



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

Citation: *Burgess v. Burgess*, 2016 NLCA 11

Date: March 8, 2016

Docket: 201501H0038 & 201501H0077

BETWEEN:

JUDY BURGESS

APPELLANT/RESPONDENT
BY CROSS APPEAL

AND:

JAMES BURGESS

RESPONDENT/APPELLANT
BY CROSS APPEAL

Coram: Welsh, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (F) 200902U0415
(2013 NLTD(F) 27)

Appeal Heard: December 16, 2015

Judgment Rendered: March 8, 2016

Reasons for Judgment by Welsh J.A.
Concurred in by Harrington and Hoegg J.A.

Counsel for the Appellant/Respondent by Cross Appeal: Randy Wellon
Counsel for the Respondent/Appellant by Cross Appeal: James J. Smyth
Q.C.

Welsh J.A.:

[1] When Judy and James Burgess separated in May 2007, they entered into a separation agreement regarding custody of, access to and support for the two children of the marriage. Provisions of the agreement regarding child support were confirmed by court order on December 8, 2009. The parties were divorced on January 29, 2010. The December 2009 order was varied by order dated May 7, 2013. Ms. Burgess appeals against that order on the basis that the applications judge erred in determining the question of child support and in ordering the parties to bear their own costs. Mr. Burgess cross-appeals regarding the addition of “other income” to his annual income and the judge’s failure to include Ms. Burgess’ severance pay in her income.

BACKGROUND

[2] When Mr. and Ms. Burgess entered into the separation agreement, they agreed that, other than sharing special and extraordinary expenses, no child support would be paid by either party because their incomes were relatively equal and they had shared custody of the children.

[3] However, in June 2010, their daughter, then approximately fourteen years of age, began to reside full-time with Ms. Burgess. Their son, then approximately eleven years old, continued with shared custody in accordance with the agreement. Following the change in the daughter’s residence, and alleging an increase in Mr. Burgess’ income, Ms. Burgess requested that Mr. Burgess pay support for both children.

[4] In his reasons for decision, the applications judge ordered that:

(1) Mr. Burgess would pay support

(a) for his son in accordance with the separation agreement, and

(b) for his daughter “in accordance with the set off method” based on annual incomes, for Mr. Burgess of \$92,265 (including \$12,700 “other income”) and for Ms. Burgess of \$63,000. Applying the *Federal Child Support Guidelines*, this resulted in a set-off between \$804.28 and \$552, leaving \$252.28 support payable monthly for his daughter;

- (3) Payment of support would commence on October 1, 2013;
- (4) Special and extraordinary expenses would be shared as set out in clause 4 of the separation agreement;
- (5) Mr. Burgess would pay retroactive child support for his daughter from June 2010 to October 1, 2013 in the amount of \$10,120, to be paid in installments of \$300 per month; and
- (6) The parties would bear their own costs.

The order also included recalculation clauses. (There was a discrepancy between the order, \$10,120 in (5), above, and the reasons for decision which specified \$9,000. This discrepancy need not be addressed given the conclusion in the following analysis that the amount of child support must be recalculated.)

ISSUES

[5] At issue in the appeal and cross-appeal is whether the applications judge erred in: (1) determining an order of support for each child; (2) imputing additional income to Mr. Burgess; (3) failing to consider a severance payment received by Ms. Burgess; (4) ordering retroactive support to June 2010; and (5) ordering the parties to bear their own costs.

ANALYSIS

Method for Determining Support for the Two Children

[6] The applications judge began by determining that there had been a material change in circumstances such that he had authority under the *Divorce Act* to review the issue of child support payable by Mr. Burgess ((2013 NLTD(F) 27, 340 Nfld. & P.E.I.R. 307, at paragraphs 19 and 22). This conclusion was not challenged on the appeal or cross-appeal.

[7] Given the change in circumstances, the next question is whether the applications judge erred by ordering Mr. Burgess to pay support for his son on the basis of the separation agreement and for his daughter using the set-off method. I am satisfied that he erred with respect to both children.

[8] Regarding his son, while there was no change in the shared custody arrangement, there was a material change in circumstances as a result of the increase in Mr. Burgess' annual income and the consequent discrepancy

between his and Ms. Burgess' income. Section 9 of the *Federal Child Support Guidelines* under the *Divorce Act* provides direction in the case of shared custody:

Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[9] The proper analytical approach to section 9 of the *Guidelines* is set out in *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217. In summary, Bastarache J., for the majority, explained:

[48] ... What is important is that the set-off [using the amounts payable under the *Guidelines*] does not take into account actual spending patterns as they relate to variable costs or the fact that fixed costs of the recipient parent are not reduced by the increased spending of the payor parent.

[49] Hence, the simple set-off serves as the starting point, but it cannot be the end of the inquiry. It has no presumptive value. Its true value is in bringing the court to focus first on the fact that both parents must make a contribution and that fixed and variable costs of each of them have to be measured before making adjustments to take into account increased costs attributable to joint custody and further adjustments needed to ensure that the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought. *Full consideration* must be given to these last two factors (see Payne, at p. 263) [Italics in original.]

...

[51] This is where discretion comes into play. The court retains the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to another, something which Parliament did not intend. ...

[10] In exercising the discretion to adjust the set-off amount in accordance with paragraphs 9(b) and (c) of the *Guidelines*, the judge requires evidence which the party seeking such an adjustment is in the best position to provide.

In the absence of such evidence, the set-off, based on the *Guidelines* amounts payable, should apply (*Contino*, at paragraph 54).

[11] In this case, the judge concluded:

[31] In both instances, I am left guessing as to what proportion of the household expenses should be attributed to the costs of providing for the children. The parties are in the best position to identify the financial burdens associated with the support of their children and should provide such calculations to the Court to support their respective positions.

...

[33] I have no significant evidence before me to determine what impact, if any, the acknowledged change in circumstances had on the financial circumstances and responsibilities of the parents. I find it inappropriate for the Court to “guess at” or “assume” a fixed financial obligation in the absence of evidence to support it.

[12] However, the judge went on to find that there had been no change in circumstances regarding the son and ordered that, in accordance with the separation agreement, support under the *Guidelines* would not be payable by Mr. Burgess. This determination was in error because it ignores the change in circumstances arising from the increase in Mr. Burgess’ income and the resulting discrepancy between the parents’ incomes.

[13] Given that the parents had shared custody of their son, section 9 of the *Guidelines* was engaged for purposes of determining the payment of support for him. In applying that provision in respect of support for the daughter, though she was no longer in a shared custody arrangement, the judge employed the set-off method. He concluded that, since there was no evidence that would engage the operation of paragraphs 9(b) and (c), there was no basis on which to adjust the set-off using the amounts payable under the *Guidelines*. That determination applies to support for the son. Accordingly, I would order Mr. Burgess to pay to Ms. Burgess child support in respect of his son using the set-off method, without adjustment.

[14] Regarding the daughter, who was residing full-time with Ms. Burgess, the question of shared custody under section 9 of the *Guidelines* did not arise. Accordingly, it was an error to use the set-off method to determine the support payable by Mr. Burgess. Rather, he is required to pay the *Guidelines* amount for one child.

Mr. Burgess' Income

[15] In assessing the income of each party for purposes of determining the amount of support to be paid, Mr. Burgess cross-appeals the order on the grounds that the judge erred by imputing against him an additional annual income of \$12,700. This was comprised of rental income for an apartment, income from "odd jobs" and rental for storage of vehicles.

[16] Regarding Mr. Burgess' rental income, the judge assessed an amount of \$600 per month, or \$7,200 annually. Mr. Burgess testified that the house was owned jointly with his partner, who was entitled to half the rent, and that the money paid by the renter was properly characterized, not as rent, but as a contribution to expenses.

[17] The judge concluded that Mr. Burgess' testimony regarding his rental income was evasive and, in fact, not credible. The evidence of the renter that he paid \$300 bi-weekly, taken with the other evidence, clearly supports the characterization of the payment as rent. As to joint ownership of the house, this was challenged by Ms. Burgess. It was open to Mr. Burgess to provide documentary evidence or to have his partner testify. He did neither, relying solely on his testimony which, as with the characterization of the rental income, the judge clearly did not accept. In the result, there is no basis on which to alter the judge's determination that Mr. Burgess' annual income would include \$7,200 rental income.

[18] In addition, the judge found:

[24] Mr. Burgess also testified that he obtains some income from "odd jobs" or "hobbies" he engages in from time to time. This, he estimates, would not exceed \$3,000 a year. He also earns about \$2,500 a year by storing vehicles and other recreational equipment on his property.

[19] Contrary to Mr. Burgess' submissions, there was evidence on which the judge could rely to impute \$5,500 as annual income from other sources. It is clear from the transcript that the judge was unconvinced by Mr. Burgess' testimony which was contradictory and evasive, and that he accepted Ms. Burgess' evidence.

[20] In summary, there is no basis on which to conclude that the applications judge erred in imputing an additional annual income of \$12,700 to Mr. Burgess.

Ms. Burgess' Income

[21] Mr. Burgess also cross-appeals the order on the grounds that the judge erred by failing to take account of severance paid to Ms. Burgess when her employment of twenty years was terminated in March 2013. She immediately obtained alternate employment with an annual income of \$63,000, a decrease from the income of \$76,671 referenced in her 2012 tax assessment. Regarding the severance pay, the judge explained:

[28] I find this testimony from Ms. Burgess [that she had insufficient income to meet her needs] to be somewhat disingenuous since she did receive a \$90,000 severance payout from her former employer, most of which she converted to RRSP's after first purchasing a motor vehicle and paying down on her credit cards. Neither counsel has made an issue of the severance payout other than to refer to it in passing. I am therefore not including this severance income for child support purposes and only refer to it above to show that Ms. Burgess is not as financially destitute as she would want the Court to believe.

[22] On appeal, it was submitted that the judge misunderstood counsel when he concluded that the severance payment was not an issue of concern. In any event, it was an error for the judge to fail to exercise his discretion to make a determination as to the effect of this one-time payment.

[23] Section 17(1) of the *Guidelines* provides:

If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[24] In her submissions, Ms. Burgess accepts the proposition that it would have been appropriate for the judge to include some or all of the severance payment in the calculation of her income for purposes of determining child support. This concession is consistent with judicial authority. For example, in *O. v. C.*, 2004 NLSCTD 7, 233 Nfld. & P.E.I.R. 322, LeBlanc J. referred to severance pay as "income replacement" and "an income source" during the notice period (paragraph 60). The conclusion follows that the judge erred by failing to address the effect of the severance payment when determining Ms. Burgess' annual income.

[25] However, this Court is not in a position to do the necessary calculation. There are questions, for example, as to tax implications and the

appropriate method of assessing the payment considering, among other things, the notice period to which the severance was meant to apply. If the parties are unable to agree on how the severance payment is to be included in Ms. Burgess' income for purposes of determining child support, evidence will be required. The appropriate venue for that assessment is the Trial Division.

Retroactive Support

[26] I begin by reiterating the difference between arrears and retroactive support. Retroactive support refers to "support that was neither paid nor claimed when it was supposedly due", while arrears refers to "a debt that has been incurred but not paid" (*B.W. v. J.G.*, 2014 NLCA 5, 346 Nfld. & P.E.I.R. 234, at paragraphs 8 and 11).

[27] In this case, the judge, concluded:

[41] Arrears [properly termed retroactive support] in relation to [Mr. Burgess] are therefore determined to be in the amount of \$9,000, as calculated from June of 2010 to October 1, 2013. Arrears shall be paid at the rate of \$300 per month, commencing on October 1, 2013

[28] Mr. Burgess submits that child support was not requested in Ms. Burgess' application filed on November 25, 2010, and that, accordingly, retroactive support should not be awarded prior to the Originating Application for Variation filed on October 3, 2012.

[29] In the circumstances, I accept Mr. Burgess' submission. The judge erred in ordering retroactive support to June 2010, the date when Mr. Burgess' daughter began residing solely with her mother. At the time, support was governed by the separation agreement. When Ms. Burgess filed the application with the Court on November 25, 2010, she specifically requested only that the Court enforce clause 4 of the separation agreement dealing with exceptional expenses. The inference follows that Ms. Burgess was content with the remaining clauses in the agreement. It was not until the application for variation filed on October 3, 2012 that she requested a change to the child support arrangement in the separation agreement. That was the date on which Mr. Burgess was notified that child support was in issue.

[30] The conclusion follows that the judge erred in ordering retroactive support to June 2010. Rather, Mr. Burgess is liable for retroactive support

from October 3, 2012 to October 1, 2013. Determination of this amount will require a calculation of the parties' incomes at the time, including the relevance, if any, of Ms. Burgess' severance payment which was received in March 2013.

Costs

[31] Without giving reasons, the applications judge ordered that the parties would bear their own costs. Ms. Burgess submits that the judge erred by failing to consider relevant factors which would have resulted in an order for costs against Mr. Burgess.

[32] In her submissions on costs, Ms. Burgess points to the principle that costs are generally awarded to the successful party. Mr. Burgess was successful with respect to consideration of Ms. Burgess' severance payment as a relevant factor in determining her income, and the commencement date for retroactive support. On the other hand, the critical issues of support for the two children and Mr. Burgess' income were decided in Ms. Burgess' favour.

[33] Ms. Burgess also relies on Mr. Burgess' conduct related to the court proceedings. She notes that a significant part of the hearing was directed to the question of Mr. Burgess' "other income". On this point, I note that Mr. Burgess was evasive and put forward untenable positions in his testimony. Further, he had not identified the additional income in his financial statements and he made the collection of evidence by Ms. Burgess difficult. Such conduct is relevant in determining the question of costs.

[34] Taking into account Mr. Burgess' conduct and the extent of Ms. Burgess' success on the critical issues, I would order costs against Mr. Burgess in this Court and in the Court below under column 3 of the scale of costs.

SUMMARY AND DISPOSITION

[35] To summarize the above conclusions:

(1) The applications judge erred in ordering child support only in respect of Mr. Burgess' daughter and in applying the set-off method to determine that support. Rather, Mr. Burgess is required to pay child support to Ms. Burgess calculated by using the set-off method for his son and the *Guidelines* amount for one child for his daughter;

(2) The judge did not err in imputing to Mr. Burgess additional annual income of \$12,700;

(3) The judge erred in failing to exercise his discretion to determine the effect of the severance payment received by Ms. Burgess in March 2013;

(4) If the parties cannot agree on how the severance payment should be included in Ms. Burgess' income, that issue is remitted to the Trial Division for determination;

(5) The judge erred in ordering retroactive support from June 2010; the correct dates are October 3, 2012 to October 1, 2013 for the payment of retroactive support for both children;

(6) Mr. Burgess shall pay costs under column 3 of the scale of costs to Ms. Burgess in this Court and in the Court below.

[36] In the result, I would allow the appeal according to the order as set out above. Insofar as it is necessary to give effect to the order, I would remit the matter to the Trial Division.

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

L. R. Hoegg J.A.