IN THE FAMILY COURT OF NOVA SCOTIA
Citation: Hartman v. Horstman, 2010 NSFC 30

Date: 2010 11 19
Docket: FLBMCA-067350
Registry: Bridgewater

Between:

Dawn Hartman

Applicant

v.

John Horstman

Respondent

Revised Decision:	The text of the original decision has been corrected according to the erratum dated September 5, 2013. The erratum has been appended to this decision.
Judge:	The Honourable Judge William J. Dyer
Heard:	August 11, 2010, in Bridgewater, Nova Scotia
Counsel:	Shawn O'Hara, for the Applicant John Horstman, the Respondent, on his own behalf

By the Court:

The Issues

[1] Dawn Hartman and John Horstman are the parents of two boys, seventeen and fifteen years old, respectively. In mid April, 2010 they consented to an order under the **Maintenance and Custody Act (MCA)** and **Child Maintenance Guidelines (CMG)** which provided that Hartman would have sole custody and day to day care and control of both children, subject to access by Horstman conditional on the wishes and discretion of the children.

[2] Based on a disclosed 2009 income of approximately $56,000, Horstman agreed to pay basic child support at the rate of $798 monthly starting May 1, 2010. It was agreed that the first four payments could go directly to Hartman and that subsequent payments would be channeled through the Maintenance Enforcement Program. Horstman also agreed to provide Hartman with copies of his Income Tax Returns and Notices of Assessment from the Canada Revenue Agency annually, starting in 2011.

[3] Left for determination was the issue of retroactive child support for the years 2007, 2008, 2009 and the first four months of 2010. More attention than usual is given to events and circumstances in those intervening years because of their heightened relevance in retroactive support cases.

[4] At the hearing, Hartman was represented by legal counsel; Horstman was not.

The Evidence

[5] Hartman's evidence was that she and Horstman met in early 1992 when she was living in a local town with a two year old child from another relationship and working at a local day care centre. Horstman was then living with his parents in another local town, attending community college, and working part-time at a restaurant.

[6] Hartman became pregnant with the parties' first son in May, 1992. After she gave birth in 1993, she moved to the same town as Horstman in 1993 and they

started to cohabit. Horstman continued with community college and to work part-time. According to Hartman, the couple had many problems in their relationship; and there were several separations. Horstman did not dispute this.

[7] When Hartman became pregnant with their second child in 1994, her pregnancy was assessed as "high risk". Reportedly, her physician advised her to move to Toronto or Calgary to receive the best or better medical care; and she and Horstman decided to do so. The couple "sold everything" and moved to Calgary where they secured an apartment. Hartman's medical condition precluded employment. The couple started to receive provincial income assistance.

[8] A second son was born prematurely in early 1995 and spent several weeks in a hospital. In February, 1995, the family moved to a larger apartment. They continued to receive income assistance. They relocated again in early 1996 within Alberta when Horstman found work.

[9] About two years later, the couple separated for undisclosed reasons. He moved back to Nova Scotia; she stayed with the children in Alberta.

[10] Hartman claimed Horstman visited the children only once - in 1999, but not thereafter. Her evidence was that the eldest child started having problems at school in or about the year 2000. She said that he was diagnosed as having both Attention Deficit Hyper-Activity Disorder and Oppositional Defiance Disorder. As a result of those diagnoses, medications were prescribed for him. Nothing more was said about the intervening years except that by 2006 the eldest child was getting into legal trouble for stealing and destruction of property. He ran away from home frequently and skipped school.

[11] Hartman disclosed she had worked in the Alberta construction industry for about 11 years but did not elaborate and provided no income particulars. In January, 2007 she sustained a work-related shoulder injury. She had to stop work. No other specifics were given. She stated that for a while she lived off her savings. She then started to receive disability benefits through the Alberta social assistance program. During this time, Hartman said the family had been living in a basement apartment; but, because of the financial situation, they were forced to move in with a friend.

[12] In 2009, Hartman decided to move back to Nova Scotia. She said Alberta had nothing more to offer her and the children; and she had no prospects there because of her medical condition.

[13] Upon returning to this Province, the older son was enrolled in school but resumed skipping classes and continued to have difficulties with the law. He also refused to take his prescribed medications.

[14] When the May, 2010 Consent Order took hold, Hartman's public assistance benefits were stopped - on the assumption Horstman's support was starting to flow. Unfortunately, with the exception of one payment in May, Hartman did not receive any of the agreed support payments (up until the hearing).

[15] Hartman wrote that she continues to be disabled as a result of her shoulder injury and that she is unable to work at this time. There were no medical or other reports submitted to support this claim.

[16] Hartman alleged that with the exception of the one visit after the separation (already mentioned), Horstman effectively removed himself from the lives of his children. Because Horstman did not provide any financial support for the children, she broadly stated she assumed the full responsibility of raising the children and providing for them financially. However, she provided very little detail about the family's living circumstances - such as whether anyone else cohabited with them during the intervening years, whether anyone else contributed to the children's support or hers, particulars of the children's unmet financial needs (if any); her income, etc.

[17] Hartman's evidence was that she made attempts through the Alberta social assistance program to obtain child support from Horstman but that the efforts were unsuccessful. She did not state when those efforts were made; but she said that she found the process slow and administratively cumbersome; and that she was not in a financial position to pursue the issue on her own. Asked to elaborate on her attempts to locate Horstman before she returned to Nova Scotia, she vaguely claimed that she had advice from either lawyers or the public assistance program "each and every year". She reasserted that attempts were made from Alberta to find and serve Horstman with legal documents in regard to child support. However, she provided no documentation to support these claims. And, when

asked about her familiarity with Interjurisdictional Support Orders legislation and processes, she professed none.

[18] When Hartman returned to Nova Scotia, she set up an independent residence in town but subsequently moved into her mother's home, out-of-town. In testimony, Hartman conceded that when she returned to Nova Scotia she did not make serious efforts to contact Horstman - ostensibly because of his track record of disinterest in the children and non-payment of support. Rather, her evidence was that she applied for help through the legal aid program and began formal court proceedings as soon as she was able to retain a lawyer.

[19] Hartman insisted that Horstman knew of the family's return and that he could have determined their whereabouts - if he wanted to. Indeed, she said she initially lived very close to his residence. The implication was that if he knew they were back he should have started to help them financially.

[20] By contrast, Horstman's evidence was that his first and only visit to Alberta after the parties separated was in 2001 (not 1999). He said that Hartman made no mention of child support when he was there. Thereafter, he said that he lost touch with Hartman but claimed he made regular attempts to find Hartman and his children. Pressed on this point, he said he tried to locate them (when he thought they were still in Calgary) by trying the internet "411 Directory" service for the City, but could find no listing under her name. He said he checked this directory every six months. According to him, he eventually found her on the internet social media service "Facebook" site. He said that he tried to contact her by sending messages or invitations to talk but received no acknowledgment or reply. He said he wanted to make contact with his sons and stated this in his messages. He agreed he did not mention the topic of child support in those messages.

[21] Horstman's evidence was that he also contacted another former partner or spouse (of his) about Hartman's whereabouts, but that individual could not or would not make disclosure. Communication with that person was complicated by the fact that in 2007, Horstman was apparently under a "no contact" order insofar as she was concerned. In any event, Horstman believes that Hartman and the individual were in touch with each other about his circumstances and perhaps about his efforts to reestablish contact. He said the practical result was that he could not locate Hartman or the children. And, he took this as further proof they

did not want anything to do with him or anything from him. In cross-examination, Horstman admitted he knew he had an obligation to support his children but assumed, because Hartman did not pursue the issue or mention it to him, that she was not seeking support.

[22] I accept Horstman's evidence that he has been living and working with a major employer in the local area for several years and that his whereabouts could easily have been determined. As mentioned, he had a relationship with at least one other individual who, he speculates, probably had communication with Hartman and who certainly knew where he lived and worked. Not without significance, Hartman submitted no rebuttal evidence on this aspect of Horstman's defence.

[23] From a third party, Horstman learned in August, 2009 that Hartman and the children had returned to Nova Scotia. He said that he hoped that Hartman would take some initiative and contact him. He admitted that he saw them out walking, but admitted that he did not attempt contact. He said he was too nervous to approach them and conceded that he did not make any serious attempts to confirm their civic address. He stated that he did not know where they were actually living; but agreed it would not have been difficult to locate them.

[24] Regarding the recent consent order and current support, Horstman said that he mailed two money orders to what he understood to be Hartman's local civic address which he had been given when the court order was approved. His evidence was that the money orders had not been cashed and the envelopes had not been returned to him.

[25] It now appears that the items may not have reached Hartman because she admittedly moved to her mother's home outside of town and she did not give Horstman formal notice of her new address. (Horstman agreed that he did not send his money orders to Hartman's lawyers office, but thought it was appropriate to send the payments to the address where he thought Hartman was living after legal proceedings started.) He said he did not learn that the support was not reaching the recipient until just before the court hearing. I accept Horstman's evidence regarding this aspect of the case.

[26] In response to the evidence from Hartman that Alberta government officials sent notices or letters to him regarding child support, Horstman denied receiving any such communication. He also denied any knowledge of attempted personal service by process servers or otherwise in the intervening years. As mentioned, Hartman did not provide copies of any letters she claims went out to him. Nor did she submit any proof of unsuccessful personal service attempts.

[27] Horstman lives in a rented house where he has been since 2007. He cohabits with a common law partner and her five children. Horstman is not the biological father of any of those children (the youngest of whom is four years old), but is he financially supporting them because the children's fathers are unable or unwilling to do so. Although he and his current partner have been living together for only about two years, his evidence was that they have had an on-again-off-again relationship for the last ten years. Asked about the fathers of the five children, he said that none of them have contact with their respective children and that there are no court orders in place requiring payment of child support. However, his partner does have some contact with the respective fathers and, from her, he said he has learned that there is no reasonable prospect of them paying support, voluntarily or otherwise. Horstman's partner did not testify and there was no opportunity for Hartman's counsel to test these assertions in court.

[28] According to Horstman, his partner has no significant assets. He concluded by saying he has no legal interest in the residence which he now occupies with his partner and her children; and that a relative who owns their residence has the property listed for sale. He expects he will have to relocate shortly.

[29] Additionally, Horstman is paying child support under a Family Court Order for the benefit of a six year old daughter by another relationship. Payments of $533 have been made since 2007 but the quantum was under an active, downward variation application at the time of the hearing. [There is a tentative understanding that those payments will be reduced to $498, retroactive to January 1, 2010, based on his expected 2010 income.)

[30] Horstman is prepared to pay some child support predating the current order, but claimed he is financially unable to pay the substantial amount now being claimed by Hartman. He disclosed that he has no significant assets. He said that he cannot borrow money to pay child support and claimed that he had been to

several financial institutions to see if he could raise any money. When questioned, he stated that he has never owned any real property in his own name, that there is no money held in trust for him, and that he has no investments or registered retirement savings. He does have a pension plan with his current employer and has certain benefits, including life insurance. (On his own initiative he designated another child as principal beneficiary of that life insurance.)

[31] Horstman did not challenge the income figures upon which Hartman bases her retroactive support claim. In 2007, Horstman's approximate annual income was $61,174. The table amount of basic support for two children would be $867. In 2008, Horstman's income was $61,509 which would attract monthly payments of $870. In 2009, his income, as noted elsewhere, was about $56,065 which would normally warrant payments of $798 monthly. The same monthly payment would apply to the first four months of 2010.

[32] Based on the forgoing figures, Hartman's total retroactive claim from 2007 until the first of May, 2010 exceeds $33,600.

Discussion/Decision

[33] There are no previous orders or written agreements. There is no reliable evidence that Hartman started proceedings or gave formal notice of any claims or demands while she was living outside of Nova Scotia, including those potentially available to her under **ISO** legislation.

[34] The parties have lived separate and apart since May, 1998. Hartman started her application in mid-November, 2009. It is self-evident that the delay is significant. So is the amount she seeks.

[35] The leading authority for situations involving requests for retroactive originating orders (and for upward variation of ongoing support orders) is the trilogy of **D.B.S. v. S.R.G.; L.J.W. *v.* T.A.R.; Henry *v.* Henry; Hiemstra *v.* Hiemstra** 2006 SCC 37. From the decisions and the many commentaries which have followed in their wake, I will touch on some of the principles which seem particularly relevant to the present case and apply them.

[36] The primary objective should be to ensure that children receive the appropriate level of financial support and any incentives for payor parents to escape or avoid her/his obligations should be discouraged. Those objectives reinforce the stated purposes of the **MCA** and **CMG.** When deciding whether a retroactive award should be made, all of the circumstances should be considered.

[37] Hartman's claim for retroactive basic support includes about $10,400 for each of the years 2007 and 2008, about $9,500 for 2009, and about $3,200 for early 2010. Likely with the Supreme Court's directions in mind, Hartman does not seek an award reaching back more than three years.

[38] As at the hearing, Horstman's total support payments (for three children) were about $1,331 monthly, with an expected small decrease to about $1,296. The payments come from his net income; and there is no income tax relief. On one sample bi-weekly pay statement, there is an array of source deductions for employment benefits and routine deductions for income tax, e.i. premiums, Canada Pension, etc. It shows net bi-weekly pay at approximately $1,200 - which is less than what he needs to pay support each month, aside from meeting his ordinary living expenses. That said, Horstman's disposable income was not subjected to close scrutiny. And, in fairness, he did not submit a detailed household budget, with or without reference to the others he is living with.

[39] Self-represented Horstman did not dispute the general proposition that he has a duty to support his children - he agreed to pay the Nova Scotia Table amount [for current support] after formal notice and the proceedings started. However, his position is that for reasons best known by Hartman, and to his belief, she did not want and she did not (until recently) demand or seek any support from him. In his submission, his whereabouts were known or easily determined; and his is not a text-book case of deliberate evasion or avoidance.

[40] Arguably, a payor parent's conduct, including "blameworthy conduct", is relevant. But, a recipient parent's conduct is also relevant - especially when (as in this case) delay is raised in reply. When it comes to looking at blameworthy conduct (which is not determinative on its own), a wide or expansive view should be taken.

[41] Judges should be alert to the practicalities associated with court applications such as legal expense, fears that the other parent might react vindictively, absence from the jurisdiction, accident or illness, absent or inadequate legal advice, or other good cause for which fault sometimes cannot be attributed to a party. And, in deciding whether unreasonable delay by a recipient militates against an award, I am mindful of jurisprudence that child support is the right of the child.

[42] When relied on, the foregoing factors must be grounded in the evidence. In my opinion, generalized pleas for fairness are insufficient if unsupported by credible evidence. The trilogy outcomes underline the importance of the facts in every case. That Horstman would challenge Hartman's version of events was known from the outset; and the delay and large amount of money being sought served to highlight the importance of the issues. However, with respect, Hartman proffered limited and, in my opinion, unconvincing evidence about her efforts and the alleged hurdles she faced in pursuing inter-provincial child support. As noted in the trilogy, the longer the delay, generally, the less likely full relief will be granted.

[43] I have directed myself to consider the present circumstances of the children, as well as their past circumstances, in deciding whether the remedy sought is justified. However, with respect, this is another part of Hartman's case which suffered from a paucity of evidence. Other than a broad statement by the mother that she financially supported the children in the intervening years, little else was disclosed about their circumstances. On the evidence, I am unable to say they suffered or endured hardship - except as might be inferred from the fact their mother became reliant on public assistance benefits at one stage and that they lived in modest accommodations.

[44] After the separation and while estranged from his children, Horstman moved on to other relationships. He fathered another child by one relationship and, by court order, must support the child. Although he is now in another relationship and may be under an obligation to contribute to the support of his common law partner, I find he is under no legal obligation to support any of her five children (by other individuals). When he decided to take on the responsibility of financially supporting the children of others, he already knew about his duty to support one child; and he knew or ought to have known that some day he would face demands on behalf of his/Hartman's children. In my opinion, Horstman's

choice to financially prefer the children now under his roof over his sons cannot be held up as a barrier to Hartman's claim.

[45] Against this background, I conclude that a retroactive award should be entertained but not to the extent advanced by Hartman. I have directed myself that where appropriate, courts should attempt to craft retroactive relief awards in a way that minimizes hardship, recognizing it will not always be possible to do so.

[46] That decided, I must determine when to make it effective and fix the quantum. The Supreme Court identified the four choices for the retroactive date: the date when an application was made to a court; the date when formal notice was given to the recipient parent; the date when effective notice was given to the recipient parent; and the date when the amount of child support could have been imposed. The Supreme Court opined that the date of effective notice should be adopted as a general rule. That date is an indication by the recipient that child support is claimed or will be pursued, and does not require the recipient parent to take any legal action.

[47] On a strict application of the law, I find that effective notice was given to Horstman when the proceedings started in November. As mentioned, only in exceptional circumstances will the date when support could have been paid, or another date, be the appropriate date from which to impose an award.

[48] Quantum is decided by reference to the **MCA** and **CMG**. "Blind adherence" to the amounts set out in the applicable Tables is not required. (For example, the court has discretion under **CMG** 10 and other sections.) As previously mentioned, the Table amount for basic support in 2009 (and early 2010) for the two boys was $798 monthly.

[49] Keeping in mind that the outcome should not flow from strict or mechanical analysis, and that there is a residual discretion with the court when looking at all of the circumstances, in these unique circumstances I am prepared go behind the effective date a few months such that Horstman's obligation will be imposed coincidental with the children's arrival in Nova Scotia. I find the delay in legal action from the time of arrival until commencement of the application was reasonably explained. Moreover, to his credit, Horstman professed a willingness to pay some retroactive support (albeit not as much as claimed). I exercise my

discretion and order that Horstman shall pay to Hartman for the children's benefit, retroactive support for the months August, 2009 to and including April, 2010. The total is $7,182 ($798 x 9). Horstman will be unable to respond to a lump sum award; and may face significant changes in his lifestyle. A long-term payment scheme is likely the only viable one. Accordingly, I order that the arrears shall be paid through MEP, at the rate of $100 monthly, on the 15th day of each month, until paid in full, starting effective December 15, 2010.

[50] No court costs are awarded.

[51] Counsel for Hartman shall submit an appropriate order.

Dyer, J.F.C.

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Revised Decision: The text of the original decision has been corrected according to this erratum dated September 5, 2013

Judge: The Honourable Judge William J. Dyer

Heard:	August 11, 2010, at Bridgewater, Nova Scotia
Counsel:	Shawn O'Hara, for the Applicant John Horstman, the Respondent, on his own behalf

Erratum:
Page 2 of the Decision, first paragraph, the first line where it reads "...two boys, **seven and five years** old"...."should have read "...two boys, **seventeen and fifteen** years old..."