FAMILY COURT OF NOVA SCOTIA

Citation: D.R.D. v. C.L.E., 2012 NSFC 13

Date: 20120613
Docket: FYMCA-10521
Registry: Yarmouth

Between:

D.R.D.

Plaintiff

v.

C.L.E.

Defendant

Judge: The Honourable Judge John D. Comeau, JFC

Heard: April 4, 2012 at Yarmouth, Nova Scotia

Counsel: Tim Landry, Esq., for the Applicant D.R.D.

Martin Pink, Q.C., for the Respondent C.L.E.

Introduction/The Application

[1] This is an application brought by D.R.D. for the following relief:

(1) To vary the Court Order issued with respect to this matter on June 10th, 1996. Specifically, the Applicant will be requesting that child support be adjusted to Zero (0) Dollars per month, commencing January 1, 2006. In support of the Application will be read the Affidavit of the Applicant, D.R.D.

[2] The Court Order of June 10, 1996 provided for child support for Haley born January 20, 1996 in the amount of $400 a month payable in the amount of $200 on the 15th and 30th of each month, commencing the 15th of June, 1996, payable to the Applicant care of the Director of Maintenance Enforcement.

Issues:

1. Change in circumstances;
2. Jurisdiction to vary retroactively and deal with arrears of child support;
3. Whether the Applicant is underemployed and the consequences of such a finding.

The Facts:

History:

[3] The Applicant lives in Digby County with his mother and stepfather. He is in his 40s. He has lived with his parents for the past couple of years. When the child support order was put in place he was a labourer and truck driver for the City of Halifax where he earned $30,000 a year. He was fired from that position and has been unemployed since August of 2004. A grievance was filed over the loss of his job and in December of 2011 this was resolved by a decision of the Nova Scotia Court of Appeal that the city had a right to fire him. This, he says, has resulted in a black mark on his employment record and with only a grade 10 education, he has been unable to obtain employment. Lack of a trade has not been helpful.

[4] He advised that because of his default paying child support, the Registrar of Motor Vehicles has taken his driver's license. Efforts to find employment consisted of filing applications with certain companies. One such company was in the business of landscaping, but his lack of a license and money prevented him from taking this job. It is not clear whether one was offered to him.

[5] While working for the City of Halifax, he took a years leave of absence and worked in Alberta for eight months making about $15 an hour. He has considered going back to Alberta but it would be difficult to do so without a license. He is in a vicious circle, no money and no license. In Alberta he had been doing truck driving and labour work. There was an indication that he may be able to get his license back if he paid the fee, but he does not have the funds.

Financial Information:

[6] The Applicant attached to his affidavit Tax Assessments for the years 2006,2007, 2008, 2009 and 2010. They all show no income in line 150, and in 2011 he was also unemployed and continues in that same situation on the date of this decision.

The Law:

[7] Section 37(1) of the ***Maintenance and Custody Act*** R.S.N.S. 1989, c. 160 indicates:

> "The Court on application may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order .... where there has been a change in circumstances since the making of the order or the last variation order."

[8] In Section 14 of the Provincial Child Support Guidelines for Nova Scotia indicates:

> "For the purpose of Section 37 of the ***Act***, anyone of the following constitutes a change in circumstances that gives rise to the making of a variation order in respect of a child maintenance order:
>
> (a) in the case where the amount of child maintenance includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child maintenance order or any provisions thereof;"

[9] The leading case from the Supreme Court of Canada that deals with these issues is ***D.B.S. v. S.R.C.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra***, 2006 SCC 37, [2006] 2 SCR 231.

[10] Counsel for the Applicant refers to this decision in his post trial brief, quoting Justice Bastarache at paragraphs 65 and 66.

> "In my view, a court order awarding a certain amount of child support must be considered presumptively valid. This presumption is necessary not only to maintain the certainty promised by a court order, but also to maintain respect for the legal system itself. It is inappropriate for a court, just as it is inappropriate for a parent, to assume that a previously ordered award is invalid.
>
> The presumption that a court order is valid, however, is not absolute. As noted above, the applicable legislation recognizes that a previously ordered award may merit being altered. This power will be triggered by a material change in circumstances. Notably, the coming into force of the *Guidelines* themselves constitute such a change under the federal regime: s. 14(c) of the *Guidelines*. An increase in income that would alter the amount payable by a payor parent is also a material change in circumstances."

[11] A decrease in income is also a material change in circumstances.

How Can Arrears of Child Support be Dealt With by the Court?

[12] There is no jurisdiction in the Court to forgive arrears. The amount in default may be set (found to be a certain dollar sum) by the Court or by agreement of the parties.

[13] In ***Smith v. Helppi***, 2011 NSCA 65 (Can LII), 2011 NSCA 54 Justice Oland referred to this issue.

> " .... a retroactive reduction in chid maintenance decreases child maintenance either by recalculating payments that should have been made or by forgiving accumulated arrears. Mr. G. has not asked that I forgive arrear. He asks that I recalculate the payments he says he should have made."

[14] The mechanics of a retroactive reduction may and can amount to a technical forgiveness of arrears.

Authority to Make Retroactive Orders With Respect to Child Support:

[15] In ***D.B.S. v. S.R.C.***, 2006 SCC 37, [2006] 2 SCR 231, the issue before the Supreme Court of Canada was "Can a Court make an order for retroactive child support? If so, in what circumstances is it to do so?

[16] Paragraph 85 of that decision indicates

> ".... that while the courts will generally have jurisdiction to make retroactive child support awards, it remains to discuss a couple of issues that could curtail the power of judges to make such awards in specific circumstances".

[17] The discussion in D.B.S. with respect to when retroactive awards should be made emphasized retroactive increases (see paragraph 96, 97 and 98)

> "Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable *status quo*; retroactive awards serve to supplant it.
>
> Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.
>
> Before canvassing the myriad of factors that a court should consider before ordering a retroactive child support award, I also want to mention that these factors are not meant to apply to circumstances where arrears have accumulated. In such situations, the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainly and predictability militate in the opposite direction. There is no analogy that can be made to the present case."

[18] Particularly relevant to the case before the Court is the "conduct of the payor". Although it is indicated his income was nil as far back as 2006, he brought this application to the court on November 28, 2011 with first court appearance on December 21, 2011. In this particular context, conduct refers to an application to the court to set the proper table (Guideline) amount, based on the payor's income.

Underemployment Argument and Imputing Income:

[19] Where the Court determines that a person is underemployed, income may be imputed to the payor. Justice Forgeron in ***MacDonald v. Pink*** [2011] N.S.J. No. 618 makes reference to a decision of the Nova Scotia Court of Appeal that deals with this issue.

> "In ***Smith v. Helppi*** 2011 NSCA 65 (CanLII), 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. In ***Gould v. Julian*** 2010 NSSC 123 (CanLII), 2010 NSSC 123. Oland J.A. states as follows:"
>
> 'Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in ***Gould v. Julian***, 2010 NSSC 123 (CanLII), 2010 NSSC 123 (N.S.S.C.), where Justice Darryl W. Wilson stated;'
>
> 'Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in ***Hanson v. Hanson***, [1999] B.C.J. No. 2532, as follows:
>
> 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". ...
>
> 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

4. Persistence in unremunerative employment may entitle the court to impute income.

5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction or income.

[33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.'"

Conclusions/Decision:

[20] The Applicant payor is asking for a retroactive adjustment to child support. There has been a material change in circumstances since the making of the 1996 order for child support as follows:

1. Section 14 of the Provincial Child Support Guidelines is applicable in that the financial information provided by the Applicant payor would result in a different child maintenance order than that made in 1996;

2 The applicable table would amount to a different amount as a result of the change to that chart which came into affect December 31, 2011;

3. There is a change in the Applicant payor's employment since the making of the 1996 order.

Change in Circumstances and Jurisdiction to Vary Retroactively:

[21] Section 37 provides the court with authority to vary an order for child maintenance retroactively. D.B.S., *supra*;, confirms the court's jurisdiction to do so and gives guidance how and under what conditions it should be done.

[22] The Federal regime contemplates a three year period (see D.B.S. *supra*, paragraph 123) for historical information of the payor's income (see s. 25(10(a) of the Nova Scotia Child Maintenance Guidelines). D.B.S. *supra*, indicates "the same rough guideline can be followed for retroactive awards". This does not preclude retroactive variation beyond three years if the circumstances warrant.

Undermployment With Option to Impute Income:

[23] The Respondent argues that the Applicant payor is underemployed. He worked for the City of Halifax and was let go (fired). During the course of that employment he had taken a years leave of absence and worked in Alberta for eight months as a truck driver/labourer.

[24] After he was terminated by the City of Halifax in 2004, he fought through various tribunals to get his job back until the Nova Scotia Court of Appeal decided the City has a right to fire him. This decision came in 2011.

[25] He has no driver's license as referred to earlier. At his age, it must be difficult to rely on his parents for support. There does appear to be lack of ambition on his part, maybe even discouragement in being unable to find employment. His problems are compounded by having only a grade 10 education, no trade or upgrading. He cannot upgrade because of lack of transportation. He has mainly been a truck driver who has lost his driver's license in a Joseph Hellier's "Catch 22" situation, because it was taken from him by the recommendations of the Director of Maintenance Enforcement for being in arrears of child support. He has put out applications to various local companies, including landscaping, (here also a driver's license would be required).

[26] The Applicant's counsel argues that it is not unreasonable that a person would not want to move out of the province to obtain employment. The decision of ***MacDonald v. Pink*** [2011] N.S.J. No. 618 (SCFD) has been referred to with respect to underemployment in this province (see paragraph 33).

> "In Nova Scotia the test to be applied in determining whether a person is intentionally underemployed or unemployed is reasonableness, which does not require proof of specific intention to undermine or avoid child maintenance obligations".

[27] The Court finds there is a material change in circumstances since the making of the June 10, 1996 order in that the Applicant's financial information would provide for a different table amount of being below the amount where child support would be payable.

[28] He has fought to get his job back without success. Living where he does and given his lack of training and having no driver's license, his being unable to find a job is not unreasonable. Some may consider he has a lack of ambition, however his circumstances are such that he cannot find a way out. As such, he is not underemployed.

[29] Child support is varied to January 1, 2006 which is the date financial information has been provided to the Court. It shows no income. The Court has no authority to forgive arrears and no evidence has been presented in order to make a finding that there are a certain amount of arrears. This decision results in a

recalculation of what payments should or should not have been required to be made for the retroactive period referred to. (See ***Smith v. Helppi,*** *supra)*.

[30] Counsel for the Applicant shall prepare the order.

_____

JOHN D. COMEAU
JUDGE OF THE FAMILY COURT FOR THE
PROVINCE OF NOVA SCOTIA