

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: MacKenzie v. Paul, 2010 NSSC 47

Date: 20100204

Docket: 1202-001544

Registry: Amherst

Between:

Roderick Daniel MacKenzie

Applicant

v.

Kathryn Lee Paul

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Douglas L. MacLellan

Heard: January 21st, 2010, in Amherst, Nova Scotia

Subject: Family law, application to vary child support order.

Summary: Child support of \$511.00 per month set in 2006 based on applicant's income of \$60,000.00 per year while working in the Yukon Territory.

Following making of that order applicant was injured and went on Workman's Compensation benefits. His income varied and was below \$60,000.00 for the years 2006 to 2008.

In 2008 he moved to Nova Scotia and started working at a job which would generate \$45,700.00 per year, but in 2009 he quit that job and started a new job which would generate \$31,000.00 per year. He asked the Court to retroactively vary his obligations between 2006 and 2008 and to set his current order based on his current income.

Issue: 1. Should Court retroactively vary his obligations during the years while his income was reduced?

2. Should Court impute income because the appellant was underemployed?

Result:

No change in order up to the end of 2008. For 2009 imputed income of \$45,700.00 to be used to determine arrears and the amount of the ongoing order.

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D E C I S I O N

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Counsel: Catherine Hirbour, for the applicant
Jerome Langille, for the respondent

By the Court:

[1] This is an application by Roderick Daniel MacKenzie dated October 21st, 2009, to vary his divorce order dated July 6th, 2008, requiring him to pay child support for his child, Justin Thomas MacKenzie, born December 20th, 1990.

[2] The Corollary Relief Judgment indicated that Mr. MacKenzie's income at that time was \$60,000.00 and required him to pay child support of \$511.00 per month commencing June 1st, 2005. It also required him to pay a monthly amount of \$100.00 on outstanding arrears of support in the amount of \$2,799.00.

[3] At the time of the divorce order Mr. MacKenzie was a resident of the Yukon Territory and the Guidelines Table for that territory were used to calculate his child support payments.

[4] The Court has before it a payment schedule from Maintenance Enforcement indicating that as of January 1st, 2010, Mr. MacKenzie is in arrears in the amount of \$10,177.00.

[5] In his application Mr. MacKenzie alleges that since the making of the order in 2006 his income had gone down and he asks the Court to recalculate the amount of support he should now be paying and to retroactively alter his outstanding arrears based on the incomes he had in the years between 2006 and the present.

[6] Counsel for the respondent takes the position that there should be no change in the amount of the current order because Mr. MacKenzie has decided to accept employment with less income and therefore he is underemployed.

THE EVIDENCE

[7] The Court has heard evidence from Mr. MacKenzie. He testified that in September 2005 he had an accident at his work and that he was off work from September 2005 to October 2008.

[8] He was working in the Yukon at that time and had to travel to Vancouver, British Columbia, for treatment. He was in the Vancouver General Hospital from December 14th, '07, to December 19th, '07. He also was treated by a chiropractor,

Dr. Adam Humphrey, from January 3rd, '07, to May 2008 at a frequency of three to five times per week.

[9] Mr. MacKenzie received Workman's Compensation Benefits as a result of his injury.

[10] In the tax year 2006 Mr. MacKenzie had a total line 150 income of \$58,367.77, made up of employment income of \$44,532.00 and Workman's Compensation Benefits of \$13,835.00.

[11] In 2007 his reported income on line 150 of his return was \$53,287.00 with \$32,400.00 of that made up of Workman's Compensation Benefits.

[12] His 2008 income was \$53,469.00 on line 150 of which \$43,425.00 was Workman's Compensation Benefits.

[13] In May 2008 Mr. MacKenzie moved to Pictou, Nova Scotia. It appears his Workman's Compensation Benefits were cut off in 2008 and he started work for

Scotsburn Mechanical Contractors Limited. His first day of work was November 10th, 2008.

[14] During the year 2009 Mr. MacKenzie worked for Scotsburn Mechanical Contractors until September 10th. He testified he left that job because his employer would not give him equipment to do his work. He was being paid \$22.00 per hour while he worked there.

[15] After leaving that job Mr. MacKenzie started work with Thorne's Burner Service Limited in Trenton, Pictou County. He started there on October 19th, 2009, and his rate of pay is \$15.00 per hour. From October 19th to December 31st, '09, he has earned a total of \$7,363.00.

[16] I am not able to determine from Mr. MacKenzie's record of employment from Scotsburn Mechanical Contractors how much of his total income from that firm was earned in 2008. His total income for the period November 10th, 2008, to September 10th, 2009, was \$18,010.00, which combined with his income from Thorne's Burner Service made his income for 2009 at or about \$25,000.00.

[17] I note that his job at Thorne's Burner Service is due to conclude in the first week of April. I have no information about what he intends to do after that job is finished.

ARGUMENT

[18] Counsel for Mr. MacKenzie asks that the Court retroactively vary his child support obligations for the years 2006 to 2009 to reflect his actual declared income for these years and to give him credit if he has in fact overpaid during that period of time.

[19] Counsel also asks that the Court reduce his current obligations to reflect his projected income for 2010 based on his current job.

[20] Counsel for the respondent objects to any retroactive adjustment in the child support order and argues that Mr. MacKenzie should be ordered to pay based on the income he had while he was in the Yukon, not what he has been making in Nova Scotia.

THE LAW

[21] Counsel advances the case of *MacGillivray v. Ross* (2008), 271 N.S.R. (2d) 37 where Forgeron, J. of the Nova Scotia Supreme Court, Family Division, reviewed the issue of imputed income in circumstances where the payor had some health issues.

[22] I have also reviewed the case of *Coadic v. Coadic*, [2005] N.S.J. No. 415, another decision of Forgeron, J. which dealt with imputing income and retroactive variance of a support order.

CONCLUSIONS

[23] In this case I find that Mr. MacKenzie had a reduction in his income initially, mainly as a result of going on Workman's Compensation benefits. His income in relevant years was as follows:

Year	Income
2006	\$58,367.00
2007	\$53,287.00

Year	Income
2008	\$53,469.00
2009	\$25,000.00

[24] During all of these years he was obligated under the divorce order to pay based on income of \$60,000.00 as set out in the divorce order of July 2006.

[25] Mr. MacKenzie did pay the required amount of \$511.00 per month up until May of 2008. That was when he moved to Nova Scotia. He did pay off all the outstanding arrears of \$2,799.00 as set in 2006.

[26] Based on his income for the years 2006 to 2008 I am not prepared to alter the amount of child support he should have paid during these years. His income in the years 2006 to 2008 would have resulted in just about what he in fact paid during these years based on the Yukon Tables in place during that time.

[27] In 2009 he started working with Scotsburn Mechanical Contractors Limited at an hourly wage of \$22.00 per hour which should generate a weekly income based on a 40 hour week of \$880.00 or \$45,760.00 per year.

[28] He worked with that company until September 10, 2009, and started with Thorne's Burner Service on October 19th, 2009, at an hourly rate of \$15.00 per hour or \$600.00 per week and which results in an annual income of \$31,200.00.

[29] I conclude that Mr. MacKenzie's decision to move to Nova Scotia in 2008 was reasonable. He was receiving Workman's Compensation benefits and working part time. He was having problems getting some medical treatment and had to travel to Vancouver for that. In 2006 he was making \$60,000.00 while working. When he moved to Nova Scotia his hourly rate would generate \$45,760.00, but with lower living expenses.

[30] While he worked for Scotsburn Mechanical he was making a reasonable wage compared to what he had been making in the Yukon. However, when he left that job and accepted a position that paid only \$15.00 an hour I must conclude that he is underemployed. I have no evidence of the average wage for a person of Mr. MacKenzie's skills.

[31] I find that making decisions that result in a reduction of income from \$60,000.00 to \$31,000.00 is not acceptable and I therefore must impute income of at least \$45,700.00.

[32] For the year 2009 he will be obligated to pay monthly support of \$398.00 per month based on imputed income of \$45,700.00 and this amount will continue in 2010. Outstanding arrears will be based on this annual income for 2009. This obligation will continue until otherwise varied by this Court.

[33] I would ask counsel for Mr. MacKenzie to prepare the order reflecting this decision.

J.