

IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Bowes v. Bowes*, 2021 NLCA 10
Date: February 9, 2021
Docket Number: 202001H0024

BETWEEN:

MICHELE JACQUELINE BOWES — APPELLANT

AND:

CHRISTOPHER ALLAN BOWES — RESPONDENT

Coram: Hoegg, Goodridge and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Family Division 201402F0228

Appeal Heard: November 16, 2020
Judgment Rendered: February 9, 2021

Reasons for Judgment by: Butler J.A.
Concurred in by: Hoegg and Goodridge JJ.A.

Counsel for the Appellant: Self-represented
Counsel for the Respondent: Self-represented

Authorities Cited:

CASES CONSIDERED: *Meadus v. Meadus*, 2012 NLCA 59, 326 Nfld. & P.E.I.R. 91; *Drover v. Drover*, 2020 NLCA 9; *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (S.C.C.); *Coles v. Coles*, 2014 NLCA 3, 345 Nfld. & P.E.I.R. 357; *Pumphrey v. Pumphrey* (1997), 148 Nfld. & P.E.I.R. 340, at paras. 13-14 (Nfld. C.A.); *Drygala v. Pauli*, [2002] O.J. No. 3731, 61 O.R. (3d) 711 (Ont. C.A.); *Duffy v. Duffy*, 2009 NLCA 48, 289 Nfld. & P.E.I.R. 132; *Mantyka v. Dueck*, 2012 SKCA 109; *Martin v. Orris*, 2010 MBCA 59; *Chidley v. Clowe's Ambulance Service* (15 November 2010), File No. 2639 (N.L. H.R.C.); *R. v. Hamilton*, [2004] O.J. No. 3252, 72 O.R. (3d) 1 (Ont. C.A.); *R. v. R.D.S.*, [1997] 3 S.C.R. 484 (S.C.C.); *Wiscombe v. Wiscombe*, 2018 NLCA 36; *Gibson v. Gibson*, 2011 ONSC 4406; *Corcios v. Burgos*, 2011 ONSC 3326; *Speirs v. Speirs*, 2011 ONSC 3712; *Clark v. Clark*, 2010 ONSC 3761; *Duffy v. Duffy*, 2008 NLUFC 30, 284 Nfld. & P.E.I.R. 83; *Mudronja v. Mudronja*, 2020 ONCA 569; *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231; *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217.

STATUTES CONSIDERED: *Access to Information and Personal Privacy Act, 2015*, SNL 2015, c. A-1.2.

REGULATIONS CONSIDERED: *Federal Child Support Guidelines*, SOR/97-175, s. 19(1)(a), Sch. III s. 3(a).

RULES CONSIDERED: *Supreme Court Family Rules*, r. F19.03(b), under Part IV of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D.

TEXTS CONSIDERED: Julien D. Payne & Marilyn A. Payne, *Child Support Guidelines in Canada, 2020* (Toronto, ON: Irwin Law Inc., 2020).

Butler J.A.:

INTRODUCTION

[1] Ms. Bowes appeals an Interim Child Support Order (the "Order") of the Supreme Court Family Division given on March 5, 2020 and which awarded her $931 monthly child support effective March 1, 2020.

[2] The parties were married in February 2001 and separated in the summer of 2013. They have five sons born between July 2001 and March 2010.

[3] Disagreement between the parties on both support and parenting issues had resulted in 13 separate orders of the Supreme Court Family Division between February 23, 2015 and November 25, 2019.

[4] The November 25, 2019 child support order provided Ms. Bowes with child support of $579 per month based upon Mr. Bowes' 2018 total income of $88,910 and Ms. Bowes' 2018 total income of $45,896.

[5] On January 27, 2020 Ms. Bowes filed an Application to Vary (the "Application") seeking to vary the November 25, 2019 Child Support Order. This resulted in the Order under appeal which was for $931 per month in child support based upon Mr. Bowes' 2019 income of $94,506 and imputed income to Ms. Bowes of $30,000 in addition to her annual spousal support of $4,440.

FACTS

[6] Mr. Bowes is an architect. Despite Ms. Bowes' education as a teacher; she did not work outside the home during the marriage and instead dedicated herself to the parties' home and children.

[7] There have been some changes in the parenting arrangements since the parties separated but at the time of the hearing (March 5, 2020) the two eldest (age 17 and 18) were residing with Mr. Bowes full-time, the 14-year-old son was residing with Ms. Bowes full-time and the 10 and 11-year-old boys were in a shared parenting arrangement with their parents, week on and week off.

The Application

[8] What led to the Application filed on January 27, 2020 was the expiration of Ms. Bowes' funding through a Skills Development Program sponsored by the federal government through the provincial department of Advanced Education Skills and Labour. Ms. Bowes was receiving this in relation to a paralegal program in which she was registered and which ended on December 23, 2019 with a final payment to her in January 2020.

[9] On the basis that she was without income, Ms. Bowes filed the Application seeking child support of $1,669 per month.

[10] In response to the Application, Mr. Bowes filed an Affidavit in Response in which he alleged that:

- Ms. Bowes had not provided proof of her 2019 income and that it was the total income for that year that should be utilized for purposes of child support calculation in 2020;

- Ms. Bowes had a history of refusing or neglecting to seek employment opportunities and was intentionally underemployed;

- Until July 2017 Ms. Bowes had been employed with Fewers' Ambulance Service in Terrenceville on a 7 day on/off rotation which allowed her to parent and work full-time;

- Prior to July 2017 Ms. Bowes was notified by her employer of employment prospects if she upgraded her skills from an Emergency Medical Responder II ("EMR") to a Primary Care Paramedic ("PCP") but Ms. Bowes refused to do so and was laid-off. Her employer noted on her July 18, 2017 record of employment that she was "an unreliable employee"; and

- Ms. Bowes' paralegal studies ended in October 2019 and she was required to do a work-term but did not vigorously seek such a work-term in spite of her availability.

[11] On these facts, Mr. Bowes challenged the appropriateness of any change to the November 2019 child support order.

[12] There is no dispute that Mr. Bowes' Affidavit in Response to Ms. Bowes' Application was required to be filed and provided to Ms. Bowes four days in advance of the hearing which had been set (on January 27, 2020) for March 5, 2020 (*Supreme Court Family Rules*, r. F19.03(b), under Part IV of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D).

[13] However, Mr. Bowes' Affidavit in Response was not sworn until February 28, 2020, was filed with the Family Court on March 3, 2020 and served on Ms. Bowes' solicitor on the afternoon of March 4, 2020.

[14] To their credit, Ms. Bowes and her counsel worked efficiently to prepare an Affidavit in Reply and sought leave to file it at the hearing the next afternoon. Ultimately, leave was given.

[15] The Affidavit in Reply addressed each of the assertions made by Mr. Bowes. Paragraphs 2-7 read as follows:

> 2. In Paragraph 4, the Respondent states that I have not provided my 2019 Income information. I can advise that at the time my Interim Application was drafted, I did not have my 2019 tax information. I can advise that I provided my T4E and my Tuition and Enrollment Certificate to my counsel, and I am told and believe to be true that they were forwarded to counsel for the Respondent via email late on the afternoon of March 2nd. My Income Tax return was not completed in time to file with the Court before our hearing, but will be submitted to this hearing, and is attached to my reply as "Schedule A". My taxable income for 2019 was $46,485.
>
> 3. My 2019 taxable income is not an appropriate indication of my current income because, as stated in my Interim Application, I am not now in receipt of any funds and am still unemployed.
>
> 4. At paragraph 5 of his affidavit, the Respondent states that I am intentionally unemployed. I deny that this is true. I am attaching a record of my attempts to gain employment, attached hereto as "Schedule B".
>
> 5. At Paragraph 7 of his affidavit, the Respondent states that I could have upgraded my skills from an EMR Il to a PCP (Primary Care Paramedic), had I chosen to, in 2017. I chose not to pursue this upgrading for several reasons. The program would have taken two years to complete, and I would not have received funding for it — I would have had to apply for student loans to cover the cost. As well, the cutoffs for applying to the program starting in September 2017 was in February of 2017, and I was not notified of my impending lay-off until May of 2017. I was listed as an 'unreliable' employee on the ROE because I could only work every other week due to the shared parenting schedule in place.
>
> 6. I chose instead to pursue training in office administration, as I felt the skills would make me more employable, and as I was able to obtain full funding.

> 7. At Paragraph 8 of his affidavit, the Respondent states that I did not, to his knowledge, seek a work term. I did in fact do a work term, as is reflected in my Official Transcript from Academy Canada, attached hereto as "Schedule C". As well, the Respondent should have been aware that I was doing my work term during this time, as I contacted him to see if he could care for the children while I was at work.

[16] The late filing of Mr. Bowes' Affidavit foreclosed the opportunity for Ms. Bowes to obtain the complete contents of her employment insurance file prior to the hearing. She asserted that these records would accurately reflect the basis on which her Employment Insurance benefits had been approved following the loss of her employment with Fewer's Ambulance Service and shed light on the "unreliable employee" reference on the record of employment. Without them, in the absence of the opportunity to testify, her counsel could only submit that "unreliable employee" reflected Ms. Bowes' inability to work a schedule other than week on, week off.

[17] After the judge heard submissions from counsel, and had recessed to consider the matter, he provided an oral judgment.

The Order

[18] The judge concluded (*inter alia*) that it was "appropriate to impute some income to Ms. Bowes for reason of her education and training, the under-graduate degree, the EMR II qualification, [*sic*] her paralegal certification" (Transcript, March 5, 2020, at 21).

[19] Further, he stated:

> … And confirming this conclusion for me is the fact that she was let go from her ambulance attendant position for being an unreliable employee as is noted on the Record of Employment from that employer. This suggests underemployment within the meaning of the law because reliability as an employee is within her control. I do not accept that the notation on the ROE meant that she could only work seven days on, seven days off, the implication being that this was somehow unacceptable to that employer. She had already worked under that schedule for a prolonged period of time, and presumably, with the agreement of the employer. The notation, "unreliable employee", likely suggests unreliability in terms of working the schedule she had been given; otherwise, the employer would've provided a different notation, something like, for example, "Employee's availability for work does not accord with employer scheduling requirements". For these reasons, I am of the view it is appropriate to impute income to Ms. Bowes, so on top of the 4,440 dollars of spousal support, I am

> imputing income of 30,000 per year, which is what she would be earning [as] an ambulance attendant. With her education and training, there is an argument to be made that 30,000 dollars is too low …
>
> (Transcript, March 5, 2020, at 21-22)

[20] On this basis, relying upon the *Federal Child Support Guidelines*, SOR/97-175 (the "*Guidelines*") to calculate the child support payable in light of the various parenting arrangements in place for the five children, the judge concluded that Mr. Bowes was required to pay child support of $931 per month.

ISSUES

[21] On this appeal, Ms. Bowes asserts that the trial judge erred:

(1) by not applying rule F19.03(b) of the *Supreme Court Family Rules* regarding filing requirements for an Affidavit in Response;

(2) in relying upon the contents of Mr. Bowes' Affidavit in Response to impute income to Ms. Bowes pursuant to section 19(1)(a) of the *Guidelines*; and

(3) in the calculation and commencement date of the child support award.

STANDARD OF REVIEW

[22] As this Court stated in *Meadus v. Meadus*, 2012 NLCA 59, 326 Nfld. & P.E.I.R. 91:

> [33] The applicable standards of review are correctness for errors of law and palpable and overriding error, that is, manifest error, for findings of fact. When the legal principle is not readily extricable, in a matter of mixed law and fact, the general rule is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, this Court will not intervene in the absence of palpable and overriding error. Where the trial decision is of a fact-based and discretionary nature, such as one involving custody or support, involving the balancing of various factors with an appreciation of the particular facts of the case, appeal courts will defer to trial judges and not intervene without material error, a serious misapprehension of the evidence, or an error of law. See *Locke v. Goulding*, 2012 NLCA 8, 318 Nfld. & P.E.I.R. 91, at paragraphs 18-19.

[23] More specifically in regard to support orders, this Court in *Drover v. Drover*, 2020 NLCA 9, citing *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (S.C.C.), emphasized the deference due to trial judges:

> [2] "Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed" *Hickey. v. Hickey,* [1999] 2 S.C.R. 518 at para. 10.
>
> [3] The standard of review to be applied to the questions on this appeal was established in *Hickey* at para. 11:
>
> > [11] Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. …

ANALYSIS

Fresh Evidence

[24] Subsequent to the hearing at the Family Division, Ms. Bowes filed a request under the *Access to Information and Personal Privacy Act, 2015*, SNL 2015, c. A-1.2, seeking relevant employment records. She received these on May 6, 2020.

[25] On August 4, 2020 Ms. Bowes made application to this Court to permit the filing of fresh evidence; her affidavit in support of this application identified and addressed the test for the admissibility for fresh evidence as stated in *Coles v. Coles*, 2014 NLCA 3, 345 Nfld. & P.E.I.R. 357. Since the information that she had received from Employment and Social Development Canada (including the Employment Insurance Agency Decision of June 27, 2017) was not available at trial, was reliable, and could have affected the result at the hearing, Ms. Bowes' application was allowed at the commencement of the hearing of this appeal.

[26] The records attached to the application for fresh evidence confirmed that disclosure of the records was delayed as a result of the Province's March 2020 declaration of a public health emergency associated with the COVID-19 virus. The records also confirmed that the employment insurance administrators had determined that Ms. Bowes' last employer was Fewer's Ambulance Service where she had worked from August 11, 2015 to June 26, 2017 on which date her employment ceased due to "shortage of work".

[27] It is clear from the records that this conclusion was reached notwithstanding the comments in box 18 of the record of employment prepared by Fewer's Ambulance Service in which the employer noted (as Mr. Bowes had asserted) that Ms. Bowes was an "unreliable employee".

[28] The records also confirmed that officials had notified both Ryan's Ambulance Service Ltd. and Fewer's Ambulance Service by letters dated July 28, 2017 that "the reason the employee lost her employment does not constitute misconduct". By letter to Ms. Bowes on the same date, Ms. Bowes was advised that the effect of this conclusion was she would have to serve a waiting period of only 1-2 weeks before receiving benefits.

[29] The remaining documents attached to Ms. Bowes' affidavit in support of the application for fresh evidence were related to job postings for primary care paramedic positions in the period May to July 2020.

Issue 1 – Did the Judge Err in Accepting Mr. Bowes' Affidavit in Response?

[30] Ms. Bowes asserts that it was inappropriate for the judge to permit Mr. Bowes to file his Affidavit in Response in violation of rule F19.03(b) of the *Supreme Court Family Rules* and without giving her the opportunity to present evidence which would clarify the notation "unreliable employee".

[31] Interim hearings for parenting and/or support are intended to result in an order that has a short temporal focus and are usually determined in a summary manner on affidavit evidence (*Pumphrey v. Pumphrey* (1997), 148 Nfld. & P.E.I.R. 340, at paras. 13-14 (Nfld. C.A.)). This is a proportionate response to reasonable expectations for access to justice in light of the nature and volume of cases the Family Division determines.

[32] A determination by an applications judge to accept or reject an affidavit is an exercise of discretion to which deference is due by a reviewing court (*Pumphrey,* at para. 17; and *Drover,* at para. 2, citing *Hickey*, at para. 10).

[33] In the circumstances that pertain to interim hearings in family matters there is a natural tendency to leniency in the acceptance of evidence presented by affidavit. The judge exercised his discretion, accepted Mr. Bowes' Affidavit in Response and Ms. Bowes' Affidavit in Reply. His procedural decisions are entitled to deference from this Court.

[34] However, it does not follow that the judge's reliance upon a phrase used in a document attached to an affidavit as the basis for imputation of income was error-free. This is addressed in Issue 2.

Issue 2 – Did the Judge Err in Relying Upon the Contents of Mr. Bowes' Affidavit in Response to Impute Income to Ms. Bowes Pursuant to Section 19(1)(a) of the *Federal Child Support Guidelines*?

[35] This ground of appeal raises two sub issues:

(a) the procedure that applies to determining whether income should be imputed under section 19(1)(a) of the *Federal Child Support Guidelines;* and

(b) the appropriateness of the judge's reliance on the record of employment reference to "unreliable employee".

(a) *The Procedure that Applies*

[36] Section 19(1) of the *Guidelines* permits a court to impute income as it considers appropriate in the circumstances and sets out a non-exhaustive list of nine such circumstances. Julien D. Payne and Marilyn A. Payne, in *Child Support Guidelines in Canada, 2020* (Toronto, ON: Irwin Law Inc., 2020) at 173, explain:

> … These circumstances fall into two categories: (i) those related to external factors such as income tax laws and (ii) those related to the conduct of the obliger, such as underemployment, failure to provide income information, or the unreasonable deduction of expenses from income. …

[37] The only enumerated circumstance of relevance in the within case was stated in section 19(1)(a):

> (a) the spouse [or former spouse] is intentionally underemployed or unemployed, other than where the underemployment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by reasonable educational or health needs of the spouse [or former spouse].

[38] A three step process to section 19(1)(a) has been judicially endorsed. The Ontario Court of Appeal in *Drygala v. Pauli*, [2002] O.J. No. 3731, 61 O.R. (3d) 711, at paras. 22-23, stated that a court is required to consider the following three questions when applying section 19(1)(a) of the *Guidelines*:

1. Is the spouse intentionally under-employed or unemployed?

2. If so, is the intentional under-employment or unemployment required by virtue of his reasonable educational needs?

> 3. If the answer to questions #2 is negative, what income is appropriately imputed in the circumstances?

[39] *Child Support Guidelines in Canada,* at 181, summarizes the three step process as follows:

> … First, the court must determine whether the parent is intentionally underemployed or unemployed. Bad faith or an improper purpose is not necessary to establish that the respondent's unemployment is intentional. Second, if the parent is intentionally underemployed or unemployed, the court must determine whether that is justified by the needs of a child of the marriage, by the needs of any child under the age of majority, or by the reasonable educational or health needs of the parent. Third, if none of these exceptions apply, then the court must decide whether to exercise its discretion and impute income to the parent.

[40] The judge's reasons confirm that he relied upon Ms. Bowes' record of employment to find that section 19(1)(a) was satisfied and that Ms. Bowes was intentionally underemployed. In respect to the reference to "unreliable employee" on the record of employment, he found that the notation "likely suggests unreliability in terms of working the schedule she had been given" (Transcript, March 5, 2020, at 22). Implicitly, the judge determined that this was sufficient to meet the first step of the analysis.

[41] Having found intentional underemployment, the onus shifted to Ms. Bowes to prove one of the exceptions stated in sub-section 19(1)(a) of the *Guidelines* (needs of a child or reasonable education or health needs of Ms. Bowes.).

[42] Ms. Bowes' Affidavit in Reply made no reference to needs of a child or health needs of her own, but in relation to reasonable education needs (that may justify underemployment or unemployment) it addressed her attempts to gain employment, why she had not upgraded her skills from an EMR II to a PCP and confirmed that her work-term for the paralegal program had been completed on December 23, 2019.

[43] The judge did not address whether the contents of Ms. Bowes' Affidavit in Reply had established an exception.

[44] In the absence of an exception that could apply, step three required the judge to exercise his discretion in determining whether to impute income to Ms. Bowes.

[45] As this Court stated in *Duffy v. Duffy*, 2009 NLCA 48, 289 Nfld. & P.E.I.R. 132, at para. 35, the following principles apply to the exercise of discretion to impute income:

> 1. The fundamental obligation of a parent to support his or her children takes precedence over the parent's own interests and choices.
>
> 2. A parent will not be permitted to knowingly avoid or diminish, and may not choose to ignore, his or her obligation to support his or her children.
>
> 3. A parent is required to act responsibly when making financial decisions that may affect the level of child support available from that parent.
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> 4. Imputing income to a parent on the basis that the parent is "intentionally underemployed or unemployed" does not incorporate a requirement for proof of bad faith. "Intentionally" in this context clarifies that the provision does not apply to situations beyond the parent's control.
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> 5. The determination to impute income is discretionary, as the court considers appropriate in the circumstances.
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> 6. Where a parent is intentionally underemployed or unemployed, the court may exercise its discretion not to impute income where that parent establishes the reasonableness of his or her decision.
>
> 7. A parent will not be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations or interests. Nor will it be acceptable for a parent to choose to work for future rewards to the detriment of the present needs of his or her children, unless the parent establishes the reasonableness of his or her course of action.
>
> 8. A parent must provide proper and full disclosure of financial information. Failure to do so may result in the court drawing an adverse inference and imputing income.

[46] In *Duffy*, at para. 35, factor 6 endorses the standard of reasonableness to the assessment required under section 19(1)(a) of the *Guidelines.*

[47] The judge's reasons do not reference the test of reasonableness but suggest that Ms. Bowes' education and training, undergraduate degree, EMR II qualification and paralegal certification were the factors he considered in his assessment of section 19(1)(a). No reference was made to other factors which would be appropriate considerations (the time that had elapsed between Ms. Bowes' graduation and the hearing, the efforts made by Ms. Bowes to obtain work as a paralegal between December 23, 2019 and March 5, 2020, and the

availability of paralegal positions). These factors would have informed the judge's exercise of discretion.

[48] Accordingly, the judge's reasons reflect an error of law in his approach to imputation of income under section 19(1)(a) of the *Guidelines*.

(b) *Reliance on the Record of Employment's Reference to "Unreliable Employee"*

[49] Significant caution must be exercised in the reliance placed upon documentary evidence attached to an affidavit particularly where its content is subject to interpretation, and there is no cross-examination of the deponent, as was the case here.

[50] The frailties of reliance upon affidavit evidence on an interim application in a family matter were recognized by the Saskatchewan Court of Appeal in *Mantyka v. Dueck,* 2012 SKCA 109. The issue in that case was relocation of a child so the first reason stated (that an interim change could create a new "normal" that could affect the final result) has no bearing here (para. 31). However the second reason stated is applicable:

> [32] The second reason for approaching interim relocations with caution is that the record before the court normally consists only of affidavit evidence which, by its nature, is often incomplete or somewhat limited in scope. Moreover, such evidence is often contradictory or inconsistent. It is thus both difficult and unwise to make important decisions on the basis of a record with these sorts of frailties. See: Nieman v. Bull, 1999 SKQB 204 at para. 7; *Shiplack v. Shiplack,* 2008 SKQB 254, 317 Sask. R. 223 at para. 19.

[51] In *Martin v. Orris,* 2010 MBCA 59, at para. 6, a similar concern was stated in the context of an interim order that dealt with issues of custody and child/spousal support.

[52] Further, "Imputation of income must be based on evidence and not speculation. A court cannot arbitrarily select an amount as imputed income. Income should not be imputed on the basis of suspicion where relevant evidence is lacking. The court cannot assume facts; facts must be proven." *Child Support Guidelines in Canada,* at 175.

[53] Ms. Bowes asserts that the evidence presented in Mr. Bowes' Affidavit in Response was insufficient to establish grounds to impute income to her.

[54] In this respect the judge's decision reveals two errors.

[55] Firstly, the phrase "unreliable employee" was open to interpretation. Mr. Bowes had provided a copy of Ms. Bowes' record of employment but could offer no reliable explanation for the notation. Ms. Bowes did not deny the notation but denied that she was intentionally unemployed; she provided a record of her attempts to gain employment and her counsel submitted that "unreliable employee" related to her ability to work only seven days on and seven days off (as an EMR) as a result of her parental obligations.

[56] There was no direct evidence which could assist the judge in the interpretive exercise because the employer provided no explanation.

[57] In the absence of both direct evidence from the employer in question and cross-examination of either party, it was an extricable error of principle for the judge to conclude that the notation "likely suggests unreliability in terms of working the schedule she had been given" (Transcript, March 5, 2020, at 22). The judge's conclusion in this regard reflects the dangers of speculation in the exercise of imputation of income in these circumstances. As the fresh evidence before this Court confirms, the notation "unreliable employee" did not mean that Ms. Bowes had unreasonably failed to attend work when scheduled.

[58] The record of employment confirmed that in the 27 pay periods preceding Ms. Bowes' last day worked at Fewer's Ambulance Service, she had received $34,743.79 in earnings. In addition to this, Ms. Bowes had earned $1,539.28 from Ryan's Ambulance Service. Her total earnings in the 54 weeks were therefore $36,283.07.

[59] The evidence confirmed that Ms. Bowes was paid $26.43 per hour for 56 hours per week worked being 7 days at 8 hours per day for a gross pay of $1,480.08 bi-weekly.

[60] For 27 pay periods, if Ms. Bowes worked every hour scheduled, her total income would be $39,962.16. Ms. Bowes explained the $3,679.09 difference as associated with two separate court attendances in Family Division during the period. Her calculation left $21.11 unaccounted for.

[61] Secondly, the judge's exchange with Ms. Bowes' counsel during submissions reflects his reliance upon facts not in evidence relative to Ms. Bowes' ability to work while upgrading to a PCP (had she done so). He stated:

> I'm not sure I accept that she wouldn't be able to work. I know that they do facilitate ongoing work while you're doing that program and I did a big human rights case with ambulance services and heard a lot of testimony, and you can work while you're doing that upgrade.
>
> (Transcript, March 5, 2020, at 16)

[62] Ms. Bowes submits that the judge's reference was likely to *Chidley v. Clowe's Ambulance Service* (15 November 2010), File No. 2639 (N.L. H.R.C.), which she claimed addressed the two-week course required to become an EMR II, not the two-year program to become a PCP. As well, Ms. Bowes asserted that there have been significant changes to regulations affecting the ambulance service industry in this province since 2010.

[63] While it was not established that the judge's reference was to *Chidley*, it was an error of law for the judge to consider evidence in an unrelated prior case in his determination of whether income should be imputed to Ms. Bowes (*R. v. Hamilton*, [2004] O.J. No. 3252, 72 O.R. (3d) 1, at paras. 119-124 (Ont. C.A.), citing *R. v. R.D.S.*, [1997] 3 S.C.R. 484, at paras. 13, 129, 150 (S.C.C.)).

[64] The judge's misinterpretation of the notation on the record of employment and reliance upon evidence not before the court were errors that led him to conclude that grounds had been established for the imputation of $30,000 in income to Ms. Bowes. His errors therefore had an impact upon the child support award. The identified errors entitle this Court to replace the judge's decision with its own.

Issue 3 - *In Light of the Errors, was the Child Support Order Appropriate?*

The Judicially Endorsed Approach

[65] "When under-employment or unemployment is the reason why income is sought to be imputed, the reasonableness of being under or unemployed becomes the issue" (*Wiscombe v. Wiscombe*, 2018 NLCA 36, at para. 47, citing *Drygala*, at para. 45; see also *Child Support Guidelines in Canada*, at 183-184).

[66] Ms. Bowes had experienced a *bona fide* change in her career path as a result of an involuntary loss of her position with Fewer's Ambulance Service. Her decision not to retrain as a PCP was reasonable since she would have been without income for the two years required to retrain and there was no evidence suggesting that she could work while training. Her decision to retrain as a paralegal was also reasonable particularly since during this course of study she

suffered no reduction in income. The evidence did not suggest that her career change would not, in time, enable Ms. Bowes to meet her financial obligations to her children or provide greater financial security in the long run (*Gibson v. Gibson*, 2011 ONSC 4406).

[67] Upon graduation, her funding came to an abrupt halt but she was actively seeking employment in her new field. Despite completion of her work term and multiple job applications in the period December 2019 to March 2020, she had not been successful in securing employment as a paralegal. Unlike the facts in *Corcios v. Burgos*, 2011 ONSC 3326, and *Speirs v. Speirs*, 2011 ONSC 3712, her efforts could not be characterized as meagre.

[68] The evidence as a whole supported the conclusion that the loss of Ms. Bowes' income was not unreasonable in the circumstances. While the judge properly recognized that Ms. Bowes held an under-graduate degree, was an experienced EMR and had recently completed her paralegal studies, "insufficient time [had] passed to permit a determination to be made whether there [had] been a significant and long lasting change of income …" (*Child Support Guidelines in Canada*, at 184; see also *Clark v. Clark*, 2010 ONSC 3761).

[69] There was no evidence to suggest either that Ms. Bowes had a history of avoiding her responsibility for child support payments, that she had denied any reasonable offer of employment or that she was content to remain unemployed.

[70] The facts of this case are in stark contrast to those in *Duffy* where the husband had made a career decision resulting in lower income, had not dedicated his efforts to the area of his training, had made poor business decisions and made capital investments instead of creating an income stream. On these facts Mr. Duffy's decisions were characterized by the trial judge as unilateral, voluntary and without regard to his legal obligations to his children (*Duffy v. Duffy*, 2008 NLUFC 30, 284 Nfld. & P.E.I.R. 83, at paras. 123-125, varied as to quantum only in 2009 NLCA 48).

[71] On the facts of this case, the first step of the judicially endorsed analysis to section 19(1)(a) was not satisfied. Mr. Bowes had not established that Ms. Bowes was intentionally underemployed or unemployed. In these circumstances the onus did not shift to Ms. Bowes to establish either that needs of a child or her own reasonable education or health needs provided an exception (step 2). Further, while unnecessary to state in the circumstances, if Ms. Bowes could not establish a statutory exception, the exercise of discretion (step 3) would require

consideration of factors beyond the two referenced by the judge (her education and experience).

Terms of the Order

[72] As an emergency interim application, in addition to quantum, this case required consideration of:

(a) A reasonable period of time to allow Ms. Bowes to secure employment; and

(b) The conditions (if any) that should be contained in the Order.

[73] Ms. Bowes' course of study had ended on December 23, 2019. The Christmas season that followed would not represent an ideal time for Ms. Bowes to obtain interviews for paralegal positions as businesses reduced their hours or closed for the holidays. Her first real opportunity would have been in the early days of January 2020.

[74] Further in light of Ms. Bowes' affidavit evidence supporting her job search, it was premature and unreasonable on March 5, 2020 to effectively declare Ms. Bowes' efforts to obtain employment as a paralegal as futile and require instead that she take minimum wage employment or revert to a position as an EMR II (if such a position was available).

[75] It would have been reasonable to allow Ms. Bowes more time to devote her efforts to finding employment in her new field and ultimately make her own determinations on whether this was feasible and if she should seek another source of income in the interim.

[76] It would also have been fair to both parties to require that Ms. Bowes notify Mr. Bowes immediately on securing employment, advise him of all income (of any form) received, provide him with relevant information on her employment, and require the parties to adjust the payment of child support by consent if possible.

[77] Unlike the applications judge, this Court is now aware of the effect of the world-wide COVID-19 pandemic. It resulted in a declaration by the Province of a state of emergency in mid-March 2020 which negatively impacted employment opportunities in many sectors of the economy and presented enhanced risks to human health for workers in essential services. It is a fact that

cannot be ignored in the assessment of the reasonableness of Ms. Bowes' efforts to obtain work and her ability to work prior to November 2020.

[78] This Court is now aware that Ms. Bowes did not obtain employment as a paralegal until November 2020. With the benefit of this fresh evidence this Court is in a position to make an Order that reflects the parties' actual circumstances in the period February 1, 2020 to November 2020.

Quantification of Child Support

[79] As to quantum, Ms. Bowes should have been awarded child support on the basis of the best evidence of the parties' respective incomes at the time of the hearing. Ms. Bowes had no earnings and it was an error to consider her spousal support as income for purposes of child support.

[80] Section 3(a), Sch. III, of the *Federal Child Support Guidelines*, SOR/97-175, states:

> "3. To calculate income for the purposes of determining an amount under an applicable table, deduct
>
> (a) the spousal support received from the other spouse."

[81] This was recently confirmed by the Ontario Court of Appeal in *Mudronja v. Mudronja,* 2020 ONCA 569, at paras. 17-18.

[82] The best evidence of Mr. Bowes' annual income at the time of the hearing was (as the judge found) $94,506.

[83] The correct incomes to utilize for purposes of the calculation under the *Guidelines* were $0 for Ms. Bowes and $94,506 for Mr. Bowes; these incomes warrant a child support award of $1,765 per month (see Schedule A).

Date of Award

[84] Varying a child support award effective on the date of the material change in circumstances or the date of notice of the material change to the opposing party is consistent with both the statutory obligation imposed on each parent (to support their children commensurate with their income) and with principles of fairness (*D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, at paras. 68 and 71).

[85] The material change in this case occurred after Ms. Bowes' received her last funding payment in January 2020 and Mr. Bowes had notice of the change in late January when he was served with the application. The commencement date should therefore be February 1, 2020.

Effect of section 9 of the Guidelines

[86] A final issue raised by Ms. Bowes respecting the calculation of the child support is her assertion that the judge erred in failing to apply the principles endorsed in *Contino v. Leonelli-Contino,* 2005 SCC 63, [2005] 3 S.C.R. 217, respecting section 9 of the *Guidelines*.

[87] In *Contino*, the Court explained that when the federal government decided in 1997 to adopt the *Child Support Guidelines* it had to "choose between different formulae and design a system that would be adapted to the Canadian context" (para. 1).

[88] *Contino*, at para. 3, explained that child support in shared custody situations was addressed in section 9 of the *Guidelines* which states*:*

> 9. 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.

[89] *Contino* described the difficulties associated with section 9:

> [4] The application of the factors under s. 9 of the Guidelines have proven to pose serious difficulties. The problems have been addressed in terms of fairness. As mentioned by professor C. Rogerson in her 1998 article "Child Support Under the Guidelines in Cases of Split and Shared Custody" (1998), 15 *Can. J. Fam. L.* 11, at p. 20:
>
> > Pushing in favour of some adjustment is a concern for fair and consistent treatment of payors who incur increased expenses during the time they spend with the child. There are two dimensions to the fairness claim. The first is fairness between the payor and the support recipient, who is arguably being relieved of some costs assumed by the payor. The second is fair and consistent treatment of the payor as compared to payors at the same income level who

> may not be spending any money directly on their children apart from the payment of child support.
>
> But then adjustments are hard to evaluate. More time spent with a child may not involve increased spending or significant savings for the other parent. Where there is a significant disparity of incomes, a new formula can mean a drastic change in the amount of support for the lower-income parent, who was previously the custodial parent, and exacerbate the differences in standard of living in the two households. There is also a concern that shared custody can entail more cost in duplication of services and leave less money for support.

[90] Little time need be spent on this ground of appeal. It would be rare that a hearing on an interim emergency application to vary child support would provide an appropriate opportunity for a judge to evaluate whether an adjustment to child support was warranted to account for the factors addressed in section 9 of the *Guidelines.* A final hearing on the Application to Vary would be the appropriate opportunity to consider these factors.

[91] In this case there was no evidence to assist the judge in appreciating whether either parent had experienced increased spending or significant savings as a result of the shared custody arrangement for the two youngest boys.

[92] Without an evidentiary basis for the factors expressed in section 9(a)-(c) of the *Guidelines*, it was appropriate for the judge to rely upon the common 'set-off' approach to calculation of child support without adjustment.

Spousal Support/Related Issues

[93] Ms. Bowes' application did not seek to vary spousal support and as a result Mr. Bowes' obligation to pay $370 per month (under the July 6, 2017 Final Support Order) remains in place.

[94] Related issues (including the effect of this Interim Order on the parties' December 12, 2019 Special Expenses Order) should be addressed in a final Order following a hearing in which the matters are meaningfully addressed.

CONCLUSION

[95] For these reasons I would allow the appeal and replace the Order under appeal with the following order:

1. The Respondent shall pay to the Appellant as interim child support for the five children of the marriage, the sum of $1,765 on the 1st day of each month, from February, 2020 to and including November, 2020.

2. Within 30 days of this Order, the Appellant is required to advise the Respondent of any income (employment or otherwise) she received in the period February 1, 2020 and November 30, 2020 and advise the Respondent of the terms of any employment she accepted.

3. Any adjustments to:

   (a) this Interim Child Support Order; and

   (b) the December 12, 2019 Special Expenses Order.

   relative to changes in Ms. Bowes' income after February 1, 2020 shall be addressed in a final hearing.

_____

G. D. Butler J.A.

I concur: _____

L. R. Hoegg J.A.

I concur: _____

W. H. Goodridge J.A.

Schedule "A"

DIVORCEMATE SOFTWARE

Tools One 2019
bowes: Calculation 1
Prepared by:
January 5 2021

Calculation Input	Annual $
Payor	*Male, 0, Resident of NL*
Income	
Employment income	94,506
Recipient	*Female, 0, Resident of NL*
No information	

Children	Age	Lives with	Table Amt	Claimed by
Child 1	16	Payor	Yes	Payor
Child 2	14	Recipient	Yes	Recipient
Child 3	18	Payor	Yes	Payor
Child 4	12	Shared	Yes	Recipient
Child 5	10	Shared	Yes	Recipient

Youngest child finishes high school 8 years from the date of separation.

Dependant credit claimed by both parents.

Child Support Guidelines (CSG)	Monthly $	
	Payor	Recipient
Annual Guidelines Income	94,506	0
CSG Table Amount (current)	1,765	0
Child Support (Table)	**1,765**	**0**

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