

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Yhard v. Mulvihill*, 2017 NSSC 101

Date: 2017-04-12

Docket: SFSNMCA No. 75651

Registry: Sydney

Between:

Mark Yhard

Applicant

v.

Sherie Mulvihill

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: March 31, 2017, in Sydney, Nova Scotia

Written Release: April 12, 2017

Counsel: Damien Barry, for the Applicant
Sherie Mulvihill, Self-represented Respondent

By the Court:

[1] Mr. Yhard filed a variation application on February 24, 2016. He seeks variation of a consent order issued July 7, 2014 retroactive to January 1, 2016. He says his income has declined and he asks the court to reduce the table amount of child support payable, as well as his proportionate share of special or extraordinary expenses. He also asks that a recalculation clause be included in any new order.

[2] Ms. Mulvihill opposes his application. She seeks an order imputing income to Mr. Yhard in the amount of \$100,000.00 for 2016, as well as an order requiring him to pay a proportionate share of special or extraordinary expenses based on that imputed income, retroactive to January 1, 2016.

[3] The parties have one child, Ayden, who is now 7 years of age. He is in his mother's primary care. The 2014 consent order was the result of Ms. Mulvihill's earlier variation application, seeking an increase in child support. Mr. Yhard filed a counter-application seeking a variation in custody and access. At the time the consent order was issued, Ms. Mulvihill had an income of approximately \$37,047.00 and Mr. Yhard had an income of approximately \$134,800.00.

[4] In 2014, Mr. Yhard was working internationally in the oil industry. He testified that he agreed to prospective child support based on his income from

2014, because he expected to continue working in the same position. Instead, he says he was terminated and cannot find equivalent work elsewhere in the industry. He has since taken a position in the family business, though at a much reduced income.

ISSUES:

1. Should income be imputed to Mr. Yhard ?
2. What is the appropriate amount of child support payable after 2015 ?
3. What is the appropriate amount of prospective child support ?
4. What section 7 expenses qualify for payment ?
5. What contribution should Mr. Yhard make to s. 7 expenses ?

Issue 1: Should income be imputed to Mr. Yhard?

[5] The governing legislation is the **Maintenance and Custody Act** and its **Child Maintenance Guidelines**, enacted pursuant to s. 55 of the **MCA**. They are virtually identical to the federal **Guidelines** for purposes of reviewing the case authorities cited by the parties.

[6] Ms. Mulvihill asks the court to impute income to Mr. Yhard under s. 19(1):

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

Clause 19(1)(h) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

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

[7] Mr. Yhard argues that the only subsection of this provision which applies to the facts of this case is 19(1)(a). I agree. Ms. Mulvihill is arguing that Mr. Yhard

is intentionally under-employed. The onus is on her to prove that claim on a balance of probabilities.

[8] Mr. Yhard relies on the decision in **Marshall v. Marshall**, 2008 NSSC 11, in which Forgeron, J. makes a number of salient points:

16 Section 19(1)(a) of the federal Child Support Guidelines provides this court with the authority to impute income to Mr. Marshall if I find that Mr. Marshall is underemployed. Section 19(1)(d) of the Guidelines provides this court with the jurisdiction to impute income if I find that Mr. Marshall is diverting income. These sections state as follows:

Imputing income

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

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

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

17 The discretionary authority found in section 19 of the Guidelines must be exercised judicially in accordance with the rules of reason and justice - not arbitrarily. **There must be a rational and solid evidentiary foundation in order to impute income in keeping with the case law which has developed. The burden of proof is upon Ms. Marshall and it is proof on the balance of probabilities: Coadic v. Coadic (2005), 237 N.S.R. (2d) 362 (SC).**

18 In reviewing the factors to be considered when a party has requested imputation, the court stated at paras. 14 to 16 of Coadic:

[14] In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr. Coadic's income

earning capacity having regard to his age, health, education, skills and employment history.

[15] In *Saunders-Robert v. Robert*, [2002] N.W.T.J. No. 9, 2002 CarswellNWT 10 (S.C.), Richard, J., stated at para. 25:

"[25] **When imputing income, it is an individual's earning capacity which must be considered, taking into account the individual's age, state of health, education, skills and employment history.** In the circumstances of the respondent, in my view it would not be unreasonable to impute, at a minimum, one-half of the income that the respondent earned in 1995 and 1996, say \$50,000. I note that the respondent's present income, according to his own evidence, is approximately \$42,500.00."

[16] In *R.C. v. A.I.*, [2001] O.J. No. 1053, 2001 CarswellOnt 1143 (Sup. Ct.), Blishen, J., reviewed the principle that income is based upon the amount of income which a parent could earn if working to his/her capacity and further adopted the factors to be applied when imputing income as proposed by Martinson, J., in *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.). Blishen, J., stated at paras. 79 to 80:

"[79] By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children. Therefore, **it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity** (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528).

"[80] In *Hanson v. Hanson*, [1999] B.C.J. No. 2532, Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income 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." (*Van Gool* at para. 30).

'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.**" [emphasis added]

[9] He argues that in reference to the above test, the following points should be considered:

- As per the Applicant's affidavit sworn on March 21, 2017, and in particular paragraph 22, Exhibit "B", he made substantial efforts throughout 2014 and 2015 to obtain employment in his previous field, but was unsuccessful in doing so;
- As per paragraph 23, Exhibit "C", the cost and time involved in renewing and updating the applicant's previous certification would be prohibitive and unrealistic in light of his current circumstances;

- The Respondent has made accusations of the Applicant holding an interest in rental properties which have been refuted by his brother, Jason Yhard, as per his sworn affidavit of March 6, 2017;
- Despite the fact that he only earned an income of \$53,277.12 (Employment income of \$34,780.00 and RRSP withdrawals of \$18,497.12) in 2015, the Applicant continued to pay child support in the amount of \$1,105.90 throughout 2015. The total amount of monthly support paid in 2015 was \$13,278.80, in addition to arrears of \$25,000.00 for a total of \$38,278.80, which was greater than his gross employment income for 2015;
- The Applicant has not remained unemployed – he has taken a position with his family business so that he can earn a consistent income;
- The Applicant has two young children which he also has to support and a new partner with whom he resides here in Cape Breton;
- As per the affidavit evidence sworn by Judy Yhard on March 21, 2017, the Applicant has been forced to borrow money from her in order to meet a substantial CRA debt as well as MEP and other expenses; and
- The Orders issued previously in this matter were issued by way of consent – an income was not previously imputed to the Applicant.

[10] With respect to Ms. Mulvihill's claim that he has other income available beyond his salary, Mr. Yhard relies on the evidence of his brother. Jason Yhard testified that he owns several rental properties in Truro. He denies that Mr. Yhard has (or ever had) any beneficial or other property interest in those units. Ms. Mulvihill did not vigorously challenge Mr. Yhard on this point during cross-examination, nor did she advance any witnesses to contradict his evidence.

[11] Instead, she relies on her affidavit, in which she recounts a conversation with Mr. Yhard before they separated, during which she says Mr. Yhard told her that he and his brother planned to build a rental unit in Truro as partners. She says that Mr. Yhard travelled to Truro to help with renovations to the unit, and that he was paid a share of the profits in 2009. She offers no other proof to contradict Mr. Yhard's brother or to support the claim that Mr. Yhard has an interest in the rentals.

[12] Failing imputation of income from rental properties, Ms. Mulvihill argues that the evidence supports imputation of income based on other factors:

- Mr. Yhard's pattern of income over the years;
- His failure to continue employment in the places and in the manner he did prior to these proceedings;

- His failure to disclose information pertaining to his finances and ability to pay;
- Evidence of his lifestyle being inconsistent with a person having the income that he alleges;
- His employment at a business that is not at arm's length; and
- Being currently employed at a lower income job and providing no evidence of efforts he has made to resume employment in the field that paid him well in the past.

[13] Mr. Yhard responds to her arguments as follows:

- He acknowledges that he had a pattern of high income up until 2014;
- He denies that he quit his job. He says that he was terminated and since then has made significant efforts to obtain work in the industry after 2014, including submitting dozens of applications online;
- There has been no failure to disclose financial information;
- There is no evidence that his lifestyle is inconsistent with his current income. He characterizes the sale of his Ben Eoin property and mortgaging of his current home as efforts to reorganize his financial obligations, given

his current financial circumstances. He says he plans to transfer title to the Mira property as security for the monies he owes his mother, who paid arrears in income tax and child support for him by drawing down funds from her pension;

- He acknowledges that he is employed on salary in his family's business, but he argues there is no evidence that he is receiving money from any other source. In fact, the salary for his position was increased when Mr. Yhard was hired.

[14] Ms. Mulvihill also has suspicions about Mr. Yhard's finances and lifestyle based on renovations undertaken to his home. However, his mother says that she financed those renovations. There is no evidence to contradict this, and it would be consistent with Mrs. Yhard's evidence that she loaned her son money to pay tax and child support arrears.

[15] Mr. Yhard argues that Ms. Mulvihill has not met the burden of proving on a balance of probabilities that the court should impute income to him. He says firstly that he cannot earn income in the range of \$100,000.00, as there is no work available to him in the oil industry without recertification, which will take up to six months and thousands of dollars, with no guarantee of work. Secondly, he argues that support should be based solely on his T4 income, and not on his line 150

income. That argument relates to 2015, when he cashed his last RRSPs. His line 150 income was \$53,277.12. He now relies solely on employment income, which in 2016 was \$38,480.

[16] I have considered all of the evidence in the context of the onus borne by Ms. Mulvihill in terms of imputation. As the Nova Scotia Court of Appeal noted in **MacIsaac v. MacIsaac** [1996] NSJ No. 185, the exercise of judicial discretion cannot be exercised arbitrarily, in an unfettered manner. I can only impute income where there is “a rational and solid evidentiary foundation”, which I find lacking in this case.

[17] Ms. Mulvihill’s suspicions do not equate to clear, convincing and cogent evidence which would tip the balance in her favour. Other than the photos of the exterior of his home under renovation, there is no evidence to support Ms. Mulvihill’s claim that Mr. Yhard leads a lifestyle which is inconsistent with his reported income. And having accepted Mrs. Yhard’s evidence that she is financing the renovations, the photos prove only that renovations were completed.

[18] Further, no evidence was advanced about Mr. Yhard’s employment history, other than as an oilfield manager for two years prior to this hearing. There is no evidence to indicate what other skills, training or education he has that might

qualify him for alternative employment. There is no evidence that there are job opportunities for his skill set. I am therefore unable to glean much about his income earning capacity from the evidence before me.

[19] I cannot conclude from the evidence that Mr. Yhard is intentionally underemployed. Even recognizing that Ms. Mulvihill need not prove bad faith, I do not find that Mr. Yhard is trying to avoid his child support obligations. This case differs from the cases cited by Ms. Mulvihill in her brief. I accept that the significant decrease in Mr. Yhard's income since 2014 constitutes a material change of circumstances sufficient to justify variation of the consent order issued on July 7, 2014. I do not accept that he has other income sources and that income should be imputed to him above what he reported to Revenue Canada. However, I find that his line 150 income in 2015, which includes the RRSPs, should be used for purposes of calculating child support in 2016.

Issue 2: What is the appropriate amount of child support payable after 2015?

[20] Mr. Yhard reported income in 2015 of \$53,277.00. That equates to a Table amount of child support of \$448.49 per month, which shall be effective March 1, 2016 (the first month after his Application was filed).

[21] In making a retroactive adjustment, I am cognizant of the requirements of the Supreme Court of Canada in **DBS**. The factors laid out in that case favour Mr. Yhard. I am satisfied that he would endure hardship supporting a new family if the order is not varied retroactively. He had committed to paying child support during 2015 based on his 2014 income, so he did not apply to vary until February 24, 2016. That is not an undue delay. The change in his income is significant and long-lasting. There is no evidence to contradict his testimony that he was terminated from his employment in Saudi Arabia. I accept that his reduction in income was not one of choice and that he has made reasonable efforts to find gainful employment since 2014.

Issue 3: What is the appropriate amount of prospective child support?

[22] Effective January 1, 2017, Mr. Yhard will pay child support based on his 2016 income of \$38,480.00.

[23] There will be a standard recalculation clause included in the order. There will also be standard disclosure obligations on the part of both parties for purposes of the recalculation clause. The anniversary date for purposes of recalculation is January 1, 2018 and each year thereafter.

Issue 4: What section 7 expenses qualify for payment?

[24] Ms. Mulvihill filed a statement of extraordinary expenses showing that Ayden is enrolled in an after-school program which costs \$150.00 per month. In her testimony, she clarified that this is a part-time charge, as Ayden only attends 3 afternoons per week. He also has some medical expenses which she paid, because there is no medical plan available.

[25] Mr. Yhard suggests that Ms. Mulvihill could reduce her school costs if she accepted his mother's offer to care for Ayden after school five days per week. Ms. Mulvihill responds that she needs a reliable program. She is concerned that if there is a cancellation, she would be left scrambling to find child care.

[26] I accept that Ms. Mulvihill should be free to make whatever childcare arrangements best suit her work requirements and Ayden's needs. Incurring a part-time child care cost for an after school program is not unreasonable for a working mother. No evidence was led with respect to tax deductions for child-care, so I have calculated the net cost to Ms. Mulvihill at \$110.00 / month.

[27] Ms. Mulvihill also claims a proportionate share of medical expenses for two prescriptions, and an eye appointment, totalling \$98.60. The first prescription and

eye appointment are from 2016 and the second prescription is dated 2017. These medical expenses do not exceed \$100.00/year and so I order no contribution.

[28] I am obliged to review the claim for soccer and swim lessons differently than for child care and medical expenses. There is rarely any question that those are necessary and reasonable expenses, whereas extra-curricular activities must be viewed through a different lens.

[29] Ayden is 7 years of age and visits his father's home regularly. There is a pool at the home. It is not unreasonable for Ms. Mulvihill to want Ayden to learn to swim. The child is not enrolled in an extensive number of activities like some children. His only other extra-curricular activity is soccer.

[30] I accept that it is necessary for Ayden to learn to swim, and the cost is not unreasonable. The amount for his YMCA membership is \$34.00 per month. Given the reduction in support payable, this will cut into Ms. Mulvihill's budget. In the circumstances, I find that swim lessons are an expense which cannot reasonably be covered in the amount payable under the table. I find, however, that soccer registration of \$140.00/year is an expense ordinarily covered under the Table amount of support.

Issue 5: What contribution should Mr. Yhard make to s. 7 expenses?

[31] I direct that Mr. Yhard contribute his proportionate share (54.5%) of the child care costs monthly, which amounts to \$59.95/month based on his 2016 income of \$38,480.00. That sum is payable effective January 1, 2017. He will also pay his proportionate share (56%) retroactively to July, 2016, which is when he stopped paying. His proportionate share for July – December, 2016 is \$61.60 per month, or \$369.60 for those months in total.

[32] Effective April 1, 2017 Mr. Yhard will reimburse 54.5% of all medical expenses incurred for Ayden, the total of which exceed \$100.00/year, within seven days of receipt of proof of payment. I make no adjustment for the tax deductibility of these expenses, because no evidence was led in this respect.

[33] I direct that Mr. Yhard contribute proportionately to Ayden's YMCA membership for swim lessons. He will pay \$18.53 per month, effective January 1, 2017. His obligation to contribute is retroactive to July, 2016, so for 2016 he owes \$114.24 total (\$19.04/month). If Ayden terminates his membership, Ms. Mulvihill shall notify Mr. Yhard and his payment will terminate.

CONCLUSION:

[34] The 2014 order is varied as follows: Mr. Yhard will pay prospective monthly child support of: Table amount \$322.48; Child care \$59.95; Swimming lessons \$18.53 = total \$400.96/month. The table amount and s. 7 expenses will be adjusted retroactively for 2016 as set out above.

[35] Any arrears accumulated under the 2014 order shall be adjusted for the sums owing for 2016. If an overpayment has accumulated under the 2014 order after the above adjustments, it shall be repaid by giving Mr. Yhard a credit of \$100.00 per month towards the varied amount of prospective child support until the overpayment is reduced to \$0. Thereafter the full sum shall be paid monthly.

[36] Counsel for Mr. Yhard is directed to prepare and file the order. Given the mixed success and barring any formal offers, I direct that each party bear their own costs.

MacLeod-Archer, J.