

**NOVA SCOTIA COURT OF APPEAL**  
**[Cite as: Wilcox v. Snow, 1999 NSCA 163]**

**Pugsley, Hallett and Flinn, JJ.A.**

**BETWEEN:**

BRENDA FAYE WILCOX (SNOW)	)	Deborah E. Bowes
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
KENNETH FRANCIS SNOW	)	Steven Zatzman
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Appeal heard:
	)	December 8 <sup>th</sup> , 1999
	)	
	)	Judgment delivered:
	)	December 22, 1999
	)	
	)	

**THE COURT:** Appeal allowed per reasons for judgment of Flinn, J.A.; Hallett and Pugsley, JJ.A. concurring.

**FLINN, J.A.:**

[1] The respondent is a self-employed businessman. The appellant is the respondent's former wife, and the mother of their two children. On December 2<sup>nd</sup>, 1998, the appellant and the respondent, both represented by counsel, consented to an Order fixing the amount that the respondent was obligated to pay for the support of his two children, commencing January 1, 1999. The Order, signed by Justice Boudreau of the Supreme Court, provides as follows:

**IT IS ORDERED**

**THAT** the Applicant/Respondent **Kenneth Francis Snow** shall pay maintenance for the two children of the marriage namely Barrett Charles Snow born March 15<sup>th</sup>, 1981 and Jason Kenneth Snow born July 23, 1983 in the amount of **Two Hundred and Fifty-One Dollars (\$251.00)** per month commencing January 1<sup>st</sup>, 1999 and on the 1<sup>st</sup> day of each and every month thereafter in accordance with the Federal Child Support Guidelines based upon Kenneth Francis Snow's 1997 annual net income of Seventeen Thousand One Hundred Sixty-Five Dollars and Forty-Six Cents (\$17,165.46) from his self-employed gross business income of Seventy-Five Thousand Eight Hundred and Fifty-Five Dollars (\$75,855.00);

[2] The Order also dealt with payment of arrears of child support. That is not relevant for the purpose of this appeal. The respondent made the monthly child support payments of \$251.00 in January, February and March of 1999.

[3] In May, 1999, five months after Justice Boudreau's Order, the respondent made application to vary his child support obligation. The sole basis of the respondent's application was the fact that his 1998 income tax return, prepared by his accountant in April, 1999, disclosed that he had net business income for the year 1998 of \$7,736.00. The gross earnings of the respondent's business were \$65,726.27.

[4] The respondent's application came on for hearing, in Supreme Court

Chambers, before Associate Chief Justice Ferguson on June 25<sup>th</sup>, 1999. The Chambers judge decided that he must accept the net business income figure, shown on the respondent's 1998 income tax return, as being the respondent's income for the purpose of determining his child support obligations. On that basis, the Chambers judge decided that there was a change in the respondent's income, and he varied Justice Boudreau's Order of December 2<sup>nd</sup>, 1998, and reduced the respondent's monthly child support obligation from \$251.00 to \$29.00.

[5] In my opinion, the Chambers judge erred in that conclusion. On this application before the Chambers judge the onus was clearly on the respondent to establish a change in circumstances before any departure from the Order of Justice Boudreau was considered. Since the respondent was putting forth reduced income as a change in circumstances, the respondent was required to do more than, simply, file with his application his 1998 income tax return. As a self-employed businessman there were specific requirements upon the respondent under the **Child Support Guidelines**. The respondent did not comply with those requirements. As a result, it was not possible to verify the reasonableness of his stated income level. That being the case, his application should have been dismissed.

[6] I will set out my reasons for coming to this conclusion.

[7] The respondent's application to vary the terms of Justice Boudreau's Order,

dated December 2<sup>nd</sup>, 1998, is made pursuant to the provisions of s. 17 of the **Divorce Act**, R.S.C. 1985, c. 3, 2<sup>nd</sup> Supp. Section 17(4) of the **Divorce Act** sets out the factors which the Court considers before making a variation order:

17 (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[8] Section 17(6.1) requires the Court making the variation order to do so in accordance with the applicable Guidelines:

17 (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[9] Section 14(a) of the **Child Support Guidelines** provides that for the purposes of s. 17(4) of the **Divorce Act**, any one of the items listed in s. 14 constitutes a change of circumstances. Section 14(a) of the **Guidelines** is relevant to this case:

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provisions thereof; .....

[10] The basis of the respondent's application to vary in this case was that his income had reduced substantially. The respondent's income is critical to the determination of his obligations to support his children under the **Child Support Guidelines**, and the **Guidelines** set out various ways in which income is determined.

[11] The parties can agree on the annual income of a payor spouse, under s.

15(2) of the **Guidelines** which provides as follows:

15 (2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

[12] It was such an agreement, between the respondent and the appellant, which resulted in Justice Boudreau's Order of December 2<sup>nd</sup>, 1998.

[13] Failing agreement between the parties, income is determined under the provisions of s. 16 to 20 of the **Guidelines**.

[14] While s. 16 of the **Guidelines** provides that 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 Revenue Canada, that reference is clearly subject to ss. 17 to 20 of the **Guidelines**, and is also subject to being adjusted "in accordance with Schedule III":

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 Revenue Canada and is adjusted in accordance with Schedule III.

[15] Schedule III to the **Guidelines** is entitled "Adjustments to Income". Section 9 of Schedule III is particularly relevant to this case, where the respondent is a self-employed businessman:

9. Where the spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

[16] Section 9 is relevant because the respondent splits the income of the business equally with his present wife. Although the evidence was far from clear, it did become apparent, in the cross-examination of the respondent, that the respondent's present wife contributes far less to the business than does the respondent. In any event, the respondent did not establish that the income splitting with his present wife was necessary to earn his self-employment income, and was reasonable in the circumstances.

[17] Further, ss. 17 to 20 of the **Guidelines** provide for cases where the Court may determine the spouse's income other than by reference, solely, to the spouse's income tax return. Section 19(1), for example, permits the Court to impute income to a spouse in circumstances where the spouse is intentionally under employed or unemployed (s. 19(1)(a)); where it appears that income has been diverted which would affect the level of child support to be determined under these **Guidelines** (s. 19(1)(d)); where the spouse has failed to provide income information when under a legal obligation to do so (s. 19(1)(f)); where the spouse unreasonably deducts expenses from income (s. 19(1)(g)).

[18] Section 19(2) provides that the reasonableness of an expense deduction, for the purposes of s. 19(1)(g), is not solely governed by whether the deduction is permitted under the **Income Tax Act**.

[19] Section 19(1)(g) and Section 19(2) are relevant in this case because the financial information which the respondent did provide indicated at least two matters that warranted clarification and justification:

1. Although the respondent's 1998 income tax return discloses that he earned only \$7,736.00 in income, his records show that the business spent, in the same fiscal period, \$6,605.37 for motor vehicle gas, repairs, insurance and licence. The respondent owns only one motor vehicle, and he did not establish the reasonableness of these expenses, particularly, that they did not relate to his personal use of the motor vehicle, as opposed to its business use. The respondent's personal monthly expenses for "motor vehicle" disclose, only, the amount of \$12.50.
  
2. The financial records that were provided show a deduction from the gross income of the business, for the taxation year 1998, of \$4,918.26 for "depreciation expense" and \$920.39 for "bad debt expense". There is no evidence as to whether these amounts were actually spent, whether they were set aside in a reserve fund, or as to whether they were reasonable expenses under s. 19(2).

[20] The above-mentioned two items are noted only because they are obvious from the evidence that was made available to the Chambers judge. However, there is another reason why matters such as these items require explanation and justification.

The respondent testified that he had monthly expenses of \$1,119.00. These expenses are made up of \$947.00 per month on his Statement of Financial Information, together with an additional \$172.00 per month on a loan. The respondent also testified that he is meeting his expenses every month. These monthly expenses translate into an annual figure of \$13,428.00. Barring some satisfactory explanation, the appellant, obviously, has access to more income than the \$7,736.00 which shows on his 1998 tax return.

[21] A full assessment of the respondent's income picture may bring other matters into play which are dealt with in ss. 17-20 of the **Guidelines**.

[22] In the case of a self-employed businessman, like the respondent, there is very good reason why the Court must look beyond the bare tax return to determine the self-employed businessman's income for the purposes of the **Guidelines**. The net business income, for income tax purposes, of a self employed businessman, is not necessarily a true reflection of his income, for the purpose of determining his ability to pay child support. The tax department may permit the self employed businessman to make certain deductions from the gross income of the business in the calculation of his net business income for income tax purposes. However, in the determination of the income of that same self employed businessman, for the purpose of assessing his ability to pay child support, those same deductions may not be reasonable.

[23] In the recent case of **Vermeulen v. Vermeulen**, [1999] N.S.J. No. 193 (Q.L.),



this Court upheld the decision of a trial judge who went beyond the self-employed spouse's income, as declared in his tax return. Chief Justice Glube, writing for the Court, said the following:

In my opinion, the decision of Justice Hall to impute the sum of \$30,000.00 as income is quite reasonable. It is one thing to deal with your income tax to provide the most favourable conclusion, but it is another matter if that affects the person's ability to make support payments.

[24] A similar conclusion was reached by Associate Chief Judge Comeau of the Family Court in the case of **C.A.L. v. R.V.W.**, [1998] N.S.J. No. 542 (Q.L.).

[25] Neither of the two cases referred to involved an application by a payor spouse to vary the terms of an existing child support order.

[26] Where, as here, the respondent is applying to vary an existing child support order, he bears the onus of proof. As a self-employed businessman he cannot, simply, file with the court a copy of his most recent income tax return, and expect that his net business income for tax purposes will be equated with his income for child support purposes. That is what the respondent did in this case. It is not enough. The businessman must demonstrate, among other things, that the deductions which were made from the gross income of the business, in the calculation of his net business income, should, reasonably, be taken into account in the determination of his income for the purpose of calculating his obligation to pay child support.

[27] In fact, s. 21(1) of the **Guidelines**, specifically requires the respondent to file

certain documentation to enable the Court to make a proper determination of his income. Relevant to this matter are the provisions of s. 21(1)(a) and (d) of the

**Guidelines** which provide as follows:

21(1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (b) a copy of every notice of assessment or reassessment issued to the spouse for each of the three most recent taxation years; .....
- (d) where the spouse is self-employed, for the three most recent taxation years
  - (i) the financial statements of the spouse's business or professional practice, other than a partnership, and
  - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length.

[28] The respondent did not comply with these mandatory provisions. He filed his personal income tax returns for two years (1998 and 1997), and a comparative income and expense statement for those two years. He filed no financial statements of the business, nor any statement under s. 21(1)(d)(ii).

[29] Section 21(1)(e) deals with the situation where the spouse is a partner in a partnership and provides as follows:

21(1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- .....
- (e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;

[30] I have made reference to s. 21(1)(e) because the respondent testified at the

hearing before the Chambers judge that his business was a partnership between he and his present wife. It is clear, however, from the respondent's income tax returns for 1998 and 1997, that he reports his income as "business income" as opposed to "income from a partnership". In any event, even if the respondent and his present wife are a partnership, the respondent failed to comply with the provisions of s. 21(1)(e). There was no confirmation of the respondent's draw from, and capital in, the partnership, for its three most recent taxation years.

[31] By relying solely on his 1998 income tax return, the respondent fell far short of the onus upon him on an application to vary an existing child support order. It was not possible, on the basis of the respondent's application, for the Chambers judge to make any reasonable assessment of the respondent's claim that he was entitled to a variance of Justice Boudreau's Order on the basis of a reduction of income. Since the onus was on the respondent here, his application should have been dismissed.

[32] I would, therefore, allow this appeal, and I would strike out the Order of the Chambers judge dated July 27<sup>th</sup>, 1999. I would also order the respondent to pay the appellant her costs, both here and in the Court below, which I would fix at \$2,000.00 plus disbursements.

Flinn, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.