IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacGillivary v. Ross, 2008 NSSC 339

Date: 20081118
Docket: 52187
Registry: Sydney, Nova Scotia

Between:

Rita MacGillivary

Applicant

v.

Brent Ross

Respondent

DECISION

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	March 5th, March 31st and September 24, 2008
Oral Decision:	November 14, 2008
Written Decision:	November 18, 2008
Counsel:	Ms. Elaine Gibney-Conohan, counsel for Ms. MacGillivary Mr. Duncan MacEachern, counsel for Mr. Ross

By the Court:

I INTRODUCTION

[1] Rita MacGillivary and Brent Ross are the parents of two teenage boys: Chris and Corey. Like all children, Chris and Corey have many expenses. The vast majority of these expenses have been met by Ms. MacGillivary. She works two jobs in an effort to make ends meet. Generally, Mr. Ross' financial contribution consists of the payment of $100 per month in tax deductable child support, and the payment of some activity costs.

[2] Ms. MacGillivary is requesting a retroactive increase in child support in conformity with the *Guidelines*. She also is asking the court to impute income to Mr. Ross.

[3] Mr. Ross states that his financial circumstances are desperate. He vigorously opposes having income imputed to him; he vigorously opposes

paying retroactive child support. Mr. Ross attributes poor health to his inability to work on a full-time basis.

[4] This variation application was heard on March 5, March 31, and September 24, 2008. The following people testified at the hearing: Walter Simpson, Scott Redford, Rita MacGillivary, Dr. Wawrzyszyn, Brent Ross, Stuart Zahara, and Michelle Ross.

II ISSUES

[5] The court will determine the following issues in this decision:

a) Has Ms. MacGillivary proven a change in circumstance?
b) What is Mr. Ross' total income?
c) Should income be imputed to Mr. Ross?
d) Should a retroactive child support order be granted?

III ANALYSIS

[6] **Has Ms. MacGillivary proven a change in circumstance?**

[7] Sections 37 and 10 of the *Maintenance and Custody Act* provide the court with the jurisdiction to make a variation order where there has been a change in circumstances in conformity with the *Provincial Child Support Guidelines*. Section 14 (c) of the *Guidelines* confirms that the coming into force of the *Guidelines* constitutes a material change in circumstances.

[8] In this case, the last court order is dated March 4, 1996. A change in circumstances has thus been proven by the fact that the *Guidelines* were implemented on August 31, 1998.

[9] **What is Mr. Ross' total income?**

[10] Section 16 and any Schedule III adjustments are the starting points in the determination of income under the *Guidelines*. The total income of a parent under s.16 must be determined before one looks to adjustments pursuant to ss.17 to 20 of the *Guidelines.*

[11] Mr. Ross reports the following total income and the following Schedule III employment expenses for each of the past three years:

Year	EI Benefits	Employment Income	Total Income	Employment Expenses	Actual Income
2005	$8,764	$13,350	$22,114	$8,613	$13,501
2006	$10,496	$13,440	$23,936	$12,146	$11,790
2007	$12,773	$14,850	$27,623	$18,623**	$9,000**

** Mr. Ross estimated his employment expenses and actual income for 2007.

[12] Mr. Ross forecasts that he will fare worse in 2008 than he did in prior years.

[13] Ms. MacGillivary states that Mr. Ross' income calculations defy all credibility. From Ms. MacGillivary's perspective, income must be imputed to Mr. Ross.

[14] **Should income be imputed to Mr. Ross?**

[15] *Reasons Supporting Income Imputation*

[16] Ms. MacGillivary states that income should be imputed to Mr. Ross for the following reasons:

a) Mr. Ross is under-employed;

b) No reliable evidence was adduced to confirm Mr. Ross' contention that his health impacts upon his ability to work;

c) Mr. Ross' claimed employment related expenses are unreasonable in the circumstances;

d) Mr. Ross did not provide all of the financial disclosure requested of him;

e) Mr. Ross earns income through the underground economy; and

f) Mr. Ross does not pay provincial or federal income tax because he under reports income and over reports expenses.

[17] Ms. MacGillivary asks the court to impute income of $31,000.00 or more to Mr. Ross for the purposes of the child support calculation.

[18] *Reasons Against Income Imputation*

[19] Mr. Ross argues that income should not be imputed to him for the following reasons:

a) Mr. Ross states that he is not underemployed; he is unable to work full time because of his reasonable health needs;

b) Mr. Ross' health difficulties predated the variation application. Mr. Ross said that he experienced health problems after he was involved in an accident at work in approximately 2001;

c) Mr. Ross states that he provided proof of health problems. He notes that he receives accommodation at his work because of

his health difficulties. Mr. Ross indicates that his employer adjusts the type and amount of work given to him. Mr. Ross relies upon the evidence of his wife and the evidence of his immediate employment supervisor. In addition, Mr. Ross notes that his family physician also confirmed that Mr. Ross complained of back problems during office visits;

d) Mr. Ross states that he only claims allowable employment expenses for income tax purposes and that no gross up should be effected in the circumstances;

e) Although he did not furnish the exact disclosure requested, Mr. Ross argues that he has nonetheless shown that his employment expenses are reasonable in the circumstances. Mr. Ross notes that his supervisors confirmed the amount of travel which was required of him and they confirmed his obligation to provide his own tools and transportation; and

f) Mr. Ross states that he does not participate in the underground economy to any extent. Mr. Ross does admit to doing the odd job for cash, but very little income is earned through this source.

[20] Mr. Ross states that he has no ability to pay additional child support because he does not earn a significant income. Mr. Ross argues that any increased child support will be a liability to his wife who has no legal obligation to support the children from his first relationship.

[21] *Legal Analysis*

[22] Section 19 of the *Guidelines* provides the court with a broad discretion to impute income in circumstances where the court finds it appropriate to do so. Ms. MacGillivary relies upon ss.19 (1)(a), (b),(f), (g) and s.19(2) of the *Guidelines* in support of her position.

[23] The discretionary authority found in s.19 of the *Guidelines* must be exercised judicially in accordance with the 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. The burden of establishing this foundation rests upon the party requesting the relief.

[24] *Health Needs of a Parent*

[25] Section 19 (1)(a) of the *Guidelines* contemplates a three step analysis: **Drygala v. Pauli** 2002 CarswellOnt 3228 (CA) at para 23. The three steps are as follows:

a) Is the parent intentionally under-employed or unemployed?
b) If so, is this caused by the health needs of the parent?
c) If no, what is the appropriate income to be imputed?

[26] Ms. MacGillivary has proven the first branch of the test; Mr. Ross admits that he is under-employed.

[27] In the second branch of the test, the evidentiary onus rests upon Mr. Ross. He must prove that health problems compromise his ability to work. Mr. Ross is the person with access to the requisite, relevant information: **Drygala v. Pauli**, supra at para 41 and **Mitansky v. Mitansky** [2000] A.J. No.179 (QB) at para. 33. In **Mitansky v. Mitansky** , supra, Smith J states that such a parent must show a meaningful link connecting the parent's health needs to the inability to work at para 33:

> Section 19(1)(a) specifically allows for intentional under-employment for health needs. Health needs are asserted by the father. The mother refutes the assertions. In my view, where long standing health needs are asserted as a reason for under-employment, the person asserting must bear an evidentiary burden of meaningfully linking the health needs to the inability to work. That information is solely within the power of that person to assert. An assertion without more will not be sufficient proof where, as here, there is a long standing history of the same health concern coupled with an historical ability to work despite that health concern. In other words, while the proving party has the usual civil onus, the other party may be assigned an evidentiary onus in some circumstances.

[28] In **Mitansky v. Mitansky**, supra, the court held that the father did not link his health needs to an inability to work above $10,000 per annum. The

court held that despite the father's serious heart condition, he could earn an income of $25,000 per annum.

[29] In **Vanbeek v. Vanbeek** [2008] O.J. No.2004 (Sup.Ct.J), the court held that the father did not establish that health issues prevented him from working full-time, although the medical evidence did corroborate pain and physical limitations. Income in the amount of $25,000 was imputed.

[30] In **Dicks v. Dicks**, [2001] N.S.J. 302 (SC), Murphy J imputed income in the amount of $21,000 per year where the father did not link his health limitations to an inability to work. Although the medical evidence confirmed that Mr. Dicks would have to limit his employment choices to those involving "non-strength activities", the evidence did not prove that Mr. Dicks was incapable of work.

[31] In **Pamma v. Pamma** ,1999 CarswellBC 2227, Loo J refused to "make a quantum leap" and say that the father could not work based on the evidence. The evidence consisted of a list of medication being taken,

together with the viva voce evidence supplied by the father. No medical opinion was proffered. Income of $50,000 was deemed.

[32] An opposite result is found in **Bourque v. Gerlach** [2006] B.C.J. No.677 (CA). In that case, Rowles JA reversed the trial decision which imputed income to a parent where there was significant expert opinion from psychiatrists, including an independent examination, which confirmed that the parent suffered from long standing panic disorder, anxiety, and recurrent depression which was not amenable to treatment. The Court of Appeal held that there was no evidence to suggest that the parent was employable in light of the substantial medical evidence. A link connecting the health needs to the inability to work had been made.

[33] I find that Mr. Ross has not met the evidentiary burden upon him. He has not proven that his health needs limit his ability to work. I reach this conclusion, based upon the following factual findings which I make:

a) Mr. Ross presented *no medical opinion* that he experienced any health difficulties which limited his ability to work. Dr. Wawrzyszyn did not provide expert opinion. Dr. Wawrzyszyn did not state that Mr. Ross' health problems prevented him from working. Rather, Dr. Wawrzyszyn's brief evidence confirmed that Mr. Ross attended his office on five occasions since 2004.

Mr. Ross complained of back pain during four of those visits: March 10, 2004, January 17, 2007, January 14, 2008, and February 26, 2008. This medical evidence is a far cry from the type of expert opinion which is required to prove that a parent suffers from serious health problems and the serious health problems limit a parent from working. Although there is some evidence to suggest that Mr. Ross experiences pain, there is insufficient evidence to link this to an inability to work;

b) Mr. Ross led little evidence of treatment. Typically, if ill health negatively impacts on one's life, some form of treatment is arranged. The evidence of Mr. Ross' treatment was less than robust. Mr. Ross' wife said that he took Ibuprofen and hot showers. No documentary proof of the prescription medication was rendered;

c) Mr. Ross presented no history of access to private or public disability resources, although he did reference a 2001 WCB claim. There was no evidence that Mr. Ross was laid off from work for health reasons. Mr. Ross did not collect EI benefits based upon ill health. Mr. Ross did not make application for CPP benefits. If health prevents a person from working, one would expect some history of access to private or public disability benefits; and

d) Mr. Ross was not credible. There were internal inconsistencies noted in his evidence. Mr. Ross responded in a vindictive fashion when he became aware that an application to vary was being made by Ms. MacGillivary. Mr. Ross is disinclined to pay a proper amount of maintenance, and is using ill-health in an attempt to realize this goal.

[34] I will discuss the third step, the amount of income to be imputed to Mr. Ross, after I review the other imputation grounds put forth by Ms. MacGillivary.

[35] *Expenses and Disclosure*

[36] Section 19 (1)(f) of the *Guidelines* provides the court with the jurisdiction to impute income where a parent has failed to provide income information when under a legal obligation to do so. Section 19(1)(g) of the *Guidelines* provides the court with the jurisdiction to impute income where the parent unreasonably deducts expenses from income. Section 19(2) of the *Guidelines* states that the reasonableness of the expense deduction is not governed solely by the *Income Tax Act*.

[37] In **Snow v Wilcox**, 1999 NSCA 163, Flinn JA confirmed that in the context of a variation proceeding, something more than the most recent copy of an income tax return was required from an applicant, businessman at para 26:

> 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.

[38] Our courts have been consistent in imposing sanctions on parties who fail to provide disclosure in recognition of the needs of children and to uphold the integrity of the judicial system. In **MacLean v MacLean** (2002), 200 NSR (2d) 34 (SC), Goodfellow J imposed a cost sanction for the lack of disclosure in a variation proceeding. Goodfellow J emphasized a "zero tolerance policy" with respect to inaccurate or untimely disclosure at paras. 19 to 21:

> 19 Full disclosure in family matters is a given. Failure of a party to do so will, in most circumstances, result in adverse consequences. Such could include, a deeming of income, deeming of value, possibly contempt, if the failure persists, if an Applicant, possibly dismissal, stay, adjournment/postponement of relief sought, denial of costs, etc.
>
> 20 Failure to comply with this basic prerequisite, full financial disclosure almost automatically will have cost consequences because compliance of such a fundamental requirement should rarely require the Court's intervention - usually, only if there are major practical/time/confidential issues that need to be addressed.
>
> 21 The Court has developed a zero tolerance policy where full financial disclosure could reasonably have been complied with without Court intervention.

[39] In **Guillena v Guillena (**2003), 212 NSR (2d) 101(SC), an adverse inference was drawn by the Supreme Court due to the husband's failure to

comply with the financial disclosure order . Income was imputed to him as a result.

[40] I find that Mr. Ross' employment related expenses are not reasonable in the circumstances based upon the following findings which I make:

a) A negative inference in drawn because Mr. Ross failed to disclose basic financial information when required to do so. Mr. Ross did not provide his 2007 income tax return. Mr. Ross provided no documentary verification for most of his employment expenses, despite being asked. He kept no log of dates, places, and distance traveled for work. He provided no receipts. Mr. Ross guessed at his Schedule III employment deductions for 2007 and projected an even worse year for 2008 - all without documentary proof. The type of evidence which Mr. Ross provided to the court is insufficient to support his Schedule III expense claims. I do not accept that the type of *viva voce* evidence provided is sufficient to account for many of the claimed Schedule III expenses in this case;

b) The financial scenario presented by Mr. Ross defies logic and all reasonable probabilities. In 2005, 65% of Mr. Ross' employment income went to expenses. His net employment income was $4,737. In 2006, 90% of Mr. Ross' employment income went to expenses. His net employment income was $1,294. In 2007, Mr. Ross claimed a loss of $3,773 after employment expenses were deducted from employment income. Mr. Ross projected a worse year for 2008. I do not accept Mr. Ross' evidence. I do not accept Mr. Ross' suggestion that he works so that he can collect EI benefits. No reasonable person would continue in such unremunerative employment;

c) There was little credible evidence produced that Mr. Ross made sincere attempts to find better paying employment. There was no documentary evidence to show meaningful job search efforts; and

d) If Mr. Ross was doing as poorly as he has suggested, he would not have acquired the larger truck. I recognize that Mr. Ross' vehicle was stolen and he received insurance proceeds. However, the larger vehicle will likely be more expensive to maintain than the truck Mr. Ross used in the past to do the same job.

[41] *Cash Jobs*

[42] I find that Mr. Ross does indeed engage in cash jobs, although the cash jobs are not that significant. They nonetheless should be added into income which is available for child support purposes.

[43] *Amount of Income to be Imputed*

[44] The factors to be considered when determining the amount of income to be imputed were reviewed by this court in **Coadic,** supra, at paras 14 to 16:

> **[14]** In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr.

Coadic's income earning capacity having regard to his age, health, education, skills and employment history.

[15] In **Saunders-Robert v. Robert**, 2002 CarswellNWT 10 (S.C.), Richard, J., stated at para. 25:

> "[25] When imputing income, it is an individual's earning capacity which must be considered, taking into account the individual's age, state of health, education, skills and employment history. In the circumstances of the respondent, in my view it would not be unreasonable to impute, at a minimum, one-half of the income that the respondent earned in 1995 and 1996, say $50,000. I note that the respondent's present income, according to his own evidence, is approximately $42,500.00."

[16] In **R.C. v. A.I.**, 2001 CarswellOnt 1143 (Sup. Ct.), Blishen, J., reviewed the principle that income is based upon the amount of income which a parent could earn if working to his/her capacity and further adopted the factors to be applied when imputing income as proposed by Martinson, J., in **Hanson v. Hanson**, [1999] B.C.J. No. 2532 (S.C.). Blishen, J., stated at paras. 79 to 80:

> "[79] By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children. Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity (**Van Gool v. Van Gool** (1998), 166 D.L.R.(4th) 528).
>
> "[80] In **Hanson v. Hanson**, [1999] B.C.J. No. 2532, Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income 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." (**Van Gool** at para. 30).
>
> '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.'"

[45] I find that Ms. MacGillivary has met the burden upon her. She has proven on the balance of probabilities that income should be imputed to Mr. Ross because he is under-employed, his employment expenses are not reasonable, he failed to provide proper financial disclosure, and some of

his income is not reported. In addition, because he under reports income and over reports expenses, he has reduced his tax liability. This is an appropriate factor to consider in respect of the imputation of income pursuant to s.19(1)(b) of the *Guidelines.*

[46] Mr. Retford is the general manager of the business where Mr. Ross is employed. He gave credible evidence which I accept. He did not attempt to mislead the court. He was candid. I accept that there is work available in CBRM because many trades people have moved to Alberta to work. As a result, good carpenters are in demand, although there is a seasonal aspect to the job.

[47] Mr. Ross is 39 years old. He has a grade nine education and a vocational course. He is a good carpenter who does quality work. Mr. Retford described Mr. Ross as a carpenter who maintained high standards. Mr. Ross' income earning capacity is substantially greater than $9,000 per year, having regard to the relevant factors and the evidentiary foundation established by Ms. MacGillivary.

[48] I fix Mr. Ross' income at $24,000 per annum for 2005 and onward. This figure is achieved by reviewing Mr. Ross' gross income history, adjusting for the overpayment of expenses and the under reporting of income, and his income earning capacity. As such, Mr. Ross will pay Mr. MacGillivary tax free child support based upon $355 per month, commencing November 2008. The payments will be made in two equal monthly instalments of $177.50 on the 15th and 30th of each month.

[49] **Should a retroactive child support order be granted?**

[50] *Position of Ms. MacGillivary in Favour of Retroactivity*

[51] Ms. MacGillivary seeks retroactive child support from January 1, 2005 to present. She filed an application to vary on March 22, 2007. Ms. MacGillivary claims $12,532 in retroactive child support.

[52] Ms. MacGillivary indicates that a retroactive award will benefit the children. She has experienced dire financial circumstances. With a

retroactive award, Ms. MacGillivary would be better equipped to deal with the expenses associated with the raising of two boys.

[53] Ms. MacGillivary states that she did not proceed with the application earlier because she was intimidated by Mr. Ross and was afraid of his reaction. She also had limited resources. Ms. MacGillivary notes that her fears were justified given that Mr. Ross initially denied that he was the father of his children. Chris and Corey suffered an emotional upheaval because of Mr. Ross' mean spirited reaction.

[54] *Position of Mr. Ross Against Retroactivity*

[55] Mr. Ross states that a retroactive order is inappropriate. First he notes that the children were very well taken care of in the past. Mr. Ross states that he contributed to their expenses, especially to their activity costs. Mr. Ross states that the children have not done without.

[56] Mr. Ross submits that he does not have the financial ability to pay retroactive support. He has limited income, no savings, and no ability to access loans. Mr. Ross denies acting in a blameworthy fashion.

[57] *Analysis*

[58] In **S(D.B.) v G.(S.R.)**, 2006 SCC 37, the Supreme Court of Canada reviewed the four factors to be balanced when determining the appropriateness of a retroactive award. The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of an insufficient payment of child support. The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The third factor to be balanced focuses on the circumstances, past and present of the child, and not of the parent, and includes an examination of the child's standard of living. The fourth factor requires the court to examine the hardship which may accrue to the non-custodial parent as a result of the non-custodial parent's current financial circumstances and financial obligations, although hardship factors

are less significant if the non-custodial parent engaged in blameworthy conduct.

[59] I have balanced these four factors. First, I recognize that Ms. MacGillivary delayed in making an application for child support. The application was not made until March 22, 2007, although Ms. MacGillivary did approach Mr. Ross on earlier occasions and requested a voluntary increase in the amount of child support being paid. I accept that Ms. MacGillivary was justified in her concerns that Mr. Ross would act inappropriately should she proceed with a variation application. Although this explanation is acknowledged, it does not absolve Ms. MacGillivary entirely from the obligation to seek a variation sooner than she did. By failing to make an earlier application, Mr. Ross was led to believe that he was fulfilling his obligation to the children by paying the court order and by paying for some of their expenses.

[60] Second, Mr. Ross did behave in a blameworthy fashion by placing his own interests in priority to the needs of his sons. Emotionally, he questioned his parentage in the presence of the children. Financially, he

did not disclose all that was required. The lack of disclosure continued after the application commenced and into the hearing itself. This blameworthy conduct is somewhat cushioned by the fact that Mr. Ross did pay for some of the children's sporting activities.

[61] Third, I find that the children will benefit from a retroactive award. Ms. MacGillivary works two jobs in an effort to make ends meet and to ensure that the boys participate in extra-curricular activities. Extra-curricular activities are extremely important to the boys' development. A retroactive award will help the children continue with their activities and will help Ms. MacGillivary meet their day-to-day needs without incurring debt.

[62] Fourth, I find that a retroactive award will cause hardship to Mr. Ross. He has no access to savings, investments or loans. This hardship factor becomes less important because of Mr. Ross' blameworthy conduct and because a retroactive award can be structured over a period of several years. I also find that Mr. Ross has an ability to earn more income if he so choses.

[63] In **S(D.B.) v G.(S.R.)**, supra, the Supreme Court of Canada held that strict reliance upon the table amount was not necessary or appropriate in most circumstances when determining the quantum of a retroactive award. Balancing all of these factors, I award retroactive maintenance in the amount of $6,000 payable at a rate of $120.00 per month for fifty months commencing January 1, 2009.

V CONCLUSION

[64] The variation application requested by Ms. MacGillivary is granted. Income is imputed to Mr. Ross based upon an annual income of $24,000. Child support in the amount of $355 per month is payable commencing November 2008. $6,000 in retroactive child support is awarded to be paid in monthly instalments of $120 commencing January 1, 2009. The usual provisions respecting the reporting of income and employment changes, and the *Maintenance Enforcement Program* will apply to the form of the order pursuant to Rule 70.

[65] Any costs submissions are to be made by November 28, with responses due on December 8th. Ms. Gibney-Conohan is to draft the order.

Forgeron J.