

SUPREME COURT OF NOVA SCOTIA
(Family Division)

Citation: Lucas v. Carr, 2017 NSSC 224

Date: 20170818
Docket: SFHMCA 025290
Registry: Halifax

Between:

Dwayne Edward Lucas

Applicant

and

Anitra Marie Carr

Respondent

LIBRARY HEADING

Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Heard: May 16, 2017; Oral Decision July 17, 2017; Written Decision August 18, 2017 at Halifax, Nova Scotia

Issues:

1. Has an undue hardship application been made out on the basis of high medical expenses?
2. Does the CPP child benefit flowing from a payor's disability have the effect of reducing the table amount of child support paid by that payor?
3. Should Mr. Lucas' child support obligation be recalculated to reflect his actual income?
4. Should arrears of child support be reduced?

Summary: Mr. Lucas sought to reduce his ongoing child support obligation based on his claimed undue hardship, by virtue of that obligation. The claim of undue hardship was not perfected and was therefore dismissed.

His claim to have his ongoing child support reduced because the mother was now receiving the CPP dependent child benefit was also dismissed. The Court concluded the CPP benefit is similar to government benefits paid to the primary care giver of the child which do not impact on the level of child support paid by a non-custodial parent. The court distinguished the case of *Senos v Karecz*, 2014 ONCA 459. In the alternative, the court concluded that if it was mistaken in its analysis and had discretion to deviate from the table amount of child support it would not do so in light of Mr. Lucas's non-involvement with the children and his avoiding child related expenses that would be in addition to child support if he was involved. The effect of his non-involvement was to increase the financial burden on Ms. Carr.

The Court did not forgive the payment of arrears payable by Mr. Lucas. The Court ordered a modest regular payment on this amount.

Keywords: Undue hardship; CPP child benefit; child support; medical expenses; arrears of child support; disability income

Legislation: Nova Scotia Maintenance Guidelines

Cases Considered: *Senos v Karecz*, 2014 ONCA 459.

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Counsel: Dwayne Lucas, Self-Represented
Alisha Brown-Fagan, Counsel for Anitra Carr

By the Court:

Introduction

[1] Mr. Lucas applied to have his past and ongoing child support obligation revised down from the table amount of child support that would otherwise be payable.

[2] The existing order dated 2008 imposed a child support obligation for two children in the amount of \$492 per month and ordered a contribution of \$70 per month for child care. The children were born in 2001 and 2005. They are primarily resident with their mother, Ms. Carr. Mr. Lucas does not exercise parenting time with them although the 2008 order provided that he could.

[3] Mr. Lucas lives with his father who has an income estimated by Mr. Lucas as \$50,000. Mr. Lucas estimates that his own income in 2017 will be approximately \$42,000 although the court has concluded for the purposes of ongoing child support his income is \$43,602.60.

Position of Ms. Carr

[4] In her response filed February 2, 2017, Ms. Carr seeks the table amount of child support; the termination of special expenses on July 1, 2016 and she asks for an assessment of arrears of child support, including special expenses. She says there has been a change of circumstances.

[5] Ms. Carr provided the Court with a record of the maintenance enforcement office to January 16, 2016 which shows arrears of \$7,428.28. That record says the regular due amount was \$68,238; the received amount was \$62,889.72 over the period April 11, 2016 to January 16, 2017.

[6] Ms. Brown-Fagan on behalf of Ms. Carr asks the Court to assess Mr. Lucas' arrears of child support between May 1, 2014 and June 30, 2017 as \$13,571.28.

[7] Ms. Brown-Fagan's calculations are outlined below:

Table amount of child support only – no child care cost

May 1, 2014 – December 31, 2014 – Income \$75,615 (\$1,043/month) = \$8,344
less amount paid (\$958.34) = \$7,385.46

January 1, 2015 – December 31, 2015 – Income \$42,986 (\$609/month) = \$7,308
less amount paid (\$4,898.19) = \$2,409.81

January 1, 2016 – December 31, 2016 – Income \$43,602.60 (\$617/month) =
\$7,407 less amount paid (\$4,885.05) = \$2,521.95

January 1, 2017 – June 30, 2017 – Income \$43,602.60 (\$617/month) = \$3,702
less amount paid (\$2,444.94) = \$1,257.06

[8] In her accompanying affidavit, Ms. Carr states Mr. Lucas earns much more than her; the 2008 order was based on a projected income in 2008 in the amount of \$33,100 and from his 2016 application documents she learned Mr. Lucas's current income. She acknowledges having received \$27,308.20 as a retroactive payment from the CPP plan for the support of the children, a children's benefit that flows directly from Mr. Lucas having qualified for CPP disability benefits.

[9] The CPP child benefit continues at \$475.38 each month. Ms. Carr receives this amount.

[10] Ms. Carr asks (1) Mr. Lucas to pay the table amount of child support and \$83 each month on the arrears; (2) authority to travel with the children; (3) authority to renew the children's passports as necessary; and (4) freedom to relocate with the children, for employment purposes, if necessary.

Position of Mr. Lucas

[11] Mr. Lucas filed a Notice of Variation Application and as stated he seeks to vary child support; the special expense obligation related to the children and he served notice that he is claiming undue hardship. He asks that his obligation to pay child support be lessened because of that hardship. He also asks that his ongoing child support obligation be reduced because Ms. Carr receives the CPP child benefit flowing from Mr. Lucas having qualified for the CPP disability benefit.

[12] In his accompanying affidavit he detailed his health challenges since his discharge from the Canadian military in 2014. They are substantial.

[13] Mr. Lucas receives disability income from Manulife and CPP disability income in the amount of \$2,818.59 and \$814.98 respectively. He placed his income for child support purposes at \$43,602.60. He says he needs to pay less

child support because of his health-related expenses. He details other living expenses he faces, many of which are typical of any adult.

[14] He explained that he seeks to test the children's blood because he wants to know if his children have inherited his medical condition.

[15] Mr. Lucas did file a Statement of Undue Hardship on August 19, 2016. At paragraph 5 he details the basis of his claim and the financial pressures he faces. He asks that he be relieved of his obligation to pay arrears of child support he sets at \$6,651.23 and that he be relieved of his ongoing child support obligation.

[16] He details many expenses and lists twenty-seven (27) medications he purchases. For twenty-four (24) of those medications he gives a cost over a three month period. The total cost for three months is given as \$3,864.25. The remaining four medications are estimated by him to cost as follows: one costs \$21.53/week; another costs \$21.03/5 day. For the flexinol and muscle relaxer he did not offer a cost.

[17] He says his minimum cost of medication each month is \$1,384.53 and his after reimbursement cost is \$358.33 per month.

[18] Mr. Lucas did not perfect the undue hardship application and the Court does not have that issue before it.

[19] Although Mr. Lucas says he has high uninsured medical expenses, he has not quantified these costs to the satisfaction of the Court.

[20] The 2008 order required each party to provide to the other, their income tax return and notice of assessment on an annual basis.

Issues

[21] The issues are:

1. Should the past child support obligation, after May 1, 2014 be found to be higher, i.e. recalculated upward?

2. Should any arrears found to exist after May 1, 2014 be cancelled or reduced?
3. Should a plan providing for the payment of arrears of child support be put in place? If so, what should it be?
4. Has Mr. Lucas made his case that his past and ongoing child support obligations place him in a situation of undue hardship? If so, what impact does that have on his past and ongoing child support obligation?
5. Should Mr. Lucas' child support obligation be reduced because of the lump sum and monthly CPP benefit paid for the benefit of his children to Ms. Carr?
6. Should Ms. Carr be given authority to renew the children's passports and travel without Mr. Lucas' permission?
7. Should Ms. Carr be permitted to relocate with the children and for her employment without Mr. Lucas' permission?

Undue Hardship

[22] The undue hardship application of Mr. Lucas was not perfected. He did not provide evidence revealing his total household income. In any case, assuming his estimate of his father's income is correct, he lives in a household having a higher standard of living than Ms. Carr's household. In addition, the debts he claims as producing a hardship upon him do not flow from his relationship with Ms. Carr.

Passports, Travel, Relocation, Blood Test

[23] Given Mr. Lucas is not currently involved in the lives of the children, Ms. Carr may renew the children's passports without the need to obtain Mr. Lucas' signature or permission. She may also travel outside the Province and Canada with the children without the need to obtain Mr. Lucas' consent.

[24] She is not given permission to relocate the children outside of Nova Scotia without first giving Mr. Lucas ninety (90) days' notice of her intention to do so and she shall require the permission of the Court to relocate outside of Nova Scotia should Mr. Lucas not confirm his agreement in writing with her doing so.

[25] The Court will hear from Ms. Carr if she does not want to cooperate in having the children tested to determine whether they have inherited the condition which gave rise to Mr. Lucas' health condition. If she agrees to do so, her counsel is directed to add an appropriate clause to the order flowing from this proceeding. She may relocate within Nova Scotia with the children.

Does CPP benefit affect Mr. Lucas' child support obligation

[26] In my view, the CPP benefit paid for the dependents of Mr. Lucas should not have the effect of reducing his obligation to pay child support as required by s.3 of the Child Support Guidelines and as quantified by the child support tables. This conclusion is consistent with other jurisprudence answering an analogous question when the effect of receipt of the child tax benefit and GST tax credit by a child or primary care provider are considered when a determination of the quantum of child support must be determined.

[27] I have considered the Ontario Court of Appeal decision in *Senos v Karcz 2014 ONCA 459*. In that case, the Court held that disability payments received by an adult child are relevant to a determination of the amount of child support paid for a child. The usual guideline approach was found to be inappropriate. However, the Court also rejected a dollar for dollar reduction of the payor's child support obligation. Herein, we are addressing the circumstances of minor children and in my view this is a distinguishing feature of the case before me. In addition, the CPP dependent's benefit flows to the primary care parent as a benefit of the father's disability benefit plan. It is, in essence, similar to a benefit of an insurance plan. It does not reflect the balancing of the state's obligation to support an adult child with that of the biological parents as was the case in *Senos v Karcz*. The Court in that case was influenced by the fact of a state obligation to support an adult disabled person.

[28] Mr. Lucas is ordered to pay child support for two children based on his income since January 1, 2014 and an application of the Nova Scotia Child Support Tables. The calculations shown in paragraph 7 are correct and represent Mr.

Carr's child support obligation since January 1, 2014. No claim for special expenses after January 1, 2014 has been made out.

[29] If the court is mistaken in its analysis and has discretion to deviate from the table amount of child support it would nevertheless exercise its discretion to not do so. A significant consideration for the court is that Ms. Carr does not benefit from the ancillary financial relief which occurs when two parents share the parenting burden. A typical noncustodial parent paying the table amount of child support, and who is participating in the life of his/her child assumes some cost of caring for the child, which costs are above and beyond child support. In the case of costs such as groceries and some entertainment for the children the fact a noncustodial parent bears some of these costs, when involved, is a benefit to the primary care parent. As observed, Mr. Lucas is not involved in the care of his children other than to pay child support.

Arrears/Retroactive Calculation of Child Support

[30] I am guided by the principles outlined by our Court of Appeal when a trial court is asked to retroactively reduce a child support obligation and or cancel arrears. (*Smith v. Selig*, 2008 NSCA 54 and *Smith v. Helppi*, 2011 NSCA 65). I have applied those principles. Justice Oland in *Smith v. Helppi* at paragraph 20 stated the following:

[20] I observe that there is a distinction between a retroactive award of child support and a retroactive reduction of child support. The former awards payments and thereby increases child support. See, for example, *D.B.S v. S.R.G*, 2006 SCC 37 (CanLII) which set out factors governing retroactive awards of child support. In contrast, a retroactive reduction of child support reduces support, whether it takes the form of forgiveness of arrears or a retroactive decrease in support payable and recalculation of arrears. See, for example, *Brown v. Brown*, 2010 NBCA 5 (CanLII) which distinguished *D.B.S.* on this basis, and *Kuszelewski v. Michaud*, 2009 NSCA 118 (CanLII). Other than *Gould*, the cases supplied by Mr. Smith to support his argument pertained to retroactive awards rather than retroactive reductions.

[31] I find Mr. Lucas' child support obligation should be recalculated to reflect his actual income. I have done so.

[32] In all of the circumstances this is not an appropriate case to remit arrears of child support including arrears of special expenses that have accrued. However, a pragmatic response to meeting that obligation is, in my view, appropriate. A modest regular payment on the arrears is appropriate. The court is influenced, in determining the amount, by Mr. Lucas's poor financial management generally which is, in part, attributable to his illness. The court is also influenced by the fact Ms. Carr receives a CPP dependent's benefit for the child which is attributable to Mr. Lucas's CPP eligibility; and the fact Ms. Carr has received a substantial CPP lump sum retroactive child benefit payment.

[33] Mr. Lucas is ordered to pay \$40 each month on the arrears of child support beginning July 1, 2017 which arrears to that point are calculated to have been \$13,571.28. In addition, Mr. Lucas shall pay the table amount of child support to reflect his annual income of \$ 43,602.60 and which gives rise to an additional monthly payment of child support in the amount of \$617 also payable on the first of every month commencing July 1, 2017.

ACJ