

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Feser v. Candelora (Feser)*, 2019 NSSC 388

Date: 20191220

Docket: *Halifax* No. 1201-070981

Registry: Halifax

Between:

Trevor Joseph Feser

Petitioner

v.

Dawna Michelle Candelora (Feser)

Respondent

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: July 3, 2019, in Halifax, Nova Scotia

Counsel: Noel Fellows for the Petitioner
William Leahey for the Respondent

By the Court:

[1] The parties are locked in conflict. The litigation between the parties is voluminous and involves contested matters before both levels of the Supreme Court of Nova Scotia- Family Division and General Division. There have been accusations and allegations levelled by both parents as against the other. All the while, the parties' 10 year old child, who ought to be the focus of the proceeding before the court, may be lost in the battle between the parents.

[2] On October 22, 2018, Ms. Candelora filed an interim motion for relief claiming: interim custody, interim access, interim child support (retroactive and prospective). The matters are so highly contested that each party intended to call multiple witnesses on an interim motion. The parties subsequently agreed to address the issue of interim child support and to leave the parenting issues to be addressed at a later hearing.

[3] Despite the fact that this was an interim motion, and without leave of the court, the parties filed excessive and voluminous materials. The cost in relation to this disclosure was likely prohibitive. The matter is so high conflict that simple matters of disclosure could not be resolved without numerous interventions and pre-hearing court appearances.

[4] This is an **interim** motion. Interim motions by definition are not a final disposition of the matter. Interim is defined in Black's Law Dictionary (5th Ed. as "In the meantime; meanwhile, temporary; between." Rather interim motions are often heard on limited evidence. Findings on an interim motion do not bind the trial judge at a final trial of the matter (*Ford v. Ford*, 2015 SKCA 23).

ISSUES:

- 1) What is the income of Mr. Feser?
- 2) What is the appropriate child support payable?
- 3) Should a retroactive award be granted?

LAW & DISCUSSION

[5] Counsel for Ms. Candelora have urged the court to consider s. 18 of the *Federal Child Support Guidelines* in the determination of Mr. Feser's income. Section 18 of the *Federal Child Support Guidelines* states:

“18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse’s annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse’s annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation’s pre-tax income.”

[6] This section would only have application if Mr. Feser is a “shareholder, director or officer of a corporation.” Mr. Feser had incorporated a company, Dynamic Instrumentation and Controls Inc. (“Dynamic”). Dynamic operated from September 2002 to April 2018. Mr. Feser testified that he dissolved the company on April 2, 2018, and began working as an employee of EVI Consulting Inc. (“EVI”). As such, s. 18 has no application.

[7] The inquiry, however, does not end there. The court must examine s. 19 of the *Federal Child Support Guidelines* to determine whether it is appropriate to impute income to Mr. Feser. Section 19 of the *Federal Child Support Guidelines* allows the court to impute income to a payor parent in appropriate circumstances.

[8] The leading case in relation to imputed income is *Smith v. Helppi*, 2011 NSCA 65 (N.S.C.A.). The Court of Appeal cited with approval the case of *Gould v. Julian*, 2010 NSSC 123 (N.S. S.C.). The principles to be distilled from *Gould v. Julian*, supra, include:

- 1) A parent has a duty to seek employment if they are healthy and there is no reason why the parent cannot work.
- 2) When examining whether a party is intentionally unemployed, the court looks to the age, education, experience, skills and health of the parent. The court also takes into account availability to work, freedom to relocate and other obligations.
- 3) Limited work experience and job skills do not justify a failure to pursue work.
- 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.

[9] As noted in *Gould*, supra, “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.”

[10] Mr. Feser’s job responsibilities for EVI are roughly the same responsibilities as he had when operating Dynamic with the exception that he is not involved in management. He works as an instrumentation technician and provides services for ConocoPhillips at its Surmont oil sand production site (located approximately 65 kilometres outside of Fort McMurray).

[11] When Dynamic was operational, it was subcontracted by Sancon Contracting Ltd. (Sancon) to work at the ConocoPhillips site. Income was paid from ConocoPhillips to Sancon to Dynamic. The change in April 2018 was that income was paid from ConocoPhillips to Sancon to EVI. Sancon is operated by a very close friend of Mr. Feser’s, Mr. Killoran. Their friendship is such that Mr. Killoran was the best man at the parties’ wedding.

[12] Mr. Feser indicated that, as a result of the downturn in the oil industry, he was dismissed by Sancon. There is no evidence to confirm that he was dismissed. The only documentary evidence provided to support this claim is a letter of June 6, 2019, purportedly from Sancon (Exhibit 4, tab “A”). It should be noted that the letter is not on company letterhead and Mr. Killoran filed no affidavit in this proceeding. The letter states in part:

“Dynamic Instrumentation and Controls Inc contract with Sancon Contracting Ltd was completed at ConocoPhillips Surmont April 2, 2018. There have been no further contracts directly issued to Dynamic Instrumentation and Controls Inc, nor Trever Feser since that date.”

[13] The correspondence does not indicate that there are no such contracts available, it merely states that no contracts have been issued. If the work that Mr. Feser was doing was no longer available, the correspondence from Sancon should have indicated that was the case- it did not. It may well be that there is contract

work available to Dynamic and/ or Trevor Feser. There is no documentation provided from ConocoPhillips to indicate that the work provided by Mr. Feser is no longer available.

[14] The evidence of Mr. Feser in relation to his income earning capacity is not credible. Credibility issues are to be determined by the trial judge. I am guided by the principles noted in the case of *Baker-Warren v. Denault* 2009 NSSC 59. Mr. Feser testified that he is now merely an employee of EVI with a salary of \$74,865 per annum. EVI is an incorporated company of David Guest. Mr. Guest is the business partner of Mr. Feser's common law partner. Mr. Guest, Mr. Feser and his current partner even resided with Mr. Guest at one point in time. Mr. Guest and Mr. Feser's common law partner are involved in a merchant credit card processing business, EVI.

[15] There is no evidence that EVI has provided any services to the gas and oil industry. The only connection to the oil and gas industry is the work that Mr. Feser continues to do for Sancon. I find as a fact that the income paid to Mr. Feser through EVI (less applicable expenses) is income available to be paid directly to Mr. Feser.

[16] The court cannot rely on the disclosed income of Dynamic as appropriately reflecting the income available to Mr. Feser pre-separation. Evidence disclosed that expenses claimed as corporate expenses of Dynamic were in reality personal expenses of Mr. Feser and/or the family. These expenses include travel expenses wherein the parties, their child and Ms. Candelora's daughter travelled to Disney World. Although Mr. Feser indicated that this was a business trip, I find as a fact that the trip was primarily (if not exclusively) for the benefit of the family.

[17] Other personal expenses paid by Dynamic include a \$1,955 charge for a Louis Vitton bag and \$539 for a bouncy castle for a neighbourhood party. Mr. Feser claimed in excess of \$107,693 in travel expenses when the vast majority of his travel expenses were being paid by Sancon. Debits on the business account related to restaurant purchases, grocery purchase, purchases at retail stores such as Winners and the Nova Scotia Liquor Commission. These are but a few examples of expenses noted to be business expenses which are clearly personal expenses.

[18] The court may examine the lifestyles and the patterns of spending of the parties prior to separation in relation to income available to the parties. As noted in Exhibit 3, tab "G", Mr. Feser deposited over \$224,000 into the parties' joint account between October 2016 and September 2017. During this time frame Mr.

Feser claims to have only earned income of \$107,308. This pattern of cash flow is also difficult to rely upon as an indication of actual income available to Mr. Feser given the spending habits of the parties and their use of credit.

[19] I must examine the entire financial picture of the parties. Mr. Feser indicated that he needed to shut down Dynamic as a result of unpaid indebtedness, including monies owing to the Canada Revenue Agency for corporate income tax and GST. His Statement of Property filed May 17, 2018, indicated that the approximate debt owing to CRA was \$63,000 plus interest and penalties. Other unsecured creditors totalled \$16,000 in May, 2018. By January 2019, the debts had ballooned. A review of the Statement of Affairs filed in the bankruptcy of Mr. Feser reveals that he had unsecured debt in excess of \$204,000- including debts to CRA of approximately \$130,000.

[20] The case of *Richards v. Richards*, 2012 NSCA 7 (N.S.C.A.) involved a claim for interim support. The court held at paragraph 46 of the decision:

“46 In my view, the most equitable way of resolving the interim support application is to return the parties as much as possible to the status quo before Mr. Richards "turned off the tap". That takes into account the factors in ss. 4 and 6 of s. 15.2 of the Divorce Act and does least violence to the circumstances of the parties and JEL.”

[21] It is clear that Mr. Feser has “turned off the tap”. From October 2017 to December 2017 Mr. Feser paid \$6,000 per month in support and servicing of matrimonial debt. In January 2018 Mr. Feser reduced this support to \$1,389 and in June 2018 he further reduced the support to \$831. He ceased making payments altogether in June 2018.

[22] A review of the bank account of Dynamic reveals that Mr. Feser’s company received \$381,089 in 2017 from Sancon. From January to April 5, 2018, Mr. Feser received \$80,288 from Sancon through his company Dynamic. If one were to extrapolate that income to an annualized figure it would equate to approximately \$320,000 in revenue.

[23] I do not accept that Mr. Feser’s true income is \$74,865 as declared on his Statement of Income filed with this court on May 13, 2019. His evidence with respect to his earnings is not credible. Disclosure was not readily forthcoming and there were issues even after the court ordered disclosure.

[24] The Ontario Superior Court examined similar circumstances in the case of *Albanez v. Samuda* 2019 ONSC 3610. In imputing income to the payor parent, the court examined the factors surrounding the payor's ceasing to work for a company. As noted in paragraph 58:

- ... b. The respondent's link to XGT and the role he played with that company is in question. While he no longer works there and the company has been sold, there are questions raised by the disclosure that remain outstanding including;
- i. Does the respondent retain ties to the operation or income of the business?
 - ii. Was his termination from the business orchestrated once he became aware that disclosure was required and would reveal that the financial statements did not align with the money flowing through the bank accounts?
 - iii. Was he the directing mind of the business while maintaining that he was simply an employee?
 - iv. Can his initial failure to provide disclosure be tied solely to his former counsel or was the failure a more deliberate one?

[25] In addressing these issues in the current matter I note the following:

- 1) It is clear that Mr. Feser is still tied to Sancon. He is still performing employment duties similar to those he performed while billing through Dynamic.
- 2) The lack of the renewal of Dynamic's contract is also suspect. The letter from Sancon does not indicate that there were no further contracts available, merely that there were no other contracts "...**directly** issued to Dynamic Instrumentation and Controls Inc, nor Trevor Feser..."
- 3) It is not clear that EVI is "the directing mind" in relation to the contract with Sancon. The evidence revealed that Mr. Feser continues to be employed in a similar capacity providing work to Sancon. I find as a fact that Mr. Feser is the directing mind in relation to the work at Sancon.
- 4) The lack of voluntary disclosure from Mr. Feser is also problematic and the court is able to make negative inferences from the lack of disclosure.

[26] Income will be imputed to Mr. Feser in the amount of \$224,000. Mr. Feser indicates that he is no longer employed as commissioning manager. As a result, I am not attributing the entirety of the pre-corporate tax revenue from Dynamic to him. As noted herein, revenue in 2017 was \$381,089 and in the first three months of 2018 was over \$80,000. Despite the downturn in the oil and gas industry, Mr. Feser appears to have been able to continue to earn significant income.

[27] The imputation of income is equivalent to the payments made by Mr. Feser between October 2016 and September 2017. At that point in time, there was a positive balance in the parties' bank accounts, Mr. Feser had a TFSA account with over \$4,300 in it, and they carried credit card debt of \$36,457. Although there were other debts owing by Dynamic (including debts to Canada Revenue Agency), it is impossible to determine the true financial position of Dynamic because of the significant blending of business and personal expenses.

RETROACTIVE CHILD SUPPORT

[28] The case of *Dram v. Foster* 2009 MBCA 125 involved a request for lump sum retroactive child support. Although the trial judge allowed retroactive child support on an interim basis, the Manitoba Court of Appeal set the decision aside. *Dram v. Foster* was considered in the more recent case of *Reddy v. Reddy* 2016 ONSC 807. At paragraph 8, the court held:

“8 *Dram v. Foster* is distinguishable from the facts of this case and it is not a conflicting decision as required by the test. *Dram v. Foster* was an appeal of an interim lump sum retroactive child support award. The case does not deal with spousal support. The focus in *Dram v. Foster* was on the fact that the parent was ordered to pay a lump sum for child support. As the court stated, **such an order should only be made where extraordinary or exceptional circumstances justify it.** The lump sum in that case also included an amount for retroactive child support. The motion judge gave no reasons for why the order had to be made on a retroactive basis. The order was set aside.” (emphasis added)

I do not have evidence that there are extraordinary or exceptional circumstances to justify a retroactive award on an interim basis. Such issues should be left to be addressed at the final hearing of the matter.

CONCLUSION

[29] Income is imputed to Mr. Feser in the amount of \$224,000. Given that he is now resident in Alberta, the table amount of child support payable is \$ \$1,939.60 per month commencing August 1, 2019 and the first of each month thereafter. Child support is payable from the date of separation to July 31, 2019. The quantum of support will be addressed at the final hearing of this matter.

Chiasson, J.