

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Currie v. Currie*, 2022 NSSC 23

Date: 2022-01-25

Docket: 039114

Registry: Sydney

Between:

Stephen Brenton Currie

Applicant

v.

Norma Jean Currie

Respondent

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Judge: The Honourable Justice Pamela A. Marche

Heard: December 8, 2021 in Sydney, Nova Scotia

Final Written December 22, 2021 – Applicant

Submissions: December 23, 2021 – Respondent

Written Decision: January 25, 2022

Subject: Retroactive Variation to Decrease Support pursuant to s. 37 of the Nova Scotia *Parenting and Support Act*; Material Change of Circumstance and Imputed Income; Financial Disclosure; Blameworthy Conduct; Test for Payor to be Relieved of Obligation to pay Arrears pursuant to s. 46(4) of the Nova Scotia *Maintenance Enforcement Act*.

Summary: Having accumulated significant arrears, Mr. Currie sought a variation (decrease) of child and spousal support retroactive to 2006. Income was imputed to Mr. Currie in 2005 due to his failure to disclose. The parties agreed to terminate child support effective 2017 on the basis that the children were no

longer dependent. Otherwise, Mr. Currie relied upon his income tax returns for 2006 onward, filed with the Court in 2020, as reliable and sufficient evidence to demonstrate a material change in circumstance. Mr. Currie further challenged Ms. Currie's entitlement to spousal support on the basis that the 2005 support order was issued in his absence. Mr. Currie, citing financial hardship, also sought relief from his obligation to pay arrears owing

Issues:

1. Has a material change in circumstances been proven to warrant a retroactive variation of child support? If so, to what date should the child support be retroactively varied?
2. Has a material change in circumstances been proven to warrant a retroactive variation of spousal support? If so, to what date should the child support be retroactively varied?
3. Is Mr. Currie entitled to be relieved of his obligation to pay arrears?

Result:

If a retroactive variation claim is based on a change in imputed income, the payor must do more than simply produce documentation, after the fact, that purports to show actual income that is lower than the imputed income. Late disclosure does not, in itself, demonstrate a material change in circumstances. The onus is on the payor to prove that it is no longer necessary or appropriate to impute income or, if income continues to be imputed, that a lower income should be imputed. Mr. Currie did not demonstrate a material change in circumstances in terms of his income and his application to vary retroactive to 2006 is dismissed.

Mr. Currie argument that entitlement to spousal support was not established in 2005 is rejected.

Mr. Currie failed to satisfy the court that he should be relieved from his obligation to pay arrears on the grounds of financial hardship.

Mr. Currie may make submissions in terms of proposing a reasonable payment plan of arrears.

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Judge: The Honourable Justice Pamela A. Marche

Heard: December 8, 2021, in Sydney, Nova Scotia

Written Release: January 25, 2022

Counsel: Danielle MacSween for the Respondent
Nicholas Burke for the Applicant

By the Court:

Overview

[1] In 2005 Mr. Currie was ordered to pay Ms. Currie \$1,000 per month in spousal support and \$2,000 per month in child support for their three children. He did not do this. As a result, Mr. Currie now owes approximately \$285,361.00 in support arrears.

[2] Mr. Currie is seeking a support variation retroactive to 2006 and a consequential reduction in arrears. Mr. Currie is further asking the Court to relieve him of his obligation to pay arrears that exceed his ability to pay.

[3] Ms. Currie agrees to terminate child support retroactive to 2017 and to terminate prospective spousal support as of December 2021 but otherwise contests Mr. Currie's application.

Background and Procedural History

[4] The parties were married on June 12, 1987 and have three children together: Shelby Lynn Currie, born December [...], 1991, Taylor Jean Currie, born August [...], 1993 and Lindsay Anne Currie, born May [...], 1995.

[5] The parties separated in May 2005 and Ms. Currie sought an order for sole custody, child support and spousal support. In July 2005 an Interim Order was

issued, the terms of which were confirmed in a Final Order issued in December 2005. The 2005 support orders were based on imputed income because Mr. Currie did not properly disclose financial information as ordered by the Court.

[6] In November 2019, after many years of thwarted enforcement attempts, the Director of Maintenance Enforcement commenced an application against Mr. Currie pursuant to s. 37 of the Maintenance Enforcement Act, SNS 1994-5, c. 6. Section 37 authorizes the Director of Maintenance Enforcement to seek court intervention to support the collection of outstanding arrears.

[7] In July 2020, Mr. Currie filed a Notice of Variation Application pursuant to s. 37 of the Parenting and Support Act, SNS 2015, c. 44 (the Act). Mr. Currie seeks to vary his child support retroactively to 2006 to reflect the “proper table amount” and to terminate any prospective child support obligation. Mr. Currie also seeks to terminate his obligation to pay spousal support, retroactively to 2006. Mr. Currie further seeks to be relieved of his obligation to pay arrears pursuant to s. 46(4) of the Maintenance Enforcement Act, SNS 1994-5, c. 6:

[8] Ms. Currie consented to a termination of child support retroactive to July 2017 on the basis that the children were no longer dependent. A Consent Order

terminating child support retroactive to July 2017 was issued on November 25, 2020.

[9] A full day hearing was held December 8, 2021 to deal with Mr. Currie's application. The application filed by the Director of Maintenance Enforcement will be dealt with at a later time. The Court heard from Mr. Currie, Ms. Currie and Maintenance Enforcement Officer, Mr. John MacPherson.

Issues

1. Has Mr. Currie proven a material change in circumstances to warrant a retroactive variation of child support? If so, to what date should the child support be retroactively varied?
2. Has Mr. Currie proven a material change in circumstances to warrant a retroactive variation of spousal support? If so, to what date should the child support be retroactively varied?
3. Is Mr. Currie entitled to be relieved of his obligation to pay arrears?

Position of the Parties

Mr. Currie

[10] Mr. Currie argues there have been two material changes of circumstances since the December 2005 order:

- the children are no longer dependent; and
- his annual income has been less than \$57,000, the income imputed to him in 2005, in each year subsequent to 2005.

[11] In support of his 2020 support variation application, Mr. Currie filed income tax information for each year back to 2006. Mr. Currie argues this documentation is sufficient and reliable proof that his income was lower than the income imputed to him in 2005 and that this constitutes a material change of circumstances sufficient to support his variation application.

[12] Mr. Currie is asking the Court to vary the child support order retroactively, for each year from 2006 to 2017, to reflect the income tax income information he has filed for each of these years as follows:

Year	Income	Support per Month	Support per Year
2006	\$37,177	\$709.97	\$8,519.64
2007	\$35,243	\$678.13	\$8,137.56
2008	\$37,177	\$709.97	\$8,519.64
2009	\$39,111	\$742.82	\$8,913.84
2010	\$39,265	\$745.35	\$8,944.20
2011	\$38,321	\$729.46	\$8,753.52
2012	\$25,543	\$507.19	\$6,086.28
2013	\$28,325	\$557.66	\$6,691.92
2014	\$38,022	\$724.37	\$8,692.44
2015	\$25,230	\$500.74	\$6,008.88
2016	\$37,306	\$712.14	\$8,545.68
		TOTAL OWING	\$87, 813.60

[13] In terms of spousal support, Mr. Currie argues that there has been no finding of entitlement to spousal support, apart from the 2005 Order, which he characterizes as being granted in his absence without evidence being heard. Furthermore, Mr. Currie argues the parties have had relatively similar income since separation and that there were periods of time when Ms. Currie earned more income than he did. Mr. Currie argues no spousal support should be paid, retroactive to 2006, and that spousal support arrears should be set at zero.

[14] Mr. Currie filed a Statement of Income that reports \$38,078 in annual income. Mr. Currie currently receives Workplace Newfoundland benefits as a result of a workplace injury he sustained in May 2020. Mr. Currie claims he receives \$477.27 per week (\$24,818 per year) in benefits. Mr. Currie notes that he is now 55 years old and argues he is unlikely to be able to return to work due to his workplace injury. Mr. Currie is asking the Court to find his annual income to be \$24,818.

[15] Mr. Currie claims that he is making reasonable efforts to pay the outstanding arrears. Mr. Currie further argues there is no evidence to suggest that the needs of the children were not being met when they were residing with Ms. Currie or that the collection of arrears would serve to benefit the children.

[16] Mr. Currie says he will suffer significant hardship if support arrears are confirmed by the Court given the method by which the Director of the Maintenance Enforcement Program (MEP) will calculate the amount MEP will garnish each month.

[17] Mr. Currie is asking that child support arrears be set at \$29,925 and that spousal support arrears be set at \$0.

Ms. Currie

[18] Ms. Currie argues Mr. Currie has failed to demonstrate a material change in circumstances and his application should therefore be dismissed. Ms. Currie asserts imputation of income is a finding of fact and simple reference to past income tax returns is insufficient to demonstrate a material change in circumstance. Ms. Currie points out that a variation application is neither an appeal nor an opportunity to relitigate the prevailing Order. Ms. Currie contends that Mr. Currie has failed to prove it is no longer necessary or appropriate to impute income.

[19] Should the Court determine that Mr. Currie has established a change in circumstances, then Ms. Currie argues that the period of retroactivity be limited to three years prior to the variation application being filed. Ms. Currie cites

unreasonable delay and blameworthy conduct on behalf of Mr. Currie as reasons for limiting the period of retroactivity.

[20] In terms of unreasonable delay, Ms. Currie notes that Mr. Currie delayed making a variation application for fifteen years. Ms. Currie contends that if the 2005 Order did not reflect Mr. Currie's actual income, then Mr. Currie should have made an application to vary long before 2020.

[21] In terms of blameworthy conduct, Ms. Currie argues that Mr. Currie has been largely non-compliant with the 2005 support order. Ms. Currie asserts that Mr. Currie breached his court ordered obligation to make full financial disclosure on an annual basis. Ms. Currie points out that Mr. Currie never willingly paid support and the only support she received from 2005 to 2019 was through intervention by the Maintenance Enforcement Program (MEP). Ms. Currie does not agree that Mr. Currie has been making reasonable efforts to pay the outstanding support arrears. She points out that Mr. Currie has only made two voluntary support payments since July 2019. Ms. Currie contends that Mr. Currie's conduct demonstrates bad faith efforts to avoid compliance with the support order.

[22] Ms. Currie agrees that prospective spousal support should terminate and suggests the appropriate termination date is December 2021. Ms. Currie argues that it is not necessary for her to prove entitlement as entitlement was established in 2005. Should the Court determine that entitlement to spousal support has not been established, Ms. Currie argues that she is entitled to spousal support on a compensatory basis.

[23] Ms. Currie seeks an Order that child support and spousal support arrears from 2006 to 2017 be set at \$232,907.88 and spousal support arrears from July 1, 2017 to December 1, 2021 be set at \$54,000 for a total amount of \$286,907.88 arrears owing.

[24] Ms. Currie argues that the collection of arrears will serve to benefit the children all of whom needed to secure student loans in order to pursue post-secondary education. Ms. Currie contends that she continues to assist the children financially and would help with paying their student debt with arrears that are collected.

[25] Ms. Currie does not agree that enforcement of the arrears owing would cause Mr. Currie a hardship. Ms. Currie argues that Mr. Currie's income should be set at \$36,778 per annum, as opposed to \$24,818, because Mr. Currie's reported net

weekly benefits of \$477.27 as opposed to gross weekly income of \$707.83. Ms. Currie rejects that Mr. Currie is unable to pay support owing due to an injury that prevents him from working. Ms. Currie contends that Mr. Currie did not meet the burden of proving he is unable work due to medical reasons. Further, Ms. Currie disputes Mr. Currie has an inability to pay noting his budget allotment for cigarettes and for vehicle operation and maintenance even though Mr. Currie denies owing a car.

[26] Ms. Currie seeks a transfer of the content of any RRSP or GIC held by Mr. Currie and an order that Mr. Currie secure a mortgage or personal loan to pay the arrears outstanding. Ms. Currie is also seeking an Order that Mr. Currie obtain a life insurance policy for security against the arrears and that she be listed as beneficiary of said policy.

Legislation and Case Law

[27] The parties were married but never divorced. Therefore, Mr. Currie has filed a variation application pursuant to s. 37 of the *Parenting and Support Act*, SNS 2015, c. 4 (the *Act*):

s. 37(1) The Court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a support order or an order for custody, parenting arrangements, parenting time, contact time or interactions where there has been a change in circumstances since the making of the order or the last variation order.

[28] Mr. Currie also makes application under s. 46(4) of the *Maintenance Enforcement Act*, SNS 1994-5, c. 6:

s. 46(4) Where payment under a maintenance order is in default, a judge of the court that made the order may, on application, relieve the payor or the estate of the payor of the obligation to pay the whole or part of the amount in default if the judge is satisfied that

- (a) having regard to the interests of the payor or the estate of the payor, it would be grossly unfair and inequitable not to do so; and
- (b) having regard to the interests of the person entitled to the payments or the estate of that person, it is justified.

Framework for Retroactive Variation to Decrease Support

[29] In *Colucci v. Colucci*, 2021 SCC 24, the Supreme Court of Canada set out a framework of principles that guide the exercise of judicial discretion when a payor seeks to retroactively decrease child support:

- **Discretion** - Courts have wide discretion to vary child support. This is necessary given the broad range of factual circumstances that give rise to variation applications (para. 29). In exercising such discretion, courts must balance three interests to ensure a fair result:
 - The child's interest in receiving the amount of support to which they are entitled.
 - The promotion of certainty and predictability; and
 - The need for flexibility.

- **Disclosure** – adequate, accurate and timely financial disclosure is critical to determining child support in a manner that is fair and effective. Full and frank disclosure is the cornerstone of the child support regime in Canada. Disclosure is crucial to ensuring that child support is paid commensurate with income. Without disclosure there is an information asymmetry that favors the payor who controls access to the information that is needed to fairly determine child support. (para. 48-54).

- **Material Change in Circumstance** - The onus is on the party seeking a retroactive decrease to show a change in circumstances. A change in circumstances includes a change which, if known at the time, would probably have resulted in a different order.
 - If the retroactive variation claim is based on a material change in income, the decrease must be significant and have some degree of continuity, and it must be real and not one of choice (para. 59-61).

 - If the retroactive variation claim is based on a change in imputed income, the payor must do more than simply produce documentation, after the fact, that purports to show actual income that is lower than the imputed income. Late disclosure

does not, in itself, demonstrate a material change in circumstances (para. 63).

- Once a material change in circumstances is established, the issue then becomes one of establishing the date of retroactivity.

- **Presumption, if Material Change in Circumstances** – if a material change in circumstances is established, there is a presumption in favour of decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice was given. The court retains discretion to depart from this presumption if the result would be unfair given the facts of a given case (para. 71).

- **DBS Factors** – The factors set out in *D.B.S. v. S.R.G.*, 2006 SCC 37 guide the Court in “weighing the equities and reaching a fair balancing of certainty, flexibility and the child’s right to support based on income.” The DBS factors are applicable, with necessary modification, when determining the date of retroactivity once a material change in circumstances has been established (para 79):

1. Does the payor have an understandable reason for any delay in seeking a reduction in support payable (paras. 97-100)?

2. Has the payor's conduct been blameworthy? A failure to disclose or to communicate will be considered blameworthy as may efforts to avoid compliance with a support order (paras. 101-103).
 3. What are the circumstances of the child? Has the child has experienced hardship or is the child currently in need (paras. 104-106)?
 4. What hardship might the payor experience as a result of limiting the date of retroactivity? Hardship factors are less significant if the payor has engaged in blameworthy conduct (paras. 107-108).
- **Quantum** – if a Court has determined that support should be decreased retroactively to a certain date, the proper amount of child support must be quantified for each year during the period of retroactivity, based upon the Child Support Guidelines. The onus is on the payor to demonstrate a decrease in income for each year. The Court may draw a negative inference from any failure to disclose (paras. 109-110).

Variation of Support based on Imputed Income

[30] In *Colucci, supra*, the Supreme Court of Canada confirmed *Trang v. Trang*, 2013 ONSC 1980, when addressing material change from imputed income (para.

63). *Trang* has been followed in several cases in Nova Scotia including *Power v. Power*, 2015 NSSC 234, *Sugg v. MacNeil*, 2016 NSSC 54, *Wright v. Nunn*, 2017 NSSC 209. These authorities clearly establish:

- The Court may consider the context of why and how income was imputed in the first instance.
- The onus is on the payor to demonstrate why there should be a change in the way their income is to be calculated.
- The payor must go beyond establishing declared income (by filing income tax information, for example) as a means to establish material change.
- The payor must prove that it is no longer necessary or appropriate to impute income or, if income continues to be imputed, that a lower income should be imputed.

Application to Spousal Support

[31] *Kerr v. Baranow*, 2011 SCC 10, confirms the *D.B.S. v. S.R.G.*, *supra*, analysis applies to the determination of retroactive spousal support, with some adaptation to reflect the fact that the spousal support relates to a claim between adults and not children.

Rescission of Arrears

[32] In *Colucci v. Colucci*, *supra*, the Supreme Court of Canada also addressed applications where the payor seeks a rescission of arrears based on inability to pay when arrears accurately reflect the amount of support the payor should have paid (paras. 133-141):

- The only factor the Court need consider in this scenario is the payor's financial capacity.
- There is a strong presumption against rescinding arrears.
- The onus is on the payor to provide sufficient evidence of their current and future financial circumstances and to prove that, even with a flexible payment plan, they can not now, or will not ever, be able to pay the arrears.
- Rescission of arrears should be a last resort in exceptional cases. Payors should not be rewarded with debt relief simply because they have managed to avoid their financial obligation to the extent necessary to accumulate significant arrears.

Procedural History

[33] Mr. Currie seeks to vary an order pursuant to which income was imputed to him. Furthermore, Mr. Currie argues the order which he seeks to vary was grated

in his absence and without evidence. A thorough review of the history of the court record is therefore warranted and reveals:

- An Application and Summons was sworn by Ms. Currie on May 9, 2005 and amended on June 27, 2005. Ms. Currie sought sole custody, child support and spousal support.
- The matter was scheduled for June 14, 2005. Mr. Currie was served personally and was represented by counsel, Mr. Pink. At the request of Mr. Currie's counsel, the matter was adjourned to July 12, 2005.
- Mr. Pink subsequently withdrew as counsel for Mr. Currie because he was unable to obtain instructions. Mr. Currie did not appear in court on July 12, 2005 and did not disclose as directed by the court.
- On July 12, 2005 the Court issued an Interim Order:
 - Ms. Currie was awarded interim sole custody.
 - The parties were directed to provide each other with contact information on an ongoing basis.
 - Mr. Currie was ordered to pay \$2,000 per month in child support commencing May 1, 2005.

- Mr. Currie was ordered to pay \$1,000 per month in spousal support commencing May 1, 2005.
- Mr. Currie was ordered to provide Ms. Currie a copy of both his personal and business Income Tax Returns, including Notices of Assessment and Re-assessment, on or before June 1 of each year on an ongoing annual basis.
- The Interim Order of July 12, 2005 also included a detailed Order for Production which directed Mr. Currie to disclose, on or before August 19, 2005, the following:
 - Complete copies of his personal Income Tax Returns, including Notices of Assessment/Reassessment from Canada and the United States for taxation years 2002, 2003 and 2004.
 - Documented proof of all domestic and foreign investments held by Mr. Currie.
 - Documented proof of all bank accounts both personal and business, the numbers of those bank accounts and balances, whether held in Canada, the United States or elsewhere.

- Documented proof of the amount received by Mr. Currie as a result of a civil claim involving a motor vehicle accident in the late 1990's, including but not limited to, total settlement, disbursements, all legal costs and the amount received by Mr. Currie along with documented proof of the disposition of all of those funds.
- Documented proof of all of Mr. Currie's gross income for the year 2005 to date, from whatever source.
- Copies of financial statements, including but not limited to, balance sheets and income statements both in Canada, and in the United States, of all business and companies which with Mr. Currie was affiliated or an officer of, including but not limited to Currie Crewing and Net Inc. for the years 2003 and 2004.
- Mr. Currie's personal financial statements including his income, liabilities, assets, and expenses.
- A warrant was issued for the arrest of Mr. Currie and the matter was rescheduled to August 29, 2005. Mr. Currie appeared in court on that day and asked for more time to collect his financial information and to seek legal

counsel. Mr. Currie's request for an adjournment was granted and the matter was rescheduled to September 27, 2005.

- Mr. Currie did not appear on September 27, 2005 and his financial disclosure remained outstanding. A warrant was issued for Mr. Currie's arrest and the matter was rescheduled to October 25, 2005.
- Mr. Currie did appear in court on October 25, 2005. He had only partially disclosed but Mr. Currie assured the Court that he had secured an accountant and a new lawyer, Mr. Gillis, to assist in addressing the outstanding issues. The Court adjourned the matter with the direction that a teleconference take place within ten days.
- On November 3, 2005, the teleconference was held. Mr. Currie did not attend, and Mr. Gillis advised he had not received instructions. The matter was rescheduled to November 17, 2005 and Mr. Currie was put on notice that the Court could proceed in his absence.
- On November 7, 2005, the Court received correspondence from Ms. Peers who advised she was newly retained by Mr. Currie and was seeking an adjournment of the November 17, 2005 court date.

- On November 14, 2005, the Court granted the adjournment request but sought assurances of compliance from Mr. Currie. The matter was adjourned to December 6, 2005 and the Court made a further Production Order directing:

- The previous Interim Order issued July 21, 2005 remained in full force and effect.
- That Mr. Currie immediately provide to the Family Court and Ms. Currie copies of Income Tax Returns for the years 2001, 2002, 2003 and 2004.
- That Mr. Currie provide a sworn Affidavit outlining:
 - Gross income from all sources for 2002, 2003, 2004, 2005 to date, including gross income earned outside Canada.
 - Documented proof of all investments, whether Canadian or foreign.
 - Summaries of all monies drawn and/or monies paid to Mr. Currie by the companies that he works for in the United States and/or Canada.

- Detailed copies of Mr. Currie's personal banking account statements for 2004 and 2005. respecting all bank accounts located in Canada and/or the United States.
- Detailed copies of monthly bank account statements from Currie Crewing and Nets Inc. in Canada and/or the United States in 2004 and 2005.
- Documented proof of the amounts received by Mr. Currie as a result of a civil claim involving a motor vehicle accident in British Columbia including, but not limited to, total settlement, disbursements, all legal costs and amounts received by Mr. Currie from the civil claim as well as a sworn statement as to where those funds have been disposed of since they were received.
- A copy of the Financial Statements of Currie Crewing and Nets Inc. for the years 2003 and 2004.
- Sworn statement as to the dates that Mr. Currie has been out of Nova Scotia since August 2004 and where Mr. Currie was located during the time he was out of province.

- Mr. Currie's Financial Statement including his income, liabilities, assets, and expenses.
- Mr. Currie did not appear for the December 6, 2005 hearing and Ms. Peers advised she was present without instructions. Mr. Currie had not provided financial disclosure as ordered by the Court. The Court granted Ms. Currie's motion to finalize the terms of the interim order.

Findings and Decision

Findings

[34] Based on a review of the court record from 2005, I find as follows:

- Mr. Currie was served personally with Ms. Currie's application and had notice of court appearances. Mr. Currie was aware of the relief sought by Ms. Currie, including the details of the 2005 Interim Order, and was given ample opportunity to respond.
- Mr. Currie failed to attend court on multiple occasions and a warrant was issued twice secure Mr. Currie's presence at court.
- Mr. Currie was represented by three different lawyers during the course of the proceeding. Ultimately, each lawyer was released from their

obligation to Mr. Currie due to Mr. Currie's failure to provide them with instructions.

- There were two very detailed Orders for Production issued outlining what Mr. Currie was required to disclose by when. Mr. Currie did not dispute his obligation to disclose and was given several opportunities to provide information to the Court and to Ms. Currie.
- Mr. Currie was granted at least three adjournments so that he could obtain legal counsel and collect the information he was ordered to disclose.

[35] The evidence supports a finding of blameworthy conduct by Mr. Currie:

- Mr. Currie cut off communication with Ms. Currie and his children after separation. Ms. Currie had no means of locating Mr. Currie.
- Mr. Currie breached his obligation to provide financial disclosure to Ms. Currie on an annual basis.
- Mr. Currie was a recalcitrant payor who actively avoided his support obligation. Mr. Currie made no voluntary support payments of support from 2005 to 2019 and the only support Ms. Currie received during this period of time was through MEP intervention. Mr. Currie has made only two voluntary support payments since July 2019. Mr. Currie frustrated the

efforts of the Maintenance Enforcement Program to collect support despite MEP interventions that included default letters, tracing and locate efforts, demands for information, formal examinations, garnishments and federal interceptions, licence revocation, and a lien.

- Mr. Currie took no steps to vary the 2005 support order until 2020 even though he advised the Maintenance Enforcement Program (MEP) several times of his intention to make a support variation application.

[36] I accept the evidence of Ms. Currie who testified that Mr. Currie's abrupt departure was traumatic for both her and the children. During the course of their marriage, Mr. Currie was the sole income earner while Ms. Currie provided unpaid labour within the home. When Mr. Currie left, he took the financial underpinnings of the family with him thereby creating significant economic hardship for Ms. Currie and the children.

[37] After separation, Ms. Currie received social assistance from 2005-2010 and she struggled to provide for her three children. In 2010 Ms. Currie was able, with the financial support of social assistance, to train to become a Continuing Care Assistant. Ms. Currie did not begin to work full time until 2011. Ms. Currie could not afford a vehicle until 2012. Ms. Currie was finally able to obtain a mortgage in

2016 at the age of 59. The children needed to incur student loans to pursue post-secondary education. Ms. Currie and her children worked diligently to escape the poverty in which they were left.

1. Has Mr. Currie proven a material change in circumstance to warrant a retroactive variation of child support? If so, to what date should the child support be retroactively varied?

[38] Mr. Currie argues there has been two material changes of circumstances since the December 2005 order:

- the children were no longer dependent as of 2017; and
- his annual income has been less than \$57,000, the income imputed to him in 2005, in each year subsequent to 2005.

[39] The parties agreed to terminate child support retroactive to 2017. Mr. Currie proposes the table amount of child support for all three children from 2006 to 2017 thereby acknowledging dependency for all three children until 2017.

[40] The sole issue remaining, therefore, is whether Mr. Currie has demonstrated a material change in circumstances in terms of his income and, in particular, how his income should be calculated. He has not.

[41] Income was imputed to Mr. Currie in 2005 because he defied multiple court orders to disclose specific information by certain dates. The Court ordered disclosure that went beyond Mr. Currie's personal income tax returns. The Court clearly felt this information was necessary to properly assess Mr. Currie's income and, in the face of Mr. Currie's lack of disclosure, the Court determined it was appropriate to impute income to Mr. Currie in the amount of \$57,000. Mr. Currie continued to fail to disclose each year until he filed a variation application in 2020.

[42] Mr. Currie did provide detailed information about his current financial situation. However, other than submitting income tax returns for the years 2006 to 2020, Mr. Currie did not address the details of his financial situation during that period of time or, more particularly, why income should no longer have been imputed to him. In cross-examination, Mr. Currie testified that Currie Crewing and Nets Inc. collapsed into insolvency sometime after 2005 but provided no evidentiary documentation in this regard. During cross-examination, Mr. Currie also acknowledged working for many different employers in multiple locations over the intervening years. Mr. Currie admitted to quitting at least one job. Mr. Currie indicated that he was part of the International Union of Painters and Allied Trades and that sometimes he took union call outs and sometimes he took non-union jobs. Mr. Currie acknowledged he had not filed income tax returns with

Revenue Canada over a ten-year period and testified that he could offer no reason for failing to do so.

[43] The issue of why income should no longer be imputed was not directly addressed by Mr. Currie and the Court was left with Mr. Currie's vague recollection of his economic situation during the past fifteen years. The onus lies with Mr. Currie, and he has fallen short of proving why it is no longer necessary or appropriate to impute income to him. The simple act of providing income tax returns as proof of actual income is, in itself, insufficient to demonstrate a material change in circumstance, if the issue of imputation goes unaddressed. Mr. Currie cannot rely on his own failure to disclose as the change of circumstance necessary to ground his subsequent variation application.

[44] The Court made a finding of fact when imputing income in 2005. To allow Mr. Currie to essentially overturn that finding, just by providing income tax information in support of a variation application filed many years later, would seriously undermine the authority and certainty of Court orders.

[45] Financial disclosure has been recognized as the cornerstone of a fair and effective child support regime. The regime cannot support economic justice if payors are permitted to capitalize on the information asymmetry between payors

and recipients by refusing to provide financial disclosure. If, by failing to properly disclose in the first instance, payors are afforded the chance of a “do-over” at some point in the future, then payors are incentivised to not disclose.

[46] Mr. Currie’s application to retroactively vary child support from 2006 to 2017 is dismissed.

[47] Mr. Currie did not establish a material change of circumstance, so it is not necessary to apply the full analysis outlined in Colucci, supra, in order to determine an appropriate retroactive date of variation. However, even if Mr. Currie had succeeded in demonstrating a material change in circumstance, it is difficult to envision a period of retroactivity beyond formal notice given the significant delay and blameworthy conduct.

2. Has Mr. Currie proven a material change in circumstances to warrant a retroactive variation of spousal support? If so, to what date should the child support be retroactively varied?

[48] Mr. Currie first challenges Ms. Currie’s entitlement to spousal support on the basis that a finding of entitlement was made in 2005 in his absence, without evidence. Mr. Currie suggests entitlement was not established. This argument is rejected.

[49] As discussed previously, Mr. Currie was fully aware of the 2005 legal proceeding and was given ample opportunity to participate.

[50] The Order of December 6, 2005 was a final Order. The final Order makes provision for periodic payment of spousal support which would not have been ordered without a finding of entitlement. The final Order confirmed the support provisions of an Interim Order. The recitals of the Interim Order clearly reflect a contemplation of the economic situation of each party.

[51] Mr. Currie did not appeal the December 2005 Order. Nor did Mr. Currie bring a motion to set aside the order based on mistake or misrepresentation. As the Nova Scotia Court of Appeal confirmed in *Gaetz v. Jakeman*, 2005 NSCA 77, a variation application is neither an appeal nor an opportunity to re-litigate the prevailing order. Mr. Currie cannot now attempt to re-litigate an issue that has already been determined.

[52] The opportunity for Mr. Currie to argue procedural unfairness in the granting of the December 2005 Order has long-past. Even so, an examination of the court record demonstrates that Mr. Currie was granted every opportunity to know the case against him and to speak to that case. Mr. Currie cannot now cry foul and, even if he could, his claims would be without merit.

[53] Mr. Currie provided spousal support calculations based on the Spousal Support Advisory Guidelines that suggest no spousal support being payable if the payor (age 55) had an annual income of \$40,000 and the recipient (age 64) had an annual income of \$38,000 and no child support was payable. On the basis of this calculation, and the challenge to entitlement, Mr. Currie argues spousal support should terminate prospectively, as well as retroactively to 2006, with spousal support arrears being set at zero for each year from 2006 forward.

[54] The reasons why Mr. Currie failed to demonstrate a material change in circumstances in terms of his bid to vary child support apply likewise to the spousal support variation analysis. As previously discussed, Mr. Currie has fallen short of proving why it is no longer necessary or appropriate to impute income to him.

[55] Mr. Currie's application to retroactively vary spousal support to 2006 is dismissed. Given that Mr. Currie did not establish a material change of circumstance, it is not necessary to apply the full analysis outlined in Colucci, *supra*, in order to determine an appropriate retroactive date of variation.

[56] Ms. Currie agrees that prospective spousal support should terminate. She argues the date of termination should be December 2021. However, I see no

reason why the date formal notice was given should not serve as the appropriate date to terminate. Mr. Currie's obligation to pay spousal support to Ms. Currie will terminate effective August 1, 2020. This will result in a reduction of spousal support arrears owing by approximately \$18,000 (assuming 18 months, including August 1, 2020 to January 1, 2022 at \$1,000 per month).

3. Is Mr. Currie entitled to be relieved of his obligation to pay arrears?

[57] Mr. Currie is asking the court to set his arrears at \$29,925. Mr. Currie argues, given his income and the garnishment policies of the Maintenance Enforcement Program, any other assessment of arrears would cause him significant hardship.

[58] Section 46(4) *Maintenance Enforcement Act, supra*, authorizes me to relieve Mr. Currie of his obligation to pay the whole or part of the arrears owing. Before doing so, however, I must be satisfied that it would be grossly unfair and inequitable if I did not relieve Mr. Currie of his obligation and that such relief is justified considering the interests of Ms. Currie and her children.

[59] It is not incumbent upon Ms. Currie to demonstrate need for a debt to which she and her children are already owed. I am satisfied that Ms. Currie and her

children experienced significant financial hardship as a result of Mr. Currie's blameworthy conduct.

[60] If Mr. Currie does experience hardship in the repayment of this legitimate debt it is, unfortunately, a hardship of his own making. Mr. Currie cannot cite the ramifications of his blameworthy conduct as the reason why he should be excused from accountability for that conduct. Mr. Currie will not be rewarded relief from the debt that he accumulated by successfully avoiding his support obligation for the past fifteen years.

[61] I have considered Mr. Currie's financial situation. I accept Mr. Currie currently receives Workplace Newfoundland benefits at the rate of \$477.27 per week in benefits, whether net or gross matters little at this point in the analysis. The evidence that was provided by Mr. Currie in relation to his ability to work did not satisfy me of a future inability to work. While Mr. Currie's currently ability to pay is limited, Mr. Currie has not provided sufficient evidence to demonstrate that he can not pay anything now, or in the future, toward the payment of arrears.

[62] Ms. Currie is seeking a transfer of the contents of any RRSP or GIC held by Mr. Currie as well as an order that Mr. Currie secure a mortgage or personal loan to pay the arrears outstanding. Ms. Currie is also seeking an Order that Mr. Currie

obtain a life insurance policy for security against the arrears and that she be listed as a beneficiary of said policy.

[63] To this end I am directing the Director of Maintenance Enforcement to confirm arrears owing by Mr. Currie as a result of this decision within 10 business days. Mr. Currie shall be afforded the opportunity to advance a reasonable payment plan in response to the Maintenance Enforcement s. 37 application and Ms. Currie's claims for asset transfer and security for support.

[64] Other than having arrears set at \$29,925, Mr. Currie has not put forth any other component of a "reasonable payment plan" as contemplated in *Colucci*, *supra*.

[65] I am deferring my decision on asset transfer and security of costs in this matter to be determined in conjunction with the s. 37 application as brought by the Director of Maintenance Enforcement. These matters must be brought back before me within 30 days. Mr. Currie is prohibited from disposing of any asset until these matters are determined on a final basis.

Marche, J. Pamela