IN THE FAMILY COURT OF NOVA SCOTIA
Citation: V.A. v. R.A., 2011 NSFC 23

Date: 2011 09 13
Docket: FBWMCA-037443
Registry: Bridgewater

Between:

V. A.

Applicant/Respondent herein

v.

R. A.

Respondent/Applicant herein

Editorial Notice
Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge William J. Dyer

Heard: May 11, 2011, at Bridgewater, Nova Scotia

Counsel: Tabitha Veinot, for V. A.
R. A., on his own behalf

By the Court:

[1] Under the **Maintenance and Custody Act (MCA)** and **Child Maintenance Guidelines** (**CMG**), R. A. (the father) commenced a variation application against V. A. (the mother) to have his child support obligations reduced retroactively to March 1, 2009.

Background

[2] The parties are the parents of two dependent sons, 15 and 11 years old, respectively. Both reside primarily with the mother, subject to reasonable access by the father.

[3] The legal history goes back to 2005. However, the most recent order was issued in late November, 2008 when the father had an annual average income of about $32,300 and the mother's (average) income was about $45,900. Under the **CMG**, the last order awarded the mother basic child support of $482 monthly, section 7 expenses of $82 monthly for 22 months, and ongoing section 7 expenses of $42. The $82 per month figure related to one child's orthodontic needs; and the $42 figure represented a contribution to medical and dental insurance premiums. There was the usual provision for annual disclosure of personal income tax returns and notices of assessment.

[4] The Maintenance Enforcement Program (MEP) has been actively involved for several years in trying to collect support due and payable by the father. Most recently, the agency took action to have the father's driving privileges suspended.

[5] Until February, 2009 the father was employed as a truck driver for a transport company based in the community of [...] , Nova Scotia. He left the company on his own initiative, claiming a lack of work. He started his own moving company, based in the Halifax Regional Municipality.

[6] Importantly, when the last order was approved, the father gave no indication to the mother or to the court that he was thinking of changing his

employment. But, within three months that is what occurred. Thereafter, what little money was recovered came by MEP garnishee.

[7] The father did not provide timely or full income disclosure to the mother. He waited a year before taking steps to start his variation application. And then he asked for rescission of child support almost all the way back to the last order.

[8] The mother countered with submissions that he has been under-reporting current income or, in the alternative, that he is intentionally under-employed or unemployed for the purpose of evading or minimizing his child support obligations.

[9] The case languished for several months during a time when both parties were self-represented and struggling to assemble routine financial disclosure. By mid July, 2010 the father had retained counsel and, by mid September, 2010 the mother also had a lawyer.

[10] By early March, 2011 the father was still represented by counsel. Indeed, his lawyer motioned for an early hearing date. There were no further developments until the start of the present hearing when, on the application of the father's lawyer, and without objection from the father, the lawyer withdrew. The father stated his intention to continue with the hearing, self-represented.

[11] It quickly became apparent that (despite the passage of time) the father could not or would not provide any additional financial disclosure. By then, I should add, his formal position on the merits had already been largely captured by an affidavit and some incomplete financial materials that had been filed on his behalf by his former lawyer.

Highlights of the Mother's Evidence

[12] A record of payments from MEP was introduced. The mother confirmed that as of approximately mid May, 2011 child support due and payable to her for the benefit of her sons exceeded $11,700.

[13] I accept the mother's evidence that the father worked episodically in the past, left various jobs, moved on to other jobs, and was irregular and inconsistent in meeting his financial obligations. She asserted that the father seeks relief every time there is a self-induced change in his employment status. That said, in fairness to him, a review of the file discloses that all past orders were by agreement and imposed without the necessity of full court hearings.

[14] In commenting on the father's most recent business venture, the mother referred to postings on Facebook (a social networking service and website) and some bravado about sponsorship of racing cars by the father's company. She also pointed to Kijiji (an online classified advertising site) and solicitations for charitable donations to be matched by corporate donations by the father's business. The mother rhetorically questioned how the father has money for these discretionary interests but no income and no money for child support.

[15] The mother also referred to conventional advertising sources in which the company purported to have two full-time plus two part-time employees and as being "Number One among local moving companies". In the commercial advertising, there is mention of a truck and 20 foot enclosed trailer.

[16] The mother drew attention to a status report posted by MEP on March 4, 2010. It reads as follows: "Action commenced to revoke Payor's driving privileges is on hold due to...." She observed that it was about this time that the father commenced his application to vary and she surmises, quite reasonably, that the father's application was prompted by fear that he might lose his licence. As it happens, by the time the hearing started, MEP had taken action and achieved licence suspension through the Registrar of Motor Vehicles. Allowing that the licence suspension would have an impact on the father's employment, the mother was not terribly sympathetic. (The issue is canvassed later in this decision.)

Highlights of the Father's Evidence

[17] The father submitted a brief affidavit. Attached to his affidavit were copies of his personal income tax summaries showing the following line 150 income:

2006 - $23,064; 2007 - $29,189; 2008 - $33,480. He presented a copy of his handwritten, late-filed 2009 personal income tax return purporting to show Line 150 income of about $7,037 from employment and self-employment. As at the hearing, he still had not filed his 2010 personal income tax return, and the Canada Revenue Agency had not assessed the 2009 return.

[18] He wrote that he left his employment as a long-haul truck driver in late February 2009 “primarily due to shortage of work”. He said this was “due to the economy, there were weeks between jobs and therefore I decided to go out on my own”. He suggested that the economy was in full recession four to six months before he left his job at [...]. But, there was no mention of this when the last order was approved.

[19] He established a new moving company which he incorporated. He experimented by advertising on the internet. Based on the number of contacts (or “hits”) from the advertising, he decided he was on the right track. However, he did not consult with any accountants, marketing or other business advisors before venturing out on his own. Nor did he seek any advice from successful business people. He had absolutely no business experience.

[20] Asked if he considered alternate paid employment before staring his own business, at first the father claimed he looked elsewhere but was unsuccessful. He stated he even considered some prospects in the U.S.A. But, he had no written proof of any applications or inquiries.

[21] When challenged on this topic, the father finally concede that he did <u>not</u> apply elsewhere for work with any other long-haul companies, based in Nova Scotia or elsewhere. He confirmed he was a veteran truck driver with over 15 years experience. He reluctantly volunteered that he was just tired of working in the long-haul sector.

[22] The foregoing is significant. It throws light on his decision to quit his job and his efforts to maintain employment - long before his licence was revoked in 2011. And it is relevant to his later decision not to seek viable alternate work when he realized his small company was unlikely to succeed - again, long before his licence was revoked.

[23] A letter from the father's former employer (tendered by the mother) confirms that the father quit the company when it was in a slack period because he (the father) did not think he was getting enough miles. However, the employer mentioned that "banked miles" are used to keep its drivers at an even weekly pay rate and noted the father drove close to 17,000 miles in early 2009 - such that he earned just over $5,000 (gross) plus 4% vacation pay. Also, he was paid for about 3,150 miles that had been "banked" from 2008 and which generated another $6,000 plus vacation pay and a safety bonus.

[24] I find the foregoing relevant and important because it shows that (despite the bleak picture painted by the father) he actually enjoyed a steady income stream in the wake of the last order and into early 2009. Other than the father's word, I find there is no evidence that the "slack period" was outside the norm for the company or the industry or, if he had stayed, that his annual income would be any less that it was in 2008.

[25] Confusingly, the father claimed that the employer's recapitulations were incorrect and that he did not accept them. But, he did not pursue the subject at the hearing; and he used the disputed figures in his 2009 return.

[26] The father described his new business as a "Limited Company". Included in his affidavit was a copy of an Income and Expense Statement for the period January 1, 2009 to December 21st, 2009 which purports to show a net loss of $4,279.70. The statement bears the company's corporate name. (The fiscal period appears to overlap his paid employment, discussed above.)

[27] In the same vein, he attached an Income and Expense Statement for January 1st, 2010 to July 31st , 2010. The stated net income for those seven months was only about $1,500. After the end of July, 2010, the estimated gross income of the business was only $15,000.

[28] The father claimed that he was not taking any wages from the business and added that he thought he should be able to "take an income this year as most of the start up costs are now out of the way". That was before his driving privileges were suspended.

[29] The father said the company's financial statements were prepared by an accountant. He did not name the accountant; and the accountant did not testify. He professed to be unfamiliar with much of the detail in the statements and repeatedly cited the accountant as being responsible for the content. For example, when asked about "employee benefits" claimed in 2009 ($852.50), the father was unable to explain what they were or for whose benefit they were paid. And, although wages and salaries were indicated as nil, he stated some wages were actually paid (notably to one of his sons) but not recorded. Asked about employee benefits ($421) paid in 2010, the father was similarly unable to explain the entry.

[30] He described himself as the sole owner and sole shareholder of the company. (No corporate documents were submitted at the hearing.) He conceded that he has not filed any corporate tax returns. With respect, the connection between annual corporate and personal returns seemed to escape him.

[31] Asked about the company's assets, the father said it only has a 20 foot leased trailer which attracts payments of about $330 monthly on a fourteen month lease. He said that the lease covers the trailer, plus a truck needed to haul the trailer. He said the total leasing costs are about $5,300 annually (which I cannot reconcile with the stated monthly payments). He vaguely stated that he was running some of his personal expenses through the company, but insisted the statements segregated personal from legitimate business expenses. He was unable to fully explain or elaborate on this.

[32] In his testimony, the father confirmed that he was residing in Halifax at the time of the last order and working for the transport company, mentioned before. He lives in a two bedroom apartment with his female partner. She works for a government agency or department and, according to him, is supporting him financially. He said the couple is behind in their bills, but did not elaborate. His partner did not testify. They have no other dependants.

[33] The father stated he did not have enough income to pay regular child support as ordered, but he stated that he once contributed $600 towards a broken dental retainer and once gave $200 for winter soccer expenses.

Unfortunately, he did not state when the money was paid; and no receipts were provided. On the evidence, I am not persuaded these amounts were paid after the last order.

[34] In asking the court to rescind his past and current support obligations, the father wrote that he realizes his financial obligations to his sons and said that he would willingly resume payment when able to do so. Not surprisingly, this was met with skepticism by the mother: experience is a hard teacher.

[35] The father's drivers licence was suspended in February, 2011. Apparently, this was one of several actions taken by the MEP Director because of the father's defaults. The father did not state what other actions (if any) the agency took and did not say what settlement discussions (if any) occurred before MEP went ahead. Without a licence, the father said he had to stop working and that his company was at a stand-still by the time of the hearing. He suggested that his company might close its doors "tomorrow".

[36] Regarding the present status of his company, the father said it is doing no work. He claimed that its website is out of date and therefore inaccurate.

[37] Asked about the references to two full-time employees in commercial advertising, the father said that the ads were developed in anticipation of what his company could and would be doing. However, he stated the company never did hit full stride. In practical terms, he said that he was only doing small jobs with the help of his girlfriend and sometimes his eldest son.

[38] The father cast himself in the role of a victim. He said his business is doomed because of his licence suspension; and so is alternate employment. But, when asked what he had done to find out what remedies he may have through MEP or otherwise for licence restoration, the father conceded that he had done nothing. (As noted elsewhere, the father was aware for about a year that licence suspension was being considered; and he had the benefit of a lawyer for much of the time.) He said that he has been depressed about the entire situation and simply not made any inquiries.

[39] The father has made no attempts to find work which may not require a licence. I judicially notice he lives in a large urban area where public transportation is widely available. I am confident in thinking there are many Nova Scotians who have secured jobs, and manage to travel to and from those jobs, without the benefit of a licence or motor vehicle.

Discussion/Decision

[40] In **M.V. v. S.V.** 2009 NSFC 24 I stressed that under the **MCA** every parent is under an obligation to financially support her or his children who are under the age of majority, unless there is a lawful excuse for not doing so. In the present case, as in that case, the mother assumed the role of primary caregiver and expected that the father, as the non-custodial parent, would contribute financial support. However, for all practical purposes, in the present case the father has not done so since the last order; and the mother has shouldered all the responsibility.

[41] The amount of child support payable by the non-custodial parent is usually the amount set out in the applicable Table, plus the amount, if any, determined under **CMG** section 7. The father's position (like the father in the **M.V.** case) is that his income has been, and continues to be, far below the income threshold for any payment - regardless of what was ordered with his consent in late 2008. The mother's position is that he made a deliberate, ill-conceived decision to leave secure, paid employment in favour of self-employment which had little prospect of success, and that he paid no regard to the children's ongoing financial needs when he did so. Moreover, after he realized (or should have realized) that his business was doomed, the mother submits he made no effort to return to the regular workforce. She submits his conduct should not be condoned by the court and that his application should be dismissed.

[42] **Smith v. Helppi** 2011NSCA 65 is a helpful reference. It too was an application to vary, with a retroactive component. Justice Linda Lee Oland wrote:

> ... Section 37(1) of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, states that maintenance orders may be varied "where there has been a change in circumstances since the making of the order or the last variation order." Section 37(2) provides that when making a variation order in respect of child

> maintenance, the court shall apply s. 10. That section states that when determining the maintenance to be paid for a dependant child, the court shall do so in accordance with the *Child Maintenance Guidelines*, N.S. Reg. 53/98 as amended, made pursuant to s. 55 of the *Act*.
> What constitutes a change of circumstances for the purposes of a s. 37 variation is found in s. 14 of the *Guidelines*, which reads in part:
>
> > **14** For the purposes of Section 37 of the Act, any one 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 provision thereof;
> > Section 19 of the *Guidelines* allows the court to impute income, as it considers appropriate, in certain circumstances. It reads in part:
> > **19 (1)** The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
> >
> > > (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;
> >
> > As set out above, s. 37 of the *Act* and s. 14 of the *Guidelines* require a change of circumstances before an existing child maintenance order can be varied...

[43] I am also mindful that section 23 of the **CMG** authorizes the court to draw an adverse inference against a parent who has failed to provide income information required by the statute or by court order, if and when it comes to imputing income.

[44] Justice Oland adopted the following analysis by Justice Darryl W. Wilson in **Gould v. Julian**, 2010 NSSC 123:

> [27] 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 of 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.

[45] On the issue of retroactive variation, Justice Oland wrote:

I observe that there is a distinction between a retroactive award of child support and a retroactive reduction of child support. The former awards payments and thereby increases child support. See, for example, *D.B.S v. S.R.G*, 2006 SCC 37 which set out factors governing retroactive awards of child support. In contrast, a retroactive reduction of child support reduces support, whether it takes the form of forgiveness of arrears or a retroactive decrease in support payable and recalculation of arrears. See, for example, *Brown v. Brown*, 2010 NBCA 5 which distinguished *D.B.S.* on this basis, and *Kuszelewski v. Michaud*, 2009 NSCA 118. Other than *Gould*, the cases supplied by Mr. Smith to support his argument pertained to retroactive awards rather than retroactive reductions.

> In *Brown*, Robertson J.A. writing for the New Brunswick Court of Appeal indicated that, in regard to the requisite material change of circumstances, an order to retroactively vary downwards could be based on many factors. He explained:
>
> **19** There is no reason why the concept of "change in circumstances" cannot be viewed flexibly as it has in the past, thereby accommodating a host of factual developments justifying the issuance of retroactive orders that reflect a partial or full remission of support arrears. Certainly, estoppel and detrimental reliance based arguments that the support recipient led the payer to believe that the obligation to pay support would not be enforced would fall within the ambit of the change in circumstances test. Hence, for purposes of deciding this appeal, and for ease of analysis, I am going to consider the factual scenarios described in ss. 118(1)(b) and (c) of the *Family Services Act* as falling within the concept of "change of circumstances".
>
> **20** As a matter of fact, the two most common grounds for relief from the payment of arrears are the payer's reduced ability to pay and the payee's reduced need for support during the period of retroactivity. With respect to the payer's ability to pay, the majority of cases involve payers who experienced a decline in income (most often due to unemployment or illness) in the years during which the arrears were accumulating. Of course, a payer who wants to reduce support arrears because of an income decline must be prepared to make full and complete disclosure.
>
> **21** In summary, the jurisdiction to order a partial or full remission of support arrears is dependent on the answer to two discrete questions: Was there a material change in circumstances during the period of retroactivity and, having regard to all other relevant circumstances during this period, would the applicant have been granted a reduction in his or her support obligation but for his or her untimely application? As a general proposition, the court will be asking whether the change was significant and long lasting; whether it was real and not one of choice.

[46] I will (again) mention several of Justice Forgeron's decisions: **2008 Marshall v. Marshall**, 2008 NSSC 11; **Crane v. Crane,** 2008 NSSC 330; and **MacGillivary v. Ross**, 2008 NSSC 339. She cited **Montgomery v Montgomery**, 2000 NSCA 2 in which it was held that an intention to deprive the other spouse of child support need not be present in order to impute income, and that it is sufficient if the payor has made an unjustifiable choice to be underemployed or unemployed. In **Marshall**, the Justice Forgeron placed special emphasis on a payor's earning capacity having regard to age, education, work skills and work history.

[47] At first blush, the father has established a significant change in his reported income sufficient to meet the threshold for review under section 37 of the **MCA** which is complemented by section 14 of the **CMG**. However, relief is discretionary. Even where income tax returns or summaries display a significant income reduction (and, in this case, little or no current income), there is no automatic right to an award of reduced support. All of the circumstances must be considered; and the court's decision must be based on the evidence presented - not on simple declarations of inability to pay.

[48] In the present case, the mother has satisfied me that this is a case in which it is inappropriate to accept and rely on the father's personal tax returns and incomplete corporate statements and disclosures. On the evidence, she has made a strong case that the father was underemployed for many months and that he is now deliberately unemployed.

[49] I find that the father left a secure, reasonably well-paying job (even if it was less than ideal and tiresome) to start an uncertain life as a small businessman. Objectively, his plans were naive and unrealistic. He launched them without any business experience and little or no professional advice. In short, his departure was unnecessary and unwarranted in the circumstances. Importantly, he left without warning the mother and gave no consideration to the likely impact on child support.

[50] I find the father's self-induced income drop to virtually "no income" cannot be justified on the evidence or in law, and that his conduct should not be rewarded by relieving him of all responsibility for past and current support to the detriment of his children. I say this knowing that dismissal of his application will result in more accumulated arrears. However, that payment of current support will be difficult and that repayment of arrears may take a lot of time, does not warrant a different outcome in this situation.

[51] Regarding the licence suspension - which the father held out as sealing his fate - the relevant sections of the **Maintenance Enforcement Act** merit attention:

> 30 (1) Where a payor is in default under a maintenance order being enforced by the Director, the Director may send a notice to the payor by mail to the address for the payor shown in the records of the Director informing the payor that if the payor does not, within the time prescribed by regulation, make arrangements satisfactory to the Director for complying with the maintenance order, any driver's licence, privilege of obtaining a driver's licence, right to operate a motor vehicle in the Province or any other licence, registration of a vehicle or any permit issued to the payor pursuant to the Motor Vehicle Act may be suspended or revoked.
>
> 2) Where a payor does not make an arrangement with the Director pursuant to subsection (1) or where a payor fails to comply with any term of an arrangement made with the Director pursuant to subsection (1), the Director may request the Registrar of Motor Vehicles to suspend or revoke any driver's licence, privilege of obtaining a driver's licence, right to operate a motor vehicle in the Province or any other licence, registration of a vehicle or any permit issued to the payor by the Registrar and the Registrar shall suspend or revoke the driver's licence, privilege of obtaining a driver's licence, right to operate a motor vehicle in the Province or any other licence, registration of a vehicle or any permit.
>
> (3) Notwithstanding subsection (2), where the Director is satisfied that the payor requires a licence for employment purposes, the Director may request the Registrar of Motor Vehicles to issue to the payor a conditional licence that authorizes the operation of a vehicle for employment purposes only and the Registrar shall issue the conditional licence unless the licence would otherwise not be issued pursuant to the Motor Vehicle Act.
>
> (4) In addition to suspending or revoking a driver's licence, privilege of obtaining a driver's licence, right to operate a motor vehicle in the Province or any other licence, registration of a vehicle or any permit pursuant to subsection (2), the Registrar of Motor Vehicles shall not renew a driver's licence, privilege of obtaining a driver's licence, right to operate a motor vehicle in the Province or any other licence, registration of a vehicle or any permit issued to the payor pursuant to the Motor Vehicle Act or otherwise deal with the payor pursuant to that Act until such time as the Registrar of Motor Vehicles receives a request from the Director to lift the suspension or revocation. (My emphasis.)

[52] It is obvious from the statute that licence suspension does not occur without notice and an opportunity to make payment arrangements to forestall it. The father presented no evidence that he tried to negotiate a settlement. A reasonable inference is that he ignored the notice and then suffered the consequences.

[53] Conditional licences for employment purposes are authorized. On the evidence, the father did not ask for this relief which, if granted, I find would have allowed him to return to work as a trucker or to pursue other employment options.

[54] Against this background, the father persists in blaming others for his predicament. Although he is unlikely to be persuaded that he is responsible for much of what has befallen him, the end result is that he has not convinced me his variation application should succeed. It is dismissed.

[55] There were no submissions regarding costs. Should the mother seek an award, her counsel shall have three weeks to make written submissions; and the father shall have two weeks to submit a reply.

[56] An order capturing the result should be submitted by Ms. Veinot in due course.

Dyer, J.F. C.