

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Shaham v. Merry*, 2016 NSSC 289

Date: 2016-10-26

Docket: *Halifax* No. SFHMCA-093061

Registry: Halifa

Between:

Guy Shaham

Applicant

v.

Deborah Merry

Respondent

LIBRARY HEADING

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: September 21 & 22, 2016, in Halifax, Nova Scotia

Oral Decision: October 26, 2016

Written Release: January 10, 2017

Subject: Custody, Access, Child Maintenance

Summary: Mr. Shaham sought a variation of the child maintenance payable by him (both retroactive and prospective). The court also addressed the issues of custody and access as there was no court order in place in relation to the parenting issues.

Issues:

- 1) Custody
- 2) Access
- 3) Child Maintenance (retroactive variation and prospective maintenance payable)

Result: By the conclusion of the hearing, the parties had agreed on maintaining joint custody of the children of their relationship with one caveat. Ms. Merry did have final decision making

authority in relation to the residence of the children so long as any change in residence was within Canada. Specified parenting time for Mr. Shaham was set out and his regular parenting time was dependent on his residence. Child maintenance was retroactively varied to reflect the actual income earned by Mr. Shaham since the issuance of the last court order. Income was imputed to Mr. Shaham and prospective child maintenance was determined based upon an imputed income of \$35,000.

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Counsel: Anne McFarlane for the Respondent

By the Court:

[1] This is the matter of Guy Shaham and Deborah Merry. The parties began cohabiting in or around September 2004 and separated eight years later (in September 2012). They have two children of their relationship Maya (10 years of age) and Shylee (soon to be 8 years of age). Ms. Merry is employed with Dalhousie University and earns a gross annual income of approximately \$88,600. Mr. Shaham was self-employed at the time of the separation but his employment situation has changed since that time and he is currently unemployed.

[2] Mr. Shaham filed a Variation Application on May 25, 2015. At that time, he sought to vary the child maintenance payable by him to Ms. Merry. He also sought the ability to travel with the children to see his extended family in the spring of 2016. The application in relation to the proposed travel was heard in March 2016 and Ms. Shaham's request to travel with the children was denied.

[3] The application to vary child maintenance is now before the court for determination. Mr. Shaham further indicated his intention to seek a variation to the parenting arrangements related to Maya and Shylee. Both parenting issues and financial issues were put before this court for determination at the hearing which took place September 21, and 22, 2016.

BACKGROUND

[4] Ms. Merry has had primary care of Maya and Shylee since the date of separation. There is no court order in place in relation to custody and access of the children. The parties had been operating under an agreement between themselves that Mr. Shaham would have the girls in his care for nine days per month. This schedule had been in place with some minor modifications since shortly after separation (January 2013).

[5] In relation to the child maintenance, the parties did formalize their agreement in a Consent Order signed by the parties in February and March 2015 and issued by the court on April 16, 2016. The Consent Order noted Mr. Shaham's income to be \$72,000 based on his Statement of Income sworn on November 25, 2014. The parties confirmed their agreement that Mr. Shaham pay \$500 per month which was significantly less than the applicable table amount (the table amount being \$996 per month).

ISSUES

- (I) What is the appropriate custodial arrangement for the children Maya and Shylee?
- (II) What is the appropriate schedule of parenting time? In examining the issue, the court must determine the following:
 - (a) Regular parenting schedule;
 - (b) Special Occasion schedule; and
 - (c) International Travel
- (III) What is the appropriate amount of child maintenance to be paid by Mr. Shaham? This includes considerations of retroactive maintenance as well as prospective maintenance (including section 7 expenses).

POSITION OF THE APPLICANT

(I) Custody

[6] Mr. Shaham is seeking a joint custodial arrangement. He asserts that both parents should be equally involved in making major developmental decisions in relation to the children. In February 2016, Mr. Shaham confirmed that he was also seeking an equality of parenting time. He sought to vary the parenting arrangement to be a 50/ 50 arrangement with the children transitioning between their parents on a weekly basis.

[7] Mr. Shaham's request for joint and shared parenting was amended at the time of the hearing. Given that his employment situation was in a state of flux (as noted below), he conceded that Ms. Merry would continue to be the primary residential parent for the children. His request to be a joint custodial parent in relation to major developmental decisions remained an issue to be determined by the court. He did, however, concede that Ms. Merry would be free to relocate with the children without the necessity of obtaining his consent so long as the relocation with the children was within Canada.

(II) Parenting time

[8] Given Mr. Shaham's employment situation, he was uncertain as to where he would be residing. His residence would greatly impact the schedule of parenting time as the options for where he may live were: Nova Scotia, Ontario, or Israel.

Mr. Shaham is an Israeli citizen and his evidence confirmed that he may have to move back to Israel to live with his parents.

[9] At the time of closing arguments, both Mr. Shaham and Ms. Merry noted the following agreements in relation to Mr. Shaham's regular parenting time:

- 1) Should Mr. Shaham reside in Nova Scotia, he would have the children every second weekend from Friday after school to Monday morning.
- 2) Should Mr. Shaham reside outside of Nova Scotia but within Canada (i.e. Ontario), he would have the children one weekend per month from Friday to Monday morning.
- 3) Should Mr. Shaham reside in Israel, he would have the children in his care for up to nine days once every three months. The schedule of parenting time would be set on an annual basis by January 1st of each year. The schedule of parenting time may be amended by the parties provided that there would be a minimum of sixty (60) days notice of intention to amend the scheduled parenting time.

[10] The parties also confirmed their agreement in relation to a holiday schedule at the time of closing arguments. Their agreement was noted to be:

I. Regular Holiday Schedule:

- a. **March Break:** In odd-numbered years, the children will be in Ms. Merry's care from 5:00 p.m. on the Friday before March Break begins until 5:00 p.m. the Sunday after March Break ends, at which time the regular parenting schedule will resume. The opposite schedule will occur in even-numbered years, with the children being in Mr. Shaham's care.
- b. **Easter:** The children will spend the Christian Easter holiday with Ms. Merry. In particular, the children will be in Ms. Merry's care from 5:00 p.m. on Good Friday until 7:00 p.m. on Easter Sunday each year.
- c. **Thanksgiving:** The Thanksgiving Holiday will not impact the regular parenting schedule.
- d. **Christmas:** The children will be in Ms. Merry's care from 12:00 p.m. on December 24 until 12:00 p.m. on December 26 each year.
- e. **Mother's Day:** The children will be in Ms. Merry's care from 5:00 p.m. the Saturday before Mother's Day until 5:00 p.m. on Mother's Day of each year.

- f. **Children's birthdays:** The children's birthdays will not impact the regular parenting schedule. On the children's birthdays, the parties will take the birthday child for lunch together. The parent who is scheduled to have the children during their birthdays will plan and host their birthday party with their friends. The parent who is not hosting the party will be entitled to attend the party.
 - g. **All other holidays:** The regular parenting schedule will not be affected by any other holiday, including Victoria Day, Canada Day, Remembrance Day, Heritage Day, and any other civic or statutory holidays.
 - h. **Local Family Birthdays:** The girls live in the Halifax Regional Municipality, and if the birthday celebration of a close family member such as their brother, aunt, uncle, cousins or grandparents in the Halifax Regional Municipality occur during Mr. Shaham's access, he will allow the girls to attend the celebration for at least 4 consecutive hours.
- II. Optional Holidays for Mr. Shaham:** Mr. Shaham will have the option to request time with the children outside of the normal parenting schedule on the following holidays:
- a. **Father's Day:** The children may be in Mr. Shaham's care from 5:00 p.m. the Saturday before Father's Day until 5:00 p.m. on Father's Day of each year.
 - b. **Passover:** The children may be in Mr. Shaham's care for four days of the Passover holiday. Mr. Shaham will provide Ms. Merry with notice in the first week of January each year of which days he intends to celebrate Passover with the children. Mr. Shaham's Passover parenting time will begin at 4:00 p.m. the first day and will continue until 5:00 p.m. four days later.
 - c. **Rosh Hashanah:** The children may be in Mr. Shaham's care during the Rosh Hashanah holiday. The children may be in Mr. Shaham's care from 4:00 p.m. on the eve of Rosh Hashanah until the following day at 5:00 p.m.
 - d. **Hanukkah:** The children may spend the first night of the Jewish Hanukkah holiday with Mr. Shaham, provided it does not coincide with Christmas Eve or Christmas Day. If it does, the children will spend this holiday with Ms. Merry, as set out above. Mr. Shaham may have the children in his care each year from 4:00 p.m. the first

night of Hanukkah until 5:00 p.m. the following day. The remainder of the Hanukkah holiday will not impact the regular parenting schedule.

[11] Mr. Shaham has requested that the girls be permitted to participate in their Bat Mitzvah celebrations when each of them reaches the age of twelve. He has requested that he be permitted to travel to Israel with the children for one week to celebrate these special occasions.

(III) Child Maintenance

[12] Mr. Shaham provided a letter from his employer, Scolab, advising of his termination as of September 16, 2016. His evidence was that he was without employment at the time of the hearing and that he did not qualify for employment insurance. He indicated that the Order of April 2015 overstated his income at \$72,000 and that the child maintenance payable pursuant to that Order needed to be adjusted in accordance with his actual income earned.

[13] Mr. Shaham's position was that he had approximately \$15,000 in income in 2015 and less than \$10,000 in 2016. He indicated that he was prepared to pay child maintenance in accordance with the guidelines based on his actual income. The Notice of Variation Application filed on May 25, 2015, requested that the child support be varied retroactively to January 1, 2015 (despite his signature on the consent Order on March 15, 2015).

[14] Mr. Shaham indicated that he provided two cash payments of \$500 each to Ms. Merry in 2015. There was no documentary evidence submitted to support this assertion. Ms. Merry denies receiving these payments.

[15] Mr. Shaham indicated that he has borrowed money from his parents in order to make ends meet. He testified that he borrowed approximately \$13,000 in 2015 from his parents. He indicates that he incurred debts in order to ensure continuity of the parenting schedule whereby he had care of the children for 9 days per month.

POSITION OF THE RESPONDENT

(I) Custody

[16] Ms. Merry was prepared to agree to a joint custodial arrangement as it related to major developmental decisions with the proviso that she would have final say in the event of disagreement. Mr. Shaham had agreed to her having primary care of the children and further agreed that she was free to move with the children within Canada without the necessity of his further consent.

[17] The sole custodial issue, therefore, is the issue of decision making.

(II) Parenting Time

[18] The parties agreed on Mr. Shaham's regular parenting time as noted above. The parties also agreed upon the schedule for special occasions. Counsel on behalf of Ms. Merry confirmed specific arrangements in relation to Mr. Shaham's parenting time for the period October 2016 to December 31, 2016. The agreement as noted on the record is as follows:

- 1) October 15- 16, 2016
- 2) October 28- 30, 2016
- 3) December 15-16, 2016
- 4) December 19 (after school) to 5 pm on December 23, 2016
- 5) December 26, 2016 at noon to December 31, 2016, at noon.

(III) Child Maintenance

[19] Ms. Merry is seeking enforcement of the arrears accumulating pursuant to the Order of April 2015. She is also seeking retroactive child maintenance for the year 2014 in the amount of \$11,952. Ms. Merry is also seeking prospective child maintenance based upon an imputed income to Mr. Shaham of \$80,000. She has requested that prospective child maintenance be set in accordance with the applicable tables in the amount of \$1,102 per month. Additionally, she is requesting that the section 7 expenses be shared on a proportional basis. Assuming Mr. Shaham's income to be \$80,000, the percentage payable by him would be 47.4% of appropriate section 7 expenses.

LAW & DISCUSSION

Custody

[20] Both parties have agreed to joint custody of their children with their primary care remaining with Ms. Merry. What is not agreed upon is whether Ms. Merry has final decision making power in the event of disagreement between the parties. Despite the difficulties of the parties, they have been able to set aside their differences the majority of the time and to work cooperatively for the sake of the children.

[21] There were two significant issues raised in the context of the custodial decisions: residency of the children and religious upbringing. Mr. Shaham has conceded that Ms. Merry will have final decision making on the children's primary residence so long as that residence is within Canada. The other significant issue raised by the parties involved the issue of religious upbringing for the children. Ms. Merry is Christian and Mr. Shaham is Jewish.

[22] The children will benefit from exposure to both religions. I am not going to assume that these parties will not work together in the best interests of their children on major developmental issues such as religion. I am not going to prefer one parent's decision making over the other. Aside from the concession related to residency for the children, the parties will have joint custody of their daughters.

[23] There has been evidence that Mr. Shaham has involved the children in discussions of the court proceeding. Under no circumstances should the children be placed in the middle of the conflict between their parents. The children are not to be made aware of court proceedings and they are not to be caught in any loyalty bind to either parent.

[24] Mr. Shaham has conceded that he has discussed the court proceedings with the children. This must cease immediately. Communication between the parties themselves must remain respectful and child centered. In order to maintain joint custody there must be communication and cooperation between the parties. It is hoped that once this litigation is put behind them that the parties are able to communicate more effectively so that their children are not caught in the middle.

[25] Being a joint custodial parent carries with it the responsibility of raising the children cooperatively. It is intertwined with the necessity that the parent will put

their child's need for stability ahead of their own needs. It is self-evident that joint custody will only work with both parents being engaged in decision making which is in the best interests of their children.

[26] Ms. Merry had asserted that she believed Mr. Shaham may pose a flight risk in the past. Mr. Shaham has indicated that this allegation is without merit. He is aware that his parents reside in a country which is a signatory to the Hague Convention. The children would not be permitted to travel internationally without a notarized consent to travel from both parents. Mr. Shaham has respected the court's prior ruling which disallowed travel to Israel in the spring of 2016.

[27] Ms. Merry does acknowledge that Mr. Shaham's family is very good. Evidence was presented that knowing Mr. Shaham's extended family in Israel would be positive for the girls. Ms. Merry indicated that the reason she would not allow the children to travel to Israel resulted from the absence of a court order related to custody and her concern that they would miss too much school. The order will confirm that the parties have joint custody but that Ms. Merry has final decision making on the children's place of residence within Canada. The order will further confirm that Ms. Merry is the primary caregiver for the children and as such there should be no prima facie impediment to the children travelling to Israel. Any decisions related to international travel must be made at the time such travel is suggested and must always be in the children's best interests.

Parenting Time

[28] Virtually all issues related to parenting time had been resolved by the time of the parties' closing arguments. One outstanding issue related to the specific request of Mr. Shaham to be allowed to travel to Israel to celebrate each of the girls' Bat Mitzvah with his family in Israel. Permission is granted to Mr. Shaham to travel for one week to include time when each of the girls turns twelve years of age to celebrate their Bat Mitzvah.

Child Maintenance

Retroactive claims for the period prior to the Consent Order

[29] Each of the parties has requested relief in relation to child maintenance for the period preceding the Consent Order issued in April 2015. I dismiss the

application of Mr. Shaham to revisit the child maintenance owing for the period January to April 2015. Likewise, I dismiss the application of Ms. Merry to revisit child maintenance owing for the period of 2014.

[30] The Consent Order between Mr. Shaham and Ms. Merry was not an interim order. It did not reserve the right of either party to seek child maintenance for a period prior to the time frame noted in the Consent Order. In other words, I would only have jurisdiction to adjust maintenance owing prior to the Consent Order if one of the parties was seeking to set it aside. That is not the case before me. The request for maintenance pre-dating the Consent Order is dismissed.

Variation of child maintenance after the issuance of the Order: May 2015 to September 2016

[31] Having dealt with the claims for maintenance owing prior to the Consent Order, I then move to consider the monies owing from the date of the Consent Order forward. Ms. Merry seeks to enforce the amount owing pursuant to the Consent Order. Mr. Shaham indicates that the Order should be varied to reflect his actual income earned during that period of time.

[32] The Consent Order was based on Mr. Shaham's income being \$72,000. Mr. Shaham testified that he was optimistic that he would be able to earn \$72,000 but that the reality was much different. He testified that the company BML was not doing well financially. He indicated that he sought other sources of income but that his income was drastically different from his anticipated income of \$72,000. Subsequent to the Consent Order, Mr. Shaham has declared bankruptcy and his employment situation has changed on a few occasions.

[33] I am prepared to accept that there has been a change in Mr. Shaham's financial circumstances since the time of granting the Order in April 2015. I find that the change in Mr. Shaham's income as set out herein is significant and warrants a variation of the Order.

[34] For the period May 2015 to December 2015, Mr. Shaham's evidence was that he earned \$14,777 during that eight month period. Amortizing that on an annual basis results in Mr. Shaham's income (post Consent Order) being \$22,165.50. Mr. Shaham's evidence in relation to his 2015 income is found at Exhibit #18.

[35] It is difficult to decipher from the evidence what Mr. Shaham's income was in 2016. He indicated in cross examination that he earned approximately \$10,000 up to the time of the hearing (in September 2016). Mr. Shaham acknowledged, however, that his bankruptcy documents reference gross monthly income of \$2,000 (reference Exhibit 1, at tab "H", p. 6). These documents are dated May 12, 2016. At p. 5 of that tab, Mr. Shaham lists his employer as "BML- Web Development and Communications Inc." ("BML").

[36] Taking the bankruptcy documentation of Mr. Shaham at face value. Mr. Shaham stated he was earning \$2,000 per month from BML. Mr. Shaham provided evidence that BML was not doing financially well and that he was not drawing income of \$2,000 monthly from BML at that time. That, however, begs the question as to why Mr. Shaham would overstate his monthly income to the trustee in bankruptcy resulting in higher monthly payments owing by him to the trustee. I accept his stated monthly income in 2016 to be \$2,000 monthly from January up to the time of signing the bankruptcy documentation in May 2016.

[37] Mr. Shaham provided documentation to the court that he provided to the bankruptcy trustee to confirm his income for the months of May, June and July 2016. During these three months he indicated he earned a total of \$1,072.

[38] Mr. Shaham secured employment with Scolab in August 2016. His gross monthly income was \$4,854.29. He earned this income over the six week period he was employed until his termination in mid September 2016. I accept that his termination was bona fide and that he no longer has employment with Scolab.

[39] I therefore calculate his 2016 gross income to be as follows:

January to April 2016 @ \$2,000 month = \$8,000

May to July 2016 = \$1,072

August to mid September 2016 = \$4,854.29 x 1.5 months = 7,281.44

2016 INCOME TO MID SEPTEMBER = \$16,353.44

[40] Mr. Shaham owes child maintenance for 2015 based on an income of \$22,165. Mr. Shaham owes child maintenance for 2016 based on his earned income to date of \$16,353.44 (his annualized income for the purpose of child maintenance is \$20,657). Therefore, Mr. Shaham owes \$314.84 for 8 months in 2015 and \$293.10 for 9 months in 2016. The total child maintenance owing is

\$2,518.72 for 2015 and \$2,637.90 for 2016. Mr. Shaham shall pay to Ms. Merry the sum of \$5,156.62 in retroactive child maintenance.

Prospective child maintenance

[41] Child maintenance is the right of the child. It is not for Mr. Shaham to decide when and if he will pay maintenance. The obligation to provide financially for children is enshrined in legislation. Mr. Shaham indicates that he is doing all he can to be employed. The difficulty is that even when Mr. Shaham was earning an income, he believed he could decide when and how he would pay maintenance. The parties came to an agreement and no monies were paid by Mr. Shaham. From this point forward, Mr. Shaham will pay the monies as directed by the court or will have to deal with the negative consequences that flow from his failure to abide by a court order.

[42] Ms. Merry is seeking to have child maintenance determined after imputing income to Mr. Shaham of \$80,000. The decision to impute is a determination of fact (*Trang v. Trang*, 2013 ONSC 1980 (Ont. S.C.J.)). Imputation of income is permissible under s. 19(1) of the *Child Maintenance Guidelines* which provide as follows:

Imputing income

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

- (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;
- (b) the parent is exempt from paying federal or provincial income tax;
- (c) the parent 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 maintenance to be determined under these Guidelines;
- (e) the parent's property is not reasonably utilized to generate income;
- (f) the parent has failed to provide income information when under a legal obligation to do so;
- (g) the parent unreasonably deducts expenses from income;

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

[43] Counsel for Ms. Merry indicated that Mr. Shaham has the ability to earn in excess of \$80,000 and had run businesses which earned him an income of over \$100,000. The difficulty with this proposition is that a three year average of Mr. Shaham's income for the period 2012 to 2014 is \$63,121. The income is drastically lower if one looks at the three year average including 2015.

[44] Mr. Shaham has no post-secondary accreditation. His skills are self-taught and he has been able to set up and run businesses in the past. He has also been able to find employment although the evidence shows that his employment has changed in the last two years.

[45] The leading decision in determining imputed income in Nova Scotia is *Smith v. Helppi*, 2011 NSCA 65 (N.S.C.A.). Our Court of Appeal cited with approval the considerations in imputation of income cases and referred to the case of *Gould v. Julian*, 2010 NSSC 123 (CanLII) at paragraph 16 of the decision:

What a judge is to consider in doing so was summarized in *Gould v. Julian*, 2010 NSSC 123 (CanLII), where Justice Darryl W. Wilson stated:

[27] Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in *Hanson v. Hanson*, 1999 CanLII 6307 (BC SC), [1999] B.C.J. No. 2532, as follows:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor"....

2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the

parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

4. Persistence in unremunerative employment may entitle the court to impute income.

5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[46] The court also dealt with the issue of imputed income in the recent decision of *Rideout v. Woodman* 2016 NSSC 205. Justice Forgeron stated at paragraph 30 of the decision:

30 In *Parsons v. Parsons*, 2012 NSSC 239 (N.S. S.C.), paras 32 and 33, this court distilled other principles applicable to s. 19 imputation claims as follows:

- The discretionary authority found in s.19 must be exercised judicially, and in accordance with rules of reason and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: *Coadic v. Coadic*, 2005 NSSC 291 (N.S. S.C.).
- The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: *Staples v. Callender*, 2010 NSCA 49 (N.S. C.A.).
- The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor

asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: *MacDonald v. MacDonald*, 2010 NSCA 34 (N.S. C.A.); *MacGillivray v. Ross*, 2008 NSSC 339 (N.S. S.C.).

- The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: *Smith v. Helppi*, 2011 NSCA 65 (N.S. C.A.); *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200 (B.C. C.A.); *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (B.C. S.C.); *Saunders-Roberts v. Roberts*, 2002 NWTSC 11 (N.W.T. S.C.); and *Duffy v. Duffy*, 2009 NLCA 48 (N.L. C.A.).
- A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: *Duffy v. Duffy*, supra; and *Marshall v. Marshall*, 2008 NSSC 11 (N.S. S.C.).
- 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

[47] I have also taken into consideration the following cases: *Elliott v. Sampson* 2015 NSSC 255, *Darlington v. Moore*, 2014 NSSC 358, *Strecko v. Strecko*, 2013 NSSC 49, *Marshall v. Marshall*, 2008 NSSC 11, *Coadic v. Coadic*, 2005 NSSC 291, *MacDonald v. Pink*, 2011 NSSC 421, *Staples v. Callender*, 2010 NSCA 49.

[48] Section 19 provides the statutory authority to impute income to a payor. This discretionary authority must be exercised on a solid foundation of evidence and judicial reasoning. The person suggesting that income should be imputed bears the burden of proof on a balance of probabilities. The discretion in s.19 cannot be utilized arbitrarily or as a means to punish payor parents.

[49] As noted by Judge Daley in the case of *O. (D.) v. D. (S.)* 2015 NSFC 9, at paragraph 34:

“A related issue is one of intent. While not specifically argued, it might be suggested that the father should not be deemed to have a higher income than

his employment insurance earnings because he had no intent to evade his child maintenance obligations and he did not act in bad faith. A finding of bad faith or an intent to evade child maintenance obligations is not required for section 19 to be engaged. As noted in the decision of *Donovan v. Donovan*, [2000] M.J. No. 407, 2000 MBCA 80 (Man. C.A.), The Manitoba Court of Appeal, in commenting on the identical section in the Federal Child Support Guidelines said the following:

The husband argues that there was no finding that he intentionally attempted to evade his child support obligations or acted in bad faith. A specific intent to evade child support obligations is not required nor is the finding of bad faith. The word "intentional" is used to differentiate s. 19 (1) (a) from factors beyond the control of the parent, such as being laid off, and implies a deliberate course of conduct on the part of the parent. ...The parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. The parent required to pay is intentionally unemployed if he or she chooses not to work when capable of earning an income..."

[50] There is a three stage analysis set out in the case of *Drygala v. Pauli*, [2002] O.J. No. 3731 (Ont. C.A.):

- 1) Stage 1- Determine whether Mr. Shaham is under-employed.
- 2) Stage 2- Determine whether the under-employment relates to the health or educational needs of Mr. Shaham.
- 3) Stage 3- Determine the income earning capacity of Mr. Shaham.

[51] **Stage 1-** I find that Mr. Shaham is under-employed. I make this finding based on the following evidence:

[52] He was employed with a company C-Level Executive Solutions in 2015 (reference Exhibit 13). This was a full time position with a starting base salary of \$35,000 per year plus commission. Mr. Shaham voluntarily left this position to pursue self employment. His evidence was that he did not earn significant enough commission income and believed that he could earn more as a self employed individual.

[53] The business set up by Mr. Shaham was BML. He had one other partner and an investor in the company. Although the company faltered in 2016, Mr. Shaham indicated that the business plan of BML is still sound. He gave evidence that he may need to rebuild that business and would need some time to attract further investor(s).

[54] The Court of Appeal in *Montgomery v. Montgomery* 2000 NSCA 2, cited with approval the comments of Cachionne C.C.J. (as he then was) at paragraph 45 of their decision:

“The evidence disclosed that the respondent's change in circumstance was self-induced. It was as a result of his wish to advance his career prospects. ... The situation the respondent found himself in was his own making and not unforeseen. In making plans for furthering his education the respondent should not have lost sight of his obligation to his son ... In allowing the application to vary the learned trial judge effectively made the appellant and her child underwriters for the respondent's career goals. He cast the appellant and her child in the role of short-term bankers for the respondent, in order to allow him to further his career plans. As such, the learned trial judge failed in his duty to ensure that the reasonable needs of the child were met.”

[55] Ms. Merry and the children should not be in the role of short-term bankers for Mr. Shaham. Mr. Shaham had employment with a guaranteed salary. To leave that employment to undertake a riskier business venture was not in the children's best interests. Mr. Shaham's drive, coupled with his social and communication skills enabled him to secure employment with C-Level Executive Solutions. It also enabled him to secure far more remunerative employment with Scolab. The reasons for his dismissal from Scolab immediately prior to the hearing are not known to the court.

[56] I have viva voce testimony from Mr. Shaham related to his job search efforts but I have no documentary proof of those efforts. In the absence of credible evidence related to his job search I am unable to find that he made bona fide efforts to obtain employment.

[57] **Stage 2-** There was no evidence provided that Mr. Shaham's current unemployment results from issues related to health or education.

[58] **Stage 3-** I find that Mr. Shaham has the ability to earn an income of \$35,000. This is the base level of income earned by Mr. Shaham when he voluntarily left his employment with C-Level Executive Solutions. When examining the issue of imputation of income, the court must take into account the individual's earning capacity given their age, health, education, employment history and marketable job skills. As noted in the decision of *Smith v. Helppi* (supra), the court must consider what is reasonable in the circumstances. Mr. Shaham is relatively young and has no health impediments to earning an income.

[59] Although Mr. Shaham does not have formal post-secondary education, he has been able to set up and run business ventures in the past. He has had investors and has proven that he has the capacity to attract investors. Counsel for Ms. Merry has suggested that the court impute income to Mr. Shaham of \$80,000. This is largely based on his earnings from businesses that he has established. I am not prepared to impute income to Mr. Shaham at that level.

[60] The children need and deserve the stability of financial support from both their parents. Income is imputed to Mr. Shaham of \$35,000 per year. Commencing January 1, 2017, Mr. Shaham's monthly child support payment is set at \$505 per month. I am delaying the commencement date for prospective support to recognize that Mr. Shaham will be in Israel for a number of weeks and to provide him the opportunity to arrange his financial affairs accordingly.

[61] Evidence was led in relation to the financial assistance provided to Mr. Shaham by his parents. The monies provided to him in order to meet his expenses does not qualify as income attributable to him for the purposes of calculating child maintenance. The case of *Cheng v. Cheng*, 21 R.F.L. (4th) 58, 1996 CarswellOnt 878 (Ont. C.A.) confirms that a grandparent voluntarily funding a parent does not give rise to liability related to child maintenance.

Section 7 Expenses

[62] Ms. Merry is seeking to have Mr. Shaham contribute to s. 7 expenses related to the children on a proportional basis. Should Mr. Shaham not be residing in Canada, there will be no contribution to section 7 expenses. The costs related to access to be borne by Mr. Shaham must be taken into account in whether the cost share expenses related to section 7 expenses.

[63] Should Mr. Shaham be residing in Canada but outside of Nova Scotia, his access costs would be significantly reduced from the costs associated with travel to and from Israel. As such, if he is living within Canada (exclusive of residing in Nova Scotia) he will contribute to child care costs proportional to income.

[64] Should Mr. Shaham be residing within Nova Scotia, all section 7 expenses (including child care and extraordinary expenses of extra-curricular activities) will be shared proportional to incomes.

CONCLUSION

[65] The parties will have joint custody of the children Maya and Shylee with the proviso that Ms. Merry shall have final decision making (by consent) related to the issues of the children's residency within Canada. Mr. Shaham owes retroactive child maintenance to Ms. Merry in the amount of \$5,156.62. Mr. Shaham owes child maintenance to Ms. Merry of \$505 per month based on an imputed income of \$35,000. Mr. Shaham's contribution to section 7 expenses is dependent on his access costs and the particulars of his contribution are set out herein.

Chiasson, J.