SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Churney v. Royal*, 2018 NSSC 133

Date: 2018-05-10
Docket: *Sydney* No. 40761
Registry: Sydney

Between:

Alison Elizabeth Churney

Applicant

v.

Daniel Shannon Royal

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	February 14, 2018, in Sydney, Nova Scotia
Oral Decision	May 10, 2018, in Sydney, Nova Scotia
Written Release:	June 5, 2018
Counsel:	Ms. Candee McCarthy for the Applicant Mr. Damien Barry for the Respondent

By the Court:

Introduction

[1] My oral decision concerns child support for a 13 year old girl. The child's father, Dannie Royal, applied to retroactively reduce his periodic child support payments and to have the court forgive outstanding arrears of about $18,500.

[2] Not unexpectedly, the child's mother, Alison Churney disagrees. Ms. Churney states that Mr. Royal did not prove a material change in circumstances and further, that he is hiding and diverting income to avoid paying support. She seeks to retroactively increase child support and to enforce arrears.

Issues

[3] The following issues will be canvassed in my decision:

- Has Mr. Royal proved a material change in circumstances?
- What is the income of Mr. Royal?
- What is the appropriate retroactive child support order?
- What is the appropriate prospective child support order?

Background Context

[4] The parties were involved in an on and off relationship for several years. Their daughter was born in 2004 and has lived with her mother since birth.

[5] Over the years, to resolve parenting and support issues, several court applications were adjudicated. The last child support order is dated November 16, 2012 and was issued in Newfoundland through the ISO process. The order set child support at $762.87 per month commencing October 16, 2012 and was based on Mr. Royal earning $87,233.80 annually. The order also states that child support is to be recalculated each year based on Mr. Royal's prior year's income. Mr. Royal, however, did not voluntarily disclose his income. Thus, recalculation did not occur.

[6] After the Newfoundland order issued, Mr. Royal moved to Alberta. He did not pay child support in a consistent fashion. Arrears accumulated and enforcement action was initiated by the Alberta enforcement agency. Soon thereafter, Mr. Royal filed a variation application using the ISO process.

[7] In his May 3, 2017 variation application, Mr. Royal asked for the following relief:

- That ongoing child support be reduced to $0 per month; and
- That all maintenance arrears be forgiven and set at $0.

[8] In support of his application, Mr. Royal's brief affidavit stated the following:

> … My income has changed, or I expect that it will change before the end of the year (give reasons): I am currently looking for work but the downturn in Alberta has created a great deal of job shortages. I do have a casual position that can't pay very much and guarantee hours.

[9] Mr. Royal's ISO application was processed and forwarded to Nova Scotia. A hearing was held on February 14 and May 10, 2018. The only person to testify was Ms. Churney. She was cross-examined on her affidavit, portions of which were struck before the hearing commenced.

[10] Mr. Royal asked to participate in the hearing in keeping with **Waterman v Waterman**, 2014 NSCA 110. Although represented by counsel, Mr. Royal chose not to attend the hearing; he also chose not to participate via video conferencing. Instead, Mr. Royal chose to have his lawyer cross-examine Ms. Churney and to present submissions on his behalf. Mr. Royal's choices enabled him to avoid cross-examination.

[11] Both parties concluded the hearing with oral submissions which supplemented their written briefs. During submissions, counsel for Mr. Royal confirmed that Mr. Royal was asking the court to cancel all arrears, and to base ongoing support on a projected annual income of $30,000. Ms. Churney's position remained unchanged.

[12] The decision was adjourned to today.

Analysis of Issues

[13] I will now turn to the analysis portion of my decision by examining each issue individually. In so doing, I confirm that I considered the evidence of the parties as outlined in the exhibits and the viva voce evidence of Ms. Churney. I also considered the submissions of counsel. I assigned the burden of proof to Mr. Royal because it is his application to vary; it is the civil burden based on the balance of probabilities.

Has Mr. Royal proved a material change in circumstances?

Position of the Parties

[14] Mr. Royal states that his evidence proves a material change in the circumstances based on the following facts:

- The Alberta economy is stagnant.
- There are job shortages in Alberta.
- His income has significantly reduced.
- Although searching for work, all that Mr. Royal could find was employment as a labourer earning $30,000 per year.

[15] In contrast, Ms. Churney states that Mr. Royal did not prove a material change in the circumstances for reasons which include the following:

- Mr. Royal's scant and incomplete evidence is insufficient to dislodge the burden upon him.
- Adverse inferences must attach to Mr. Royal's evidence given his failure to disclose, his cavalier attitude, and his blameworthy conduct.
- Mr. Royal has an income earning ability that exceeds $140,000.

Law on Material Change in Circumstances

[16] An application to vary is not an appeal of an original order. Rather, an existing order must be treated as correct at the time the order was made. The

existing order can only be varied if a party proves that a material change in the circumstances exist.

[17] A material change is one where, had the facts existed at the time the original order was made, the judge likely would have made a different order. A material change includes circumstances where something unexpected happens or where something that was expected to happen does not. A material change must be more than a minor or temporary change. The change must be a substantial, continuing change which impacts the foundation upon which the existing order was made. The change cannot be self-induced.

Decision

[18] I find that Mr. Royal did not prove a material change in the circumstances for any year other than 2014 when his income increased to $141,791. I make this finding for reasons as follows:

- In setting Mr. Royal's income, I must look to his income earning capacity; I am not restricted to the earnings which Mr. Royal reports to Canada Revenue Agency: **Dalton v. Clements**, 2016 NSSC 38 para 22.

- Mr. Royal did not provide proof, on a balance of probabilities, that his income earning capacity was and is less than $87,233.80.

- I have neither details nor particulars of job search efforts. A blanket self-serving statement that one is looking for work because of a downturn in the economy is insufficient.

- I have no evidence about the feasibility of Mr. Royal seeking employment outside of Alberta given his historical employment patterns of working in other provinces such as Nova Scotia and Newfoundland.

- I have no details or particulars confirming why Mr. Royal is no longer employed. No ROE was produced and no independent detailed evidence led.

- Mr. Royal did not supply evidence to fill in the significant evidentiary gaps. This despite Mr. Royal being made aware of Ms. Churney's

position for several months before the hearing was held. I draw a negative inference because of Mr. Royal's failure to lead such evidence.

- Mr. Royal chose not to participate personally or by video conferencing. He thus avoided cross examination. I draw a negative inference in such circumstances.

- Mr. Royal did not produce all the financial information that was required of him. It is likewise appropriate to draw an adverse inference in such circumstances.

- I accept Ms. Churney's evidence that Mr. Royal threatened to quit his job if Ms. Churney pursued child support payments. This threat is in keeping with Mr. Royal's failure to pay child support consistently even when his reported income disclosed an ability to pay.

- Mr. Royal acted in a blameworthy fashion when attempting to evade his child support obligation. He failed to consistently pay child support. He failed to notify Ms. Churney of his substantial 2014 income increase. Mr. Royal placed his own needs in priority to the needs of his daughter.

[19] In summary, Mr. Royal failed to prove a material change in the circumstances such that his income earning capacity is less than $87,233.80. In contrast, I find that a material change in circumstances has been proven for 2014 when Mr. Royal earned $141,791.

What is the income of Mr. Royal?

[20] Given my conclusions on the previous issue, I find the income of Mr. Royal for child support purposes continues to be $87,233.80 with the exception of 2014 when Mr. Royal earned $141,791.

What is the appropriate retroactive child support order?

[21] Given my income finding, I will not grant Mr. Royal's application to retroactively eliminate child support arrears. To the contrary, I confirm that all arrears should be paid as there is no change in circumstances except for 2014.

[22] In addition, I allow the recalculation of maintenance for 2014 based on Mr. Royal's actual income which exceeded his income earning capacity. The current order calls for maintenance to be recalculated. Mr. Royal's daughter should benefit from her father's increased income.

[23] Further, the **DBS** factors also support such a conclusion for four reasons. First, Ms. Churney sought an increase once she learned of Mr. Royal's 2014 income; there was no delay. Second, Mr. Royal acted in a blameworthy fashion in failing to disclose his 2014 income in a timely fashion and in underpaying child support despite his sizeable pay increase. Third, Ms. Churney will use the retroactive support for the child. Ms. Churney has acted in an exemplary fashion in respect of her daughter. Fourth, any hardship which may be experienced by Mr. Royal was self-induced.

[24] Retroactive support is based on the **Child Support Guidelines** table amount of $1,232 less the ordered amount of $762.87 which equals $469.13 times 12 months for a total retroactive payment of $5,630, which is to be paid in monthly installments of $100 until paid in full.

What is the appropriate prospective child support order?

[25] The prospective child support payment will continue at the rate established in the last court order given Mr. Royal's failure to prove a material change in the circumstances.

Conclusion

[26] The variation application of Mr. Royal is denied. The application to retroactively recalculate child support for 2014 is granted such that a further retroactive award of $5,630 shall be added to the accumulated arrears, payable at a rate of $100 per month until paid in full.

Forgeron, J.