Date: 20160210
Docket: 14/79
Citation: *Goulding v. Goulding*, 2016 NLCA 6

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

TROY GOULDING APPELLANT

AND:

JOANNE GOULDING RESPONDENT

Coram: Rowe, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 200705T0131

Appeal Heard: November 13, 2015
Judgment Rendered: February 10, 2016

Reasons for Judgment by Hoegg J.A.
Concurred in by Harrington J.A.
Separate Reasons, Dissenting In Part by Rowe J.A.

Counsel for the Appellant: Self Represented (By Video Conference)
Counsel for the Respondent: Self Represented

Corrected decision: The citation of the original judgment was corrected on February 18, 2016. A description of the correction is appended.

Hoegg J.A.:

INTRODUCTION

[1] Troy and Joanne Goulding married in April 1997 and had one child, Cameron, now aged 17. Mrs. Goulding's son from a previous relationship lived with the family until he died unexpectedly when Cameron was 2 years old. Shortly after the boy's death the couple separated. Cameron lived with her mother until November 2013, when she left her mother's home in Gambo and moved to Grand Falls to live with her father. She has not seen her mother since that time. Immediately after Cameron moved to Grand Falls, Mr. Goulding applied for child support. The matter was referred to Family Justice Services for mediation, but no agreement was reached.

[2] Mr. Goulding's application was heard on September 11, 2014. The Applications Judge (the Judge) ordered Mrs. Goulding to pay child support for Cameron in accordance with the *Federal Child Support Guidelines* on a go-forward basis commencing October 1, 2014 and retroactive support for July, August and September of 2014. The Judge also ordered that Cameron have access to her mother every second weekend and for times during the summer and at Christmas and Easter.

[3] Mr. Goulding appeals the Judge's decisions respecting retroactivity and access. He argues that the Judge ought to have ordered child support retroactive to November 2013 when Cameron moved in with him and when he made his application. Regarding access, Mr. Goulding argues that the Judge ought not to have ordered that Cameron have access to her mother because Cameron does not want to exercise access to her mother, and at her age, she should not be told what to do.

Retroactive Child Support

[4] On Mrs. Goulding's obligation to pay retroactive child support, the Judge said:

> [10] Based on other reasons, which I will outline in a few minutes, I am exercising my discretion and setting the date for retroactive support to July, the first appearance before a judge on this matter in court. It could and should have been resolved on that date. The court would have set August 1st for the first payment.

> [11] The Applicant will pay arrears for July, August and September in the amount of $578.00 x 3 or $1,734.00. The arrears will be repaid at $150.00 a month, $75.00 paid on the 1st and 15th of each month until the arrears are paid in full. The first monthly payments are to be made on October 1st and October 15th, 2014.

[5] The Judge finished his judgment without stating his reasons for exercising his discretion to order retroactive support only back to July 1, 2014.

[6] In *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, (*D.B.S.*) Bastarache J. explained the nature of "retroactive" child support awards:

> 2 The awards contemplated in the present appeals are often termed "retroactive awards" because they involve enforcing past obligations, not ensuring prospective support. Though misleading in the technical sense, I will adopt this terminology in these reasons because it helps identify the tension that underlies such awards. Still, I must observe that these "retroactive" awards are not truly retroactive. They do not hold parents to a legal standard that did not exist at the relevant time: see *MacMinn v. MacMinn* (1995), 174 A.R. 261 (C.A.). But they are "retroactive" in the sense that they are not being made on a go-forward basis: the parents who owe support (the "payor parents") are being ordered to pay what, in hindsight, should have been paid before: see *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254, 1999 BCCA 393, at paras. 55-57. Unlike prospective child support awards, then, retroactive awards implicate the delicate balance between certainty and flexibility in this area of the law.

and the approach a judge must take in considering whether to award it:

> 5 … A modern approach compels consideration of all relevant factors in order to determine whether a retroactive award is appropriate in the circumstances. Thus, while the propriety of a retroactive award should not be presumed, it will not only be found in rare cases either. Unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, while blameworthy conduct by the payor parent will have the opposite effect …

Justice Bastarache addressed the reach of retroactive child support in the same paragraph, saying:

> … that an award should generally be retroactive to the date when the recipient parent gave the payor parent effective notice of his/her intention to seek an increase in support payments …

[7] At paragraph 133 Justice Bastarache summarized the factors a judge should consider when exercising his or her discretion to award:

> In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

[8] In regard to the hardship factor, Justice Bastarache explained that the hardship occasioned to a payor by an order to pay retroactive child support involves a broader consideration than that involved in a consideration of "undue hardship" under section 10 of the *Federal Child Support Guidelines*:

> 114 While the *Guidelines* already detail the role of undue hardship in determining the quantum of a child support award, a broad consideration of hardship is also appropriate in determining whether a retroactive award is justified.
>
> 115 There are various reasons why retroactive awards could lead to hardship in circumstances where a prospective award would not. For instance, the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can currently afford. As well, payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor parent: it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.

[9] The appropriateness of a retroactive child support award was considered by this Court in *B.W. v. J.G.*, 2014 NLCA 5, 346 Nfld. & P.E.I.R. 234 (*B.W.*), wherein Welsh J.A. applied the relevant law and determined that payment of retroactive child support was not warranted in that case due to the parent's inability to pay it.

[10] The awarding of retroactive child support is discretionary, as Bastarache J., Welsh J.A., and the Judge in this case noted. However, a judge's discretion must be exercised judicially, that is on the basis of proper legal principle, and for discernable reasons (*Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (Nfld. C.A.) (para. 33) and *Moray Seafoods Ltd. v.*

Nasco Canada Ltd., 2006 NLCA 29, 256 Nfld. & P.E.I.R. 219 (paras. 13 to 21)). In this case, the Judge's decision suggests that he had reasons for exercising his discretion to award retroactive child support only to July 1, 2014, but he failed to state what those reasons were. There being no way for this Court to assess whether the Judge exercised his discretion judicially, his decision must be set aside.

[11] The issue now becomes whether this Court should substitute its view of the retroactivity issue or whether the matter ought to be remitted to the trial court for reconsideration. It is my view that the matter ought to be remitted to the trial court for reconsideration.

[12] Mrs. Goulding advised the Court that she has been paying child support in accordance with the Judge's order, and also that she has paid the three months' retroactive support she was ordered by the Judge to pay by putting it on her line of credit. She pressed upon this Court that, given her substantial debt load and other obligations, she is unable to afford to pay the additional sum of $4,429.50 which would be payable if she were ordered to pay child support from July 1, 2014 back to the date of Mr. Goulding's application.

[13] Both Mr. & Mrs. Goulding earn incomes in the area of $65,000 per year. Mrs. Goulding points out, however, that equal is not always fair, and given her onerous financial circumstances, it would not be fair to order her to pay further retroactive support. While this may be a valid point, an equally valid point is that despite Mrs. Goulding's other financial obligations, including some related to other family members, she has a primary obligation to support her child. It is within this context that a decision as to whether Mrs. Goulding must pay retroactive child support for the period between July 1, 2014 and November 2013, based on the *D.B.S.* factors, must be made.

[14] The information before this Court in this case comprises documentation showing Mrs. Goulding's income for 2013 and copies of her Visa bills and banking transactions for periods in 2013 and 2014. The financial information concerning her other financial obligations and her debt load is scant at best. And there is no financial information concerning Mr. Goulding, which is generally regarded as irrelevant to paying child support on a go-forward basis but which could be relevant to the child's standard of living, the third factor identified by Justice Bastarache in *D.B.S.* (See also *B.W.* at paras. 26, 49 and 50.) To my mind, Mrs. Goulding's current

circumstances and financial commitments, which could justify a judge exercising his or her discretion not to award retroactive child support to the date of Mr. Goulding's application, are not so documented and explained to enable me to properly consider the factors set out in *D.B.S.* and decide whether the Judge erred in ordering retroactive support only back to July 1, 2013. In this regard I note that in *B.W.*, significantly detailed financial information respecting both parents allowed this Court to determine the appropriateness of an order for retroactive payment. In the result, I believe it is more appropriate in this case that a trial court rehear the matter so that it can consider all relevant factors so as to have a "holistic view of the matter and decide [the] case on the basis of its particular factual matrix", as Justice Bastarache put it in *D.B.S.*

Access

[15] Mr. Goulding submits that the Judge's order respecting the mother's access to Cameron should be vacated on the basis that Cameron does not wish to see her mother. Mrs. Goulding submits that she is respecting Cameron's wishes and not exercising access to Cameron, but that the order should remain so that Cameron will know that her mother loves her and wants to have a relationship with her.

[16] The Judge explained why he ordered access:

> [14] The child, Cameron lives with her father in Grand Falls and attends school there. She has been diagnosed with Asperger's disability, but is at a high function level. This contributes to her ability to relate to her mother. The Applicant stated, in her evidence, that she understood this has impaired their ability to develop a full mother and daughter relationship, as Cameron has problems with her emotions. Not being a counsellor, I only put this in to show that the mother does want a relationship with Cameron. However, since Cameron left, this has not taken place.
>
> [15] The Respondent claims he has no issue with access, but would like it on Cameron's wishes. The applicant, however, wishes to have a formal order, realizing it is going to be difficult to enforce if Cameron refuses. Based on what I have heard, I believe a relationship should be encouraged by the Respondent. I am therefore willing to enter a formal access order as follows: Cameron is to see her mother every second weekend and alternate statutory holidays, commencing with the Thanksgiving weekend in October.

[17] It is not uncommon for children, particularly teenagers, to refuse to see a parent in accordance with an access order. While parents are advised, as the Judge advised Mr. Goulding in this case, to encourage children to see their non-custodial parents pursuant to an access order, it is understandably difficult to force a child, particularly a teenager, to do so when the child is not willing.

[18] However, just because a child at a certain point in time chooses not to see a non-custodial parent does not mean that a judge should decline to order access. An access order is predicated on the child's best interests, which are generally thought to be that a child know and spend time with both parents unless good reason dictates otherwise. Although Cameron is 17 years old, she is still a child of the marriage and supported by both of her parents. I also note that the Judge did not interview or otherwise hear from Cameron; it is her father who is seeking to have the access order vacated.

[19] In my view, the Judge's access order, based on what he heard, shows that he appreciated that an access order would be in Cameron's best interests. I would also point out that Cameron could change her mind about seeing her mother at any time. In any event, enforceability is, to my mind, a separate issue, and enforceability of an access order in the context of teenage children exercising access to a non-custodial parent is an entirely different matter than the enforceability of a court order in many other legal contexts. In short, because enforceability may be problematic does not mean that the order should not be made.

[20] In the result, it is my view that Mr. Goulding has not shown that the Judge erred in ordering that Cameron have access to her mother. I would not interfere with his order.

SUMMARY AND DISPOSITION

[21] The Judge erred in failing to give reasons for his decision respecting retroactive child support. Accordingly, I would set aside his order, and remit the matter of retroactive child support for the period from November 2013 to the end of June 2014 to the trial division for reasoned consideration.

[22] It has not been shown that the Judge erred in making the access order. Accordingly, I would not interfere with it.

[23] Both Mr. and Mrs. Goulding are self-represented. In these circumstances, and given the outcome of the appeal, I would make no order for costs.

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L. R. Hoegg J.A.

I Concur: ____________________________________

M. F. Harrington J.A.

Rowe J.A. (Separate Reasons, Dissenting in Part):

[24] I have read the reasons of my sister Hoegg. I would agree with her disposition regarding child support set out in paragraph 20. I would, however, offer a critique of the law as regards “retroactive” payments of child support. My comments relate to an order for support for the period between the date of the notice of an application and the date of an award.

[25] I would draw a distinction between:

(a) an application for the payment of or for an increase in child support for a period starting on the date of the application; and

(b) an application for an increase in child support for a period that precedes the date of the application.

[26] The first situation is prospective; the applicant is seeking an increase for the future. The second situation is retrospective; the applicant is seeking an increase for a period in the past.

[27] The first situation involves retroactivity only to the extent that it deals with the delay between the application and the award of an increase

following adjudication. The second situation is entirely retroactive, as it imposes an increase for a period that preceded the application.

[28] The jurisprudence including *D.B.S.*, *supra*, does not make clear a distinction between the two situations; both are referred to as "retroactive". There are important policy reasons why such a distinction should be made.

[29] In the second situation (entirely retroactive), a payor who had abided by a subsisting order is later called on to pay an additional amount. Persons who are prudent manage their finances in line with their obligations. If a prudent payor had known that he or she would be called on to pay more in year one and two, then they might well have foregone certain expenditures. But not knowing what would happen in year three (when an order for a retroactive increase in child support is made), a prudent payor might well make expenditures in years one and two, only to find themselves short in year three. This unanticipated change of circumstances can readily lead to hardship. It is reasonable for a court to be open to a party who pleads hardship (where it genuinely exists) on the foregoing basis.

[30] The first situation (retroactivity only to the extent that it deals with the delay between the making of an application and the award of increased child support) is different. In the first situation, the payor is on notice that he or she may well be ordered to pay (more) child support.

[31] A prudent person would make provision for the payment of such support from the date they had notice of the application. Unlike the payor in the second situation (entirely retroactive), the payor in the first situation cannot credibly say "If I had known, I would have made different expenditure decisions." Barring exceptional circumstances, a court should <u>not</u> be open to a plea of hardship from a payor who fails to take prudent steps to set aside funds in these circumstances. To do otherwise would be to reward both delay (put off the date of the award as long as possible) and want of financial prudence (spend the money now, then plead hardship later).

[32] I would note, as well, what Justice Bastarache wrote at paragraph 118 of *D.B.S.*:

> Having established that a retroactive award is due, a court will have four choices for the date to which the award should be retroactive: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and

> the date when the amount of child support should have increased. For the reasons that follow, I would adopt the date of effective notice as a general rule.

(Emphasis added.)

[33] See also *B.W. v. J.G.*, *supra*, para. 23, where Welsh J.A. wrote:

> [I]n general, where retroactive support is ordered, the operative date is when the payor parent had notice of the recipient parent's intention to seek a variation.

[34] Concerning the order for access, I disagree with the disposition set out in paragraph 21. In my view, the judge erred by making the order that he did. I would have set aside the order.

[35] An order is not made to encourage. It is not made as a symbol of parental commitment. An order is made to compel. An order should not be made unless it is intended that it be complied with.

[36] Yet in this case it is acknowledged by all that the order (that "Cameron is to see her mother") is not enforceable and was not intended to be enforced. Rather, it was made to symbolize Ms. Goulding's parental commitment to her daughter. And it was made to encourage the daughter to respond to this commitment by her mother. But that is not what orders are for.

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M. H. Rowe J.A.

Correction Notice

Correction made on February 18, 2016:

1. On page 1, the citation was stated incorrectly as 2015 NLCA 6 and was replaced with 2016 NLCA 6.