

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Bisbee v. Bisbee, 2011 NSSC 470

Date: 20111228

Docket: 1201-060118

Registry: Halifax

Between:

Ronald Stanton Bisbee

Applicant

v.

Brenda Darlene Bisbee

Respondent

Judge: The Honourable Justice Moira C. Legere Sers

Heard: July 29, 2011 and December 1, 2011
Halifax, Nova Scotia

Counsel: Ronald Bisbee, not present
Brenda Bisbee, self-represented

By the Court:

[1] Ronald Bisbee (hereinafter the "applicant") of Ontario began this support variation application on November 24, 2009, pursuant to the *Interjurisdictional Support Orders Act*, 2002, Statutes of Ontario, S.O. 2002, Chapter 13. The respondent, Brenda Bisbee, (hereinafter the "respondent") resides in Nova Scotia.

[2] The matter correctly proceeded through the provisional variation process with Ontario issuing a provisional order and Nova Scotia responsible for the confirmation hearing.

[3] The parties were married on October 5, 1991 in the province of Ontario, separated June 13, 2003 and divorced by order dated April 4, 2008.

[4] They had a child together, Julia Marie Noelle Bisbee, born September 18, 2001. She is 10 years old.

[5] The applicant claimed relief from the current support order. He sought to end his obligation to pay support for his child.

[6] In support of his application, two changes are noted:

- A change in his income, first having moved to self-employment and then finding himself unable to work due to his medical difficulties; and
- His argument that the respondent mother of his child makes enough money and does not need his support. No reliable evidence was provided that could or did support the latter argument.

[7] The applicant's medical problems were not diagnosed at the time of the application. They would eventually render him unable to work. At the time, he had difficulty walking, was self-employed and working on an on-call basis.

[8] The applicant made an undue hardship claim on the basis of his debt situation.

[9] The applicant's current spouse, Cathy Bisbee, notified the Court that the applicant died on October 27, 2011.

Legal Process

[10] This matter was heard first in Ontario and resulted in a provisional order out of Superior Court of Ontario on December 24, 2010.

[11] The provisional order came before the Supreme Court of Nova Scotia (Family Division) on July 29, 2011.

[12] By order dated August 22, 2011 the Nova Scotia Court ordered a transcript of the Ontario proceedings, as well as an order for disclosure, an attachment to secure the proceeds of the applicant's insurance policy and an order that the matter return to Ontario for more evidence.

[13] Further particulars were required including a complete copy of the applicant's 2009 Income Tax Return; a copy of all Notices of Assessment or Reassessments from Revenue Canada for the 2009 year; details of any life insurance plans, including company number, policy number and base amount; further proof of total disability; and proof of disability payments, the gross amount, for the year 2010 and 2011.

[14] A separate interim order dated August 22, 2011 indicated as follows:

Ronald Bisbee, shall hold in trust as security for the payment of child maintenance and arrears by providing charge against the proceeds of an insurance in his name in the sum of \$20,000 payable out of any and all insurance policies in the name of Ronald Bisbee.

[15] This Court received additional affidavits and information from the applicant dated October 7, 2011, together with medical documentation, the 2009 income tax summary, the affidavit of the applicant's current wife, Cathy Bisbee, dated October 7, 2011 and copy of his continuing power of attorney. The transcript was received on November 2, 2011. The 2010 income tax return and proof of income for 2011 were not included.

[16] The respondent has advised that the Maintenance Enforcement Program removed the file from their registry and ceased to enforce retroactively and prospectively the order for support.

[17] To the extent possible I have sufficient information to finalize the confirmation order. I have addressed in this decision the retroactive application to vary.

[18] The applicant has a child in Nova Scotia who continues to be entitled to support.

Life Insurance

[19] In response to the order to disclose, the applicant, while living, provided an affidavit affirmed on October 7, 2011. This affidavit was sworn to by his wife, Cathy Bisbee, as his power of attorney.

[20] In this affidavit, on his behalf, the applicant provided information that he had no life insurance and therefore the order of Justice Campbell in 2005 was, in his view, unenforceable.

[21] In the original consent order before Justice Campbell dated December 12, 2005 and never varied by court order, Justice Campbell endorsed an order as follows:

20. Life and Medical Insurance

The applicant agrees that in the event life and medical insurance are offered by his present or future employer, he will cover the child, Julia, under such medical plan. He will also ensure Julia is one of the named beneficiaries under his life insurance, in order to ensure that the respondent will receive the equivalent amount of child support payable for Julia, until Julia is no longer considered a dependent child of the marriage. [Emphasis mine]

[22] The applicant did not comply with this portion of the order.

[23] I was provided a Continuing Power of Attorney for property, granted by the applicant to Cathy Bisbee on April 18, 2011. In that Continuing Power of Attorney, with conditions, the applicant gave his home to be sold to his wife for her own purposes to pay out just debts and all of her debts, including all monies owed to Cathy Bisbee.

[24] In this document the applicant attempted to avoid any payment of any indebtedness to the respondent on behalf of his daughter. The Continuing Power of Attorney notes "all monies owed to the respondent upon my death are voided and considered paid in full." That, of course, is not binding on the courts.

[25] His daughter is not mentioned as a beneficiary.

[26] The respondent withdrew her request for a portion of the life insurance, having learned in the response information that the policy was owned by Cathy Bisbee.

[27] However, the respondent did indicate that if the policy was held on the applicant's life, it should include his daughter as beneficiary.

[28] I understand that the insurance policy was in fact on the applicant's life and paid for by his then current spouse, Cathy Bisbee. I do not know whether Cathy Bisbee was always the owner on the policy or whether the applicant originally set up the policy to respond to the court order demanding he do so. Those enquiries will have to be made by the respondent.

[29] The applicant was in breach of this order. Any recovery due his child in Nova Scotia will have to be pursued through an application against his estate.

[30] The child's right to support will have to be dealt with through an application under the *Testators' Family Maintenance Act* or by other means.

The Applicant, Ronald Bisbee

Medical Circumstances

[31] The medical reports show that the applicant and his then current wife, Cathy Bisbee, first noticed changes in his health in August to October of 2009. Subsequently, after numerous doctors' appointments, he was diagnosed with ALS.

[32] The applicant was referred for investigation by his doctor for testing October 23, 2009. A reporting letter from Sunnybrook Health Centre states that his medical difficulties began in August of 2009.

[33] By letter dated July 13, 2010 it was confirmed by Dr. Zinman that the applicant had ALS, as well as having had in the past a myocardial infarction (heart attack). By November 22, 2010, the applicant was advised that he needed assistance in order to attend medical appointments.

[34] The medical evidence supports that the circumstances outside the control of the applicant existed post August/October 2009 to support a variation application.

Failure to disclose

[35] The transcript of the December 24, 2010 reveals that the applicant appeared before the court in Ontario with very little financial documentation. He appeared on at least four occasions, not always adequately responsive to the Court's directions.

[36] The Ontario Court noted that the applicant did not file sufficient information to allow for a determination as to whether there ought to be a change in the amount paid for 2009.

[37] The transcript notes the applicant made a decision not to seek a further adjournment in order to provide additional information regarding his 2009 income and the reasons for the reduction other than his decision to move into a self-employed state.

[38] The matter had been before the court for months. The Court in Ontario tried, without success, to impress upon the applicant the onus he bore to provide the documentation required because of the existence of his dependent child in Nova Scotia.

[39] The Court has asked the applicant to provide a schedule of his income each year, what should have been paid, what he did pay and the net effect.

[40] That information was not completely supplied.

[41] The applicant did not provide annually his financial disclosure as ordered. Obtaining full disclosure continued to be problematic. His 2010 tax return was never provided.

Earnings**Evidence of Income**

[42] In July 2003 the separation agreement notes the applicant earned \$32,464.00 and the respondent earned \$31,000.

[43] The income tax returns suggest an increase in the applicant's income from 2005 of \$28,000 leading to the current order to his 2007 income and a steady decline thereafter.

[44] For the purpose of addressing child care expenses, I include the available information I have from the respondent:

<u>Year</u>	<u>Father</u>	<u>Mother</u>
2005	\$28,000	
2007	\$34,504	
2008	\$24,282	\$31,074
2009	\$12,623	\$37,685
2010*	\$12,362	\$36,485
2011		\$50,049

*The applicant's CPP benefits started April 2010 at \$1,030.17 monthly (\$12,362 annually).

[45] I do not have sufficient information for the 2006 year.

[46] The applicant's latest 2007 Notice of Reassessment shows income of \$34,504. The provisional order used an earlier assessment reflecting a lower amount. The reassessed amount would have yielded a high payment resulting in an underpayment of child support.

[47] The latest 2008 reassessment shows gross business income of \$24,282 (net of \$8,074). Again, the provisional order used the earlier assessment (there were two previous assessments). The latest tax reassessment in November 2009 rejected the net \$8,074 figure as reflective of the applicant's actual income.

[48] When the applicant signed the application on November 24, 2009, he claimed an annual income of \$12,000 from self-employment. He was married to

Cathy Bisbee, who worked with Hudson's Bay Company, earning a net \$1,408.96 per month. His financial statement disclosed living expenses of \$3,462.26 per month.

[49] The applicant's actual 2009 Notice of Assessment shows his net business 2009 income of \$12,623, with gross business income \$19,436. I had no evidence to determine whether this income was reassessed as was the 2008 filing and business deductions disallowed.

[50] I am reluctant to rely on the 2009 summary when it did not provide the revised 2008 figures amount in which the tax department rejected the applicant's claim regarding his net income and taxed him on his gross business income.

[51] In April 2010 the applicant began receiving a CPP disability payment of \$1,030.17. This results in an annual income of \$12,362.

[52] In January 2011 that entitlement increased to \$1,047.68 monthly.

[53] In February 2011 as a result of the respondent's application, a credit split commenced. The evidence confirms a CPP split; however, the statement from Canada Pension shows the applicant's monthly entitlement of \$1,034.71 was reduced by \$553.03 which was diverted to satisfy FOE ("Federal Enforcement Order") deductions, leaving him with a net payment of \$477.09.

[54] I cannot determine without more evidence whether the reduction in the applicant's CPP payments is a result of the pension credit split or arrears in child support. This is essential if I am to determine the arrears with any accuracy.

[55] In April the child, who is the subject matter of this proceeding, began receiving \$214 from CPP as a result of her father's disability. This I am told did not reduce the applicant's entitlement to CPP income.

[56] Cathy Bisbee began to receive long-term disability in the amount of \$1,029 per month due she says to stress. I have no documentation on that issue although I have no reason to doubt that evidence.

[57] Ronald and Cathy Bisbee argued that the mandatory garnishment by FOE left them financially strapped and seeking family support during the period of their

medical crisis. The mandatory garnishment arose due to the historic non payment of child support.

[58] The applicant disclosed they lived in and owned a family home, assessing this at \$150,000. He assessed his car at \$10,000.

[59] The applicant had an outstanding CIBC mortgage for \$162,710 and a HBC Mastercard for \$8,000 together with \$700 balance on his Visa. I am unaware if the mortgage was insured.

Current Order

[60] In the Corollary Relief Judgement, the child was placed in the custody of the mother, Brenda Bisbee.

[61] The Corollary Relief Judgement dated March 4, 2008 uses an annual salary for the applicant of \$28,000 and \$34,495.28 for the respondent. The child support ordered was \$243 monthly. The guideline amount reflects a slightly higher amount.

[62] The applicant's portion of the child care was 22% of the total costs. He was ordered to pay \$143 monthly. (I am not aware of the reasons for reducing the applicant's responsibility from 44% (prorated) to 22%, and I am not tasked with going beyond that order).

[63] The existing variation order dated March 3, 2009 varies the Corollary Relief Judgment dated March 4, 2008.

[64] That variation order confirms that the applicant was to pay to the respondent, pursuant to the Federal Child Support Guidelines, the amount of \$243.00 per month commencing October 1, 2005, together with special or extraordinary expenses for daycare costs in the amount of \$143 per month, commencing on October 1, 2005.

[65] As of September 22, 2005, the applicant was in arrears in the amount of \$1,000. He was ordered to pay at the rate of \$5 per week commencing October 7, 2007 until the arrears are retired. That would yield a payment in addition to the base amount and special expenses of \$21.67 monthly.

[66] The order finally states as follows:

It is further declared that all amounts paid by the respondent, Ronald Bisbee, for both ongoing support and arrears since October 1, 2005 to date shall be credited toward the comprehensive obligation of the respondent, Ronald Bisbee, set out in this order.

Provisional Order

[67] The provisional order varied the child support and terminated the applicant's obligation to pay child support effective April 2010 when he began to receive CPP disability. The Ontario Court did not consider his Social Assistance payments with the CPP.

[68] For 2007, the Court provisionally accepted what appears to be the processed income of \$32,807 rather than the applicant's reassessed income of \$34,504. The Court adopted the base amount of \$243. If based on the reassessed income, the base support should be \$320.

[69] Due to a lack of information, the section 7 contribution of \$143 per month was not changed.

[70] The total payable for 2007 was determined to be \$432 per month, commencing January 1, 2007 to December 1, 2007.

[71] For the year 2008, based on the applicant's earnings of \$8,074, the Court reassessed his payment to \$1 per month with no ability to pay section 7 expenses, commencing January 1, 2008 to December 1, 2008.

[72] The applicant sought no change in his obligation in child support in 2009.

[73] Commencing April 1, 2010, the applicant's income was restricted to CPP disability benefits. The Court found he had no ability to pay child support. Commencing April 1, 2010 he was to pay \$0 per month.

[74] The Learned Trial Judge determined that arrears existed of \$1,887.72 as of December 24, 2010. The applicant was to satisfy those arrears at a rate of \$75 per month, commencing January 1, 2011.

[75] I cannot determine based on the transcript or the arrear's statement whether as a result of the retroactive analysis there was a credit given for subsequent payments garnished to December 2010, resulting in an apparent overpayment.

[76] I also cannot determine whether there was a consideration of the effects of this December 24, 2010 retroactive analysis on the respondent. This is critically important due to the lack of provision for the child for the future.

[77] If the Confirming Court accepts the retroactive analysis, the end result will be an overpayment and possibly an obligation to pay back.

[78] The retroactive analysis is based on the income of the applicant and not necessarily the needs of the child or the circumstances of the custodial parent who has been primarily responsible for support this child.

[79] The provisional order terminates child support as of April 1, 2010 at a time when the applicant was receiving CPP disability payments in addition to what appears to be social assistance payments.

[80] The reasons for the social assistance payments are not known to the Court. One of many explanations may be that the Family Responsibility Office was effecting either a pension split or a garnishment because of previous non payment. Arrears existed before the applicant's very difficult medical circumstances began.

[81] If I were to accept the provisional order, I would have to also acknowledge that subsequent to April 1, 2010 an additional \$7,496.61 was paid by the applicant both in support of his daughter and to satisfy historic arrears.

[82] Arrears affixed by the order as at April 1, 2010 were \$5,853.56. This would result in an overpayment in principal of \$1,643.05.

[83] That would create a hardship on the respondent considering a number of factors. She will not receive ongoing monthly support from the child's father; the lateness of the application was in large part due to the applicant's failure to pursue

the application in a timely fashion; his breach of the order's requirements to provide disclosure on a timely basis; and his failure to take measures to provide for his daughter in the future.

[84] It would in these circumstances be unconscionable to require the respondent to pay back when the series of circumstance leading to this overpayment was largely outside her control and largely up to the August 2010 date when the applicant began to be symptomatic, largely inside his control.

[85] Such an order would not meet the needs of the child.

Maintenance Enforcement Program Payout

[86] Cathy Bisbee advises that the estate of Ronald Bisbee received \$785. This was held by Maintenance Enforcement and subsequently paid to the respondent. Cathy Bisbee asks that I order the respondent to repay that sum.

[87] For reasons set out above, I will make no such order to repay this money.

The Respondent, Brenda Bisbee

[88] The respondent is seeking enforcement of the outstanding arrears up to the date of the application in November 2010, with a variation occurring subsequent to the applicant's application reflecting his ability to pay based on his disability benefits.

[89] The respondent's request was tabled before she learned of the applicant's death and amended afterwards.

[90] The respondent is also seeking child care expenses and health-related expenses that exceed insurance reimbursement.

[91] The child is in an after-school program costing \$294 per month and is in summer daycare of \$140 per week for seven weeks for a total of \$980. The respondent is seeking ½ reimbursement for the summer daycare in the amount of \$490.

[92] Proof of the after-school daycare program and the summer program has been provided.

[93] Any entitlement to that will have to be pursued as a result of the existing court order of Justice Campbell directly against the estate.

[94] The respondent asks the Court to dismiss the application for change prior to the applicant's application in November 2009.

[95] The respondent asks that the Court consider the social services and CPP disability allowance as an indicator of the applicant's income. His social services payment was \$869.47 and his CPP disability was \$1,030.17 for a 2010 income, should these two be included, of approximately \$22,795 annually.

[96] The respondent would agree to the Court adjusting the 2010 payments to the scale amount of \$190 per month.

[97] The respondent agrees to adjust the section 7 payments for 2010 and 2011 to reflect the incomes noted in the documentation to include 38% of the cost for those two years, calculated by considering a total income of \$59,295 utilizing the percentage share.

[98] For the 2010 year, the section 7 costs were \$3,706.45, resulting in the applicant's proportionate share at \$1,408.45, for a monthly payment of \$117.37.

[99] For the 2011 year, the respondent anticipates the daycare costs would be a total of \$3,920.

[100] In recognition of the applicant's death, the respondent asks that section 7 expenses for 2011 from January to October be set at \$3,332 and that the applicant be responsible for 38% of the total payment, resulting in a payment of \$126.62 per month, with a child support payment of \$190 from January to October 2011.

Maintenance Enforcement Program Arrears

[101] Maintenance Enforcement documentation indicates arrears as of April 3, 2010 were \$5,942.64. Current arrears to October 22, 2011 were \$6,446.51.

[102] As of the date the applicant finally perfected his application and provided sufficient information to the court on December 24, 2010, such that a decision could be made, arrears were \$5,207.

[103] From August 1, 2009 until Maintenance Enforcement began to garnish the applicant's wages, no payments were made toward child support.

[104] The Ontario Court effected an adjustment from 2007 forward. Arrears were calculated at \$1,887.72 to April 1, 2010.

Conclusion

[105] The applicant's application is dated November 2009. He asked for a retroactive adjustment.

[106] He was obligated under a 2005 order.

[107] Contrary to his affidavit, he was present and did enter into a consent separation agreement.

[108] The parties agreed upon the inclusion of the child as beneficiary under a life insurance policy.

[109] Each spouse was entitled to apply for a division of Canada Pension Plan credits accumulated from the date of their marriage of October 5, 1991 up to the separation date, namely June 13, 2003.

[110] Both parties were obligated to provide each other with a copy of their annual income tax returns, complete with all attachments, even if filed or not, on or before June 1st.

[111] All other provisions of the separation agreement remained enforceable.

[112] The March 3, 2009 order of Justice Campbell did nothing other than to correct the weekly payments to reflect appropriate monthly payments of \$243 plus \$143 for child care expenses.

Effective Retroactive Date

[113] The application date is November 2009. The originating court provisionally reassessed the child support retroactively back to January 2007. The Court was only in a position to render a decision in December 2010, a full year after the application date.

[114] This Court only received sufficient information to render a confirming order in late October 2011.

[115] I cannot confirm the retroactive aspect of this order. There was no supporting evidence in the initial proceedings to conduct an analysis of the factors to address the conduct of the payor parent, the circumstances of the child, the hardship occasioned by a retroactive award, the date of retroactivity or the quantum of the retroactive award as set out *DBS v. SRG; LGW v. TAR; Henry v. Henry; Hiemstra v. Hiemstra [2006] SCC 37*.

[116] This analysis is critical given a retroactive adjustment would have significant impact on the respondent who is left supporting the child without any assistance from the applicant.

[117] Based on the documented information, I make the following findings.

[118] For 2007, the applicant's income was more than his annual income when the original support order was issued. His contributions were not adjusted.

[119] For 2008, the applicant's income was \$24,282 and the respondent's income was \$31,074.

[120] The applicant's original application indicates that in 2008 he was trying to establish himself as self-employed. The downturn in the applicant's income appears to relate to moving from the status of employee to self-employed and other unknown factors.

[121] I am unaware of the applicant's reasons for the move from employment to self-employment and am, therefore, limited in my analysis such that I cannot impose a retroactive reduction.

[122] In 2009, the respondent's income was \$37,685. In the same year the applicant's gross business income was \$19,436 and net was \$12,623. I have already mentioned my reluctance to rely on these figures.

[123] The applicant's application is dated November 24, 2009. This was the beginning of his medical crises leading to his disability and untimely death.

[124] For 2010, the only information I have of the applicant's CPP income is similar to the 2009 income.

[125] After April 2010, due to many factors including the applicant's medical and living circumstances and the FOE order, he was unable to contribute more out of his income and unable to improve his circumstances.

[126] Ronald Bisbee and his wife Cathy Bisbee were deeply troubled in his final days leading no doubt to the unfortunate exchange in their affidavit material, leaving a written legacy of unfounded accusations. The accusations are unsubstantiated, perhaps arising out of their financial stress and troubled living circumstances and ought to be divorced from an analysis that focuses on the needs of his children and their right to be maintained.

[127] Left as is, the applicant owes the respondent. A confirming order which recognizes the applicant's material change, his decline in health beginning in August 2009 and diagnosed later in 2010 would result in an overpayment.

[128] Due to the findings of fact and my conclusion, I find a variation in the order may have been legitimately pursued when in 2008 there was a material change in income. However, no finding can be made retrospectively given the lack of evidence on the reasons for the change.

[129] Certainly in 2009 the application disclosed the beginning of the applicant's significant health issues. Had the application proceeded and full disclosure taken place in a timely fashion that may well have resulted in a reduction in the order.

[130] The receipt of CPP did not materially change the applicant's income from 2009. The garnishment did. The garnishment was issued for historical non payment and lack of process and non disclosure.

[131] Contributing to the delay is the provisional process between two provinces and the chronic frailties associated with processing these applications between provinces.

[132] I decline to confirm the retroactive analysis and on the facts determine that what, if any, arrears and/or overpayment exist is unenforceable and unreliable.

[133] I vacate the arrears that show on the record and bar the possibility of an overpayment entirely as this retroactive analysis in these circumstance will lead to an injustice.

[134] The recovery of future support must, if pursued, proceed under other legislation.

Legere Sers, Moira C.