

FAMILY COURT OF NOVA SCOTIA
Citation: *Deveau v. Deveau*, 2020 NSFC 3

Date: 20200206
Docket: FDMCA 086927
Registry: Digby

Between:

Melanie O'Neill

Applicant

v.

Steward Deveau

Respondent

Judge: The Honourable Judge Jean M. Dewolfe
Heard: November 25, 2019, in Annapolis Royal, Nova Scotia
Final Written Submissions: November 28, 2019
Counsel: Rachel Taylor, for the Applicant, Melanie O'Neill
Sinead Russell, for the Respondent, Steward Deveau

By the Court:

Introduction

[1] This is an application by Steward Deveau to reduce child support payments for two children. The Respondent, Melanie O'Neill seeks to adjust child support retroactively for three years prior to the date of the application and to set prospective child support based on an imputed income.

[2] In August 2013, the parties consented to an interim order providing for \$350.00 per month child support payments based on Steward Deveau's income of \$25,000.00 per year. Steward Deveau was to provide "proof of income".

[3] The interim order was "considered to be permanent" by the Court at an October 2013 appearance, but no final order was issued. Given the extent of the order and the time which has elapsed since it was issued, current counsel agree that the Court should treat the 2013 order as a final order, and that the parties' respective applications to vary are procedurally appropriate.

Evidence

[4] Steward Deveau's testified that he became unemployed due to illness in August 2018. He then returned to work, had an accident in December 2018 in

which he injured his arm and hand, and was let go shortly thereafter. He did not qualify for Employment Insurance benefits, and is fighting to get Worker's Compensation. He applied for CPP disability entitlement in October 2019. He stated that he has "Chronic Regional Pain Syndrome". His only supporting medical evidence was a two sentence letter from his family doctor dated May 9, 2019, stating that he had been off work since January 2019 due to a hand injury which rendered him "disabled and unable to work". He provided no verification of his WCB status, his illness in 2018, or confirmation of treatment or of current diagnosis or prognosis for his injuries. He indicated that he has paid for clothes and medical needs for the children.

[5] Steward Deveau provided financial disclosure of his income since 2013. In the years in which Melanie O'Neill seeks an adjustment of child support he earned as follows: 2016 (\$84,670.00); 2017 (\$66,491.00) and 2018 (\$21,177.00). He claims to have had no income since December 2018. He says he paid support until August 2018, and then missed September, October and November 2018 due to illness. His last child support payment was made in December 2018. Support was being paid directly.

[6] Steward Deveau owns a home which is assessed at \$169,000.00 and is encumbered by a \$119,000.00 mortgage. He drives a Toyota Tundra truck and

pays \$622.00 per month as a payment, which is not in arrears. He has cut and sold wood, but testified that he stops when it hurts. He has bred dogs with a friend but has sold none. His spouse is a substitute teacher and pays his expenses. He drives and hunts. He can carry supplies, approximately 30 pounds of carrots or apples and a rifle for hunting. He is 43 years of age. He has the children in his care on alternate weekends.

[7] Steward Deveau testified that he has a Grade 12 education. He considered applying to be a bus driver but could not lift 50 pounds and was disqualified. He is on no medication except the occasional use of a cream for pain. He has “stopped” physiotherapy and is not attending a rehabilitation program. He does not intend to look into retraining programs until after the decision from his Workers’ Compensation appeal. Prior to his work in the fishing industry he had worked in carpentry, construction, and mink farming.

[8] There appears to be a question as to whether Steward Deveau quit or was constructively dismissed from his work in December 2018, after his accident.

[9] He testified that he did not know he should have advised Melanie O’Neill as to his higher income, as this was not in the 2013 order and he was not represented at the time.

[10] Melanie O'Neill's evidence is that Steward Deveau stopped his child support payments in June 2018, and then made one last payment in December 2018. She testified she had no idea that he had made so much more in 2016 and 2017 than the income upon which the 2013 order is based (\$25,000.00). She also testified that she requested income information and additional funds from him on numerous occasions.

[11] A review of text messages between the parties provided by Melanie O'Neill appears to show requests for income information and funds after Steward Deveau stopped paying child support in May 2018. It is unclear as to when previous requests for income disclosure were made.

[12] She testified that her requests were met by threats by Steward Deveau that if she asked for more support he would just "work under the table" and she would get "nothing". She also testified that she was afraid of Steward Deveau, that she had had a peace bond against him in the past due to threats, and they do not speak. In April 2019 she had to get an order for the return of the children after he took them from their school and refused to return them.

[13] While she was "ok" with the 2013 order as long as she got her regular child support payments, she testified that she has struggled financially to support the

children. She works as a cashier earning approximately \$24,000.00 per year and has had to borrow money from her parents and go into debt. She has paid for daycare and tutoring with no assistance from Steward Deveau.

[14] She testified that she is only aware of one pair of shoes which Steward Deveau bought for a child.

Law

[15] These are cross variation applications and as such each respective applicant must prove a material change in circumstances on a balance of probabilities.

[16] The *Parenting and Support Act*, R.S.N.S. 1989, c. 160 as amended, s. 37(1) provides authority for this Court to rescind or vary child support “prospectively or retroactively”.

Retroactive Variation

[17] Melanie O’Neill seeks an adjustment of child support retroactively for three years prior to her application (May 2016 to May 2019). This would allow for significant increases for two years and a slight decrease in the third year (2018). She relies on the Supreme Court of Canada case of *D.B.S v. S.R.G. et al*, (2006)

SCC 37 which outlined four factors for a Court to consider in circumstances where the Applicant seeks a support increase retroactively:

- 1) Reasonableness of the custodial parent's excuse for failing to make a timely application.
- 2) The conduct of the non-custodial parent;
- 3) The circumstances of the child(ren) past and present;
- 4) The hardship that may accrue to the non-custodial parent of a retroactive award, particularly in the face of blameworthy conduct.

[18] This Court accepts Melanie O'Neill's evidence that the parties do not communicate well, and that she was afraid to seek financial disclosure from Steward Deveau due to his threat to work "under the table" and pay nothing. This Court also accepts that given the lack of communication, Melanie O'Neill had no idea that Steward Deveau had earned significantly higher income in 2016 and 2017.

[19] Steward Deveau hides behind the fact that there was no financial disclosure clause in the 2013 order.

[20] Steward Deveau consistently made the payments pursuant to the 2013 order until 2018. However, he did not disclose his increased income to Melanie O'Neill.

[21] The children deserve an appropriate level of child support. Melanie O'Neill has struggled financially to meet their needs. Steward Deveau contributed nothing to their reasonable tutoring and child care expenses even when earning significantly more than Melanie O'Neill. The Court finds that he was aware of these expenses and his failure to disclose his income or voluntarily provide assistance to Melanie O'Neill is blameworthy conduct. Steward Deveau has assets and a partner who shares expenses with him.

[22] Therefore, child support will be adjusted so that Steward Deveau will pay child support as follows:

- \$1,179.00 per month for the months of May 2016 to and including April 2017 (\$84,670.00 income).
- \$916.00 per month for the months of May 2017 to and including November 2017 (\$66,491.00 income, old Tables).
- \$939.00 per month for the months of December 2017 to and including April 2018 (\$66,491.00 income, new Tables).
- \$300.00 per month for the months of May 2018 to and including December 2018 (\$21,177.00 income).

[23] The Court finds that Steward Deveau paid \$350.00 per month from August 2013 to and including June 2018. The Court finds Melanie O’Neill to be a more credible witness than Steward Deveau, who has no proof of payments for July and August 2018.

Prospective Child Support

[24] The Court has no evidence except for Steward Deveau’s testimony that he cannot currently work. His doctor’s letter is dated. He is able to drive, hunt, and cut wood. He has made no efforts to work, retrain or pay any child support. His disclosure with respect to his health in 2018 and since the accident is lacking.

[25] Melanie O’Neill seeks to have income of \$25,000.00 imputed to Steward Deveau, thereby providing ongoing child support of \$360.00 per month.

[26] Section 19 of the *Child Support Guidelines* provides the Court with the ability to impute income. Justice Forgeron in *MacDonald v. Pink 2011 NSSC 421* ably summarized the principles Courts must follow when imputing income:

[24] ...

- a. The discretionary authority found in sec. 19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and

reasonableness, must be shown before a court can impute income: **Coadic v. Coadic** 2005 NSSC 291.

- b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49.
- c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivray v. Ross**, 2008 NSSC 339.
- d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi** 2011 NSCA 65; **Van Gool v. Van Gool**, 1998 CanLII 5650 (BC CA), [1998] 113 B.C.A.C. 200; **Hanson v. Hanson**, 1999 CanLII 6307 (BC SC), [1999] B.C.J. No. 2532 (S.C.); **Saunders- Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.
- e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self- induced reduction in income: **Duffy v. Duffy**, supra; and **Marshall v. Marshall**, 2008 NSSC 11.

[27] Melanie O'Neill argues that Steward Deveau is intentionally unemployed.

This does not require proof of a specific intention to avoid child support

obligations, but the payor's actions must be assessed in the context of reasonableness: *Gould v. Julian*, 2010 NSSC 123 at para. 33.

[28] The Court finds that Steward Deveau is intentionally unemployed. His evidence of disability is insufficient. His explanation as to his inability to work is not credible. It is unreasonable for a 43 year old man to make no efforts to work and/or retrain. He has made no contributions to his children's support for almost two years.

[29] The Court must assess Steward Deveau's income earning potential. His lowest income prior to 2019 was \$21,177.00 (2018). I have no credible evidence as to why he cannot continue to earn at least this amount or retrain to do so. I note that this is less than full time minimum wage. Therefore, child support will be set at \$300.00 per month commencing January 1, 2019 based on an imputed income of \$21,177.00.

[30] All child support including arrears will be paid through the Nova Scotia Maintenance Enforcement Program. Steward Deveau will forthwith advise Melanie O'Neill of any changes in his income as they occur and will annually provide his tax return to Melanie O'Neill on or before June 1st each year.

[31] I will hear the parties on the issue of costs.

[32] Counsel for the Applicant, Melanie O'Neill, please prepare the Order.

Jean M. Dewolfe, JFC