

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Young v. Marshall*, 2018 NSSC 211

Date: 2018-09-07
Docket: No.70239
Registry: Sydney

Between:

Melissa Young

Applicant

v.

Andrew Marshall

Respondent

Judge: The Honourable Justice Robert Gegan

Heard: July 5, 2018

Written Release: September 7, 2018

Counsel: Susanne Dixon, Counsel for Melissa Young
Andrew Marshall, Self-Represented

Introduction

1. The Parties, Melissa Young and Andrew Marshall, were in a relationship for approximately one year. During this relationship, they had a child, Jaylin Marshall, born **[full date of birth removed from published version of decision]** 2007. The Parties separated in 2009.
2. Ms. Young has been the primary care giver for the child, Jaylin, since the Parties separated. The most recent Orders were a Consent Order granted by Justice MacLeod-Archer on March 20, 2017, with respect to the issues of custody and access, and there was a previous Consent Order issued February 17, 2016, which was issued following conciliation and consent between the Parties.
3. Under the provisions of the Consent Order of February 17, 2016, Mr. Marshall was to pay child support in the amount of \$422.00 per month, based on an imputed income of \$50,244 (\$34,000 employment income and \$16,244 in employment insurance income), for the year 2015. The Consent

Order also provided that Mr. Marshall was to provide, each year, disclosure of his income and any changes, both directly to Ms. Young and also to the Director of Maintenance Enforcement.

4. There were previous Orders that which are not relevant to my decision in this matter.

Issues

5. The two issues the court must decide are as follows:
 - What is the appropriate income for Mr. Marshall?
 - What are the appropriate special and extra-ordinary circumstances to be paid by the Parties?

Analysis

6. Mr. Marshall has been employed by Crane Cove Seafoods in Eskasoni for several years. His income as reported in box 24 on the T-4 slips indicates that he receives both employment income and employment insurance. It also, from the tax documents he filed with the court, shows that he pays no income tax.

Position of the Parties

7. Ms. Young says pursuant to section 19 of the Federal Child Support Guidelines, the higher income should be attributed to Mr. Marshall given that he is exempt from paying income tax. In addition, Ms. Young says that Mr. Marshall has not disclosed his income for 2017 and that the court should rely upon documents showing Mr. Marshall's 2016 year-to-date income of \$59,378.62.

8. Mr. Marshall acknowledged that he did not disclose his income for 2017 as required under clause 3 of the current Order. He also did not dispute either

his income or the fact that it was received tax free. Mr. Marshall says his income should not be grossed up because:

- It is his Treaty right to receive those monies.
- He has bills to pay, including truck payment, grocery, and a spouse who had children from another relationship.

Issue 1 – What is the appropriate income for Mr. Marshall?

9. The court has considered evidence in these proceedings, much of which went unchallenged by Mr. Marshall. The court considered Exhibit 1 in the proceeding, which was the Affidavit of Melissa Young. Ms. Young's Affidavit and Exhibits went unchallenged. In fact, Mr. Marshall chose not to cross-examine Ms. Young on the Affidavit.

10. With respect to the issue of setting the income for Mr. Marshall, Ms. Young asks the court to impute the income of Mr. Marshall in the amount of \$59,378.62; however she also requests that it be grossed up because Mr. Marshall does not pay income tax. She also gave detailed evidence with respect to the section 7 expenses in relation to the child, Jaylin.

Relevant Legislation and Case Authorities

11. The court is guided by section 19 of the Federal Child and Support Guidelines, which reads as follows:

Imputing income

*19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances **include the following:***

*(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable **educational or health needs of the spouse;***

(b) the spouse is exempt from paying federal or provincial income tax;

(c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

12. In addition, as also pointed out by counsel for Ms. Young, the court may draw an adverse inference for a party who fails to report the appropriate income. Section 23 reads as follows:

Adverse inference

23. Where the court proceeds to a hearing on the basis of an application under paragraph 22(1)(a), the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate.

13. I find from the facts before me that Mr. Marshall does have an annual income of \$59,378.62 for child support purposes. I find as well that this income is earned as a Band member working on Reserve, and is tax free.

14. Following the relevant case authorities and I also adopt the approach set out in **Francis v. Isadore-Francis**, 2010 NSJ No. 359. There at paragraph 18, after referring to section 19 of the Federal Child Support Guidelines, Wilson, J. said as follows:

In determining the amount of income to be imputed to the father because he is exempt from paying federal and provincial income tax, I have used an effective tax rate of 33.59%. This percentage was provided to the court by counsel for the mother as the effective tax rate on an annual income of \$74,904.00, which is close to the court's determination of \$77,320.00. The father's annual income for purposes of determining his child support obligation is \$116,428.00 ($\$77,320.00 \div .6641$). The Table amount of support for three children based on annual income of \$116,428.00 is \$1,997.00.

15. Using this approach, I find that Mr. Marshall's total income is \$59,378.62 x .6283, which produces a total gross up income of \$94,506.80.

16. Accordingly, I order that Mr. Marshall commence paying child support effective July 1, 2017, based on the Table amount of income of \$94,506.80 per year, which results in a Table amount owing of \$755.00.

17. In submissions by Ms. Dixon, on behalf of Ms. Young, quite fairly, seeks child support to the date of the commencement of the Application to Vary.

Issue 2 - What is the appropriate special and extra-ordinary circumstances to be paid by the Parties?

18. Mr. Marshall in cross-examination on the stand took no issue with the necessity of the section 7 expenses that were outlined by Ms. Young, and therefore, there is no factual dispute as to whether or not those expenses meet the criteria for section 7 expenses.

19. I will therefore order that Mr. Marshall will contribute by prorating section 7 expenses. Mr. Marshall must contribute 75% towards the cost of the child care / martial arts, which results in him being required to pay \$264.06 per month, or 75% towards the total cost of these expenses.

20. Once again, Ms. Dixon, counsel for Ms. Young, fairly attributes an income for purposes of contributing to section 7 expenses, by imputing an income of

\$21,823.00 to Ms. Young, even though she is not employed and which would translate into Ms. Young's share of section 7 expenses to be \$88.02 per month, or 25% towards the total cost of the expenses.

21. I therefore, order section 7 expenses on the amount stipulated above.

Conclusion

22. Mr. Marshall will pay the sum of \$755.00 per month in child support to Ms. Marshall commencing on July 1, 2017, based on an income of \$94,506.80.

23. Mr. Marshall shall pay section 7 expenses to Ms. Marshall in the amount of \$264.06 per month.

24. Total monthly obligations for child support is $\$755 + \$264.06 = \$1,019.06$ per month.

25. Ms. Young shall pay section 7 expenses in the amount of \$88.02 per month.

26. All payments are to be directed through Maintenance Enforcement.

27. Ms. Young shall advise Mr. Marshall forthwith upon enrollment of Jaylin in the section 7 activities and as well, will also advise Mr. Marshall forthwith if she is successful in obtaining any subsidy towards the costs of the programs.

28. Ms. Young shall also provide Mr. Marshall with confirmation of Jaylin's enrollment in the child care / section 7 expenses, including confirmation of costs associated with enrollment.

29. Finally, neither Party has requested costs so each Party shall bear their own costs in this proceeding.

Gregan, J.