted that the respondent worked fulltime from the time the children were young, and while being primarily responsible for the children and household. This enabled the appellant to work. The corollary relief judgment referenced the respondent's income as being $42,000.

[40] The trial judge appears to have considered all of the financial background relevant to the spousal support as well as the appropriate sections of the **Divorce Act** (s. 15(2)). However, as with the child maintenance, the trial judge, when setting spousal support, overstated the appellant's income by at least the same $10,000.

[41] Other than general reference to the **Divorce Act** and relevant case law, the trial judge's decision does not lend itself to a detailed analysis on the issue as to how she arrived at the amount of $1,000 per month in spousal support. I have already noted the interim spousal support was $500 per month.

[42] There is insufficient material in the record for this Court to do an analysis using the *Spousal Support Advisory Guidelines*. I am satisfied the spousal support should be reduced to reflect an income that is substantially less than the trial judge imputed. I would set spousal support at the rate of $650 per month effective November 25, 2014.

[43] Before ending I wish to address comments made by appellant counsel. She expressed concern that if spousal and child maintenance payments are not varied the appellant will be on a 'work treadmill' that he cannot get off. His income has traditionally been supplemented to the extent of $15,000 to $20,000 per year. The appellant does not wish to be forced to work what is virtually two jobs indefinitely, so as to pay increased child and spousal support.

[44] I would not require the appellant work two jobs or even extra jobs beyond his regular employment. If, however, the appellant works outside of his regular employment, he must keep track of **all** income earned through that employment. It **shall** be included in his income for purposes of calculating child and spousal support. This requirement to report the income for purposes of calculating child support and spousal support is not a new concept. It is not related to or based upon him paying income tax on those additional earnings. If the appellant chooses not to work outside of his regular employment then he will be entitled to apply to vary the child and spousal supports based on a change of circumstances. The end result is that he is not on a treadmill requiring him to work anything beyond his regular employment. If he does work extra, support is to be based on that extra income.

Costs

[45] Counsel have made submissions on the issue of costs. Both suggest $1,200 in costs to the successful party. The appellant has succeeded in this appeal. He shall be entitled to costs in the amount of $1,200 inclusive of disbursements.

Scanlan, J.A.

Concurred in:

Fichaud, J.A.

Bourgeois, J.A.