Citation: Horbas v Horbas, 2020 MBCA 34 Date: 20200318
Docket: AF19-30-09238

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Diana M. Cameron
Madam Justice Lori T. Spivak

B E T W E E N :

MELISSA LINETTE HORBAS	)	***T. P. Beley***
	)	*for the Appellant*
	)	
(Petitioner) Appellant	)	***C. C. Santos***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
GARY CHARLES STEVEN HORBAS	)	***October 22, 2019***
	)	
	)	*Judgment delivered:*
(Respondent) Respondent	)	***March 18, 2020***

SPIVAK JA

[1] This is an appeal by the petitioner (the wife) of the trial judge's decision under the *Divorce Act*, RSC 1985, c 3. The trial judge ordered that the parties have joint legal custody of their children with shared physical care and control and set the annual income of the respondent (the husband) for child support purposes at $52,000 on both a retroactive and go-forward basis.

[2] A central issue in this appeal is whether the trial judge erred in declining to impute income to the husband because of intentional underemployment when he left employment out of province in the pipeline industry to work locally at a reduced income to spend more time with his children.

Background

[3] The parties began living together in Winnipeg in 2002 and married on February 11, 2005. They have three children; a son born November 18, 2006; a daughter born November 8, 2008; and a daughter born February 14, 2011. They separated on June 17, 2016.

[4] During cohabitation, the wife was a civilian employee of the Canadian Armed Forces and the husband was employed in the pipeline industry where he had been working since he was a young man. In 2007, the parties relocated to the Edmonton region as the wife was promoted to another job with the Canadian Armed Forces and the husband would be closer to Alberta worksites in the pipeline industry.

[5] In 2010, the parties decided to return to Manitoba and moved into a house in West St. Paul, which they had started building some years before. By that point, two of their children were born and the wife left her employment with the Canadian Armed Forces to become a full-time, stay-at-home mother. The wife's income in 2009 and 2010 was in the range of $50,000. Beginning in 2012, she earned some nominal income from a self-employed venture. In 2015 and 2016, she worked for her brother in a pet-grooming business, earning approximately $12,000 per year. Starting in 2017, she worked cleaning houses, earning between $800 and $1,200 per month less the cost of cleaning supplies and car expenses.

[6] From 2010 until 2015, the husband continued to work in the pipeline industry at steadily increasing income and responsibilities. He worked for a number of different companies as a tie-in foreman, general labourer, boom operator, assistant superintendent and superintendent. His employment

required him to be away from Manitoba on different contracts for weeks or months at a time. His last pipeline job outside of Manitoba was in 2015 as a superintendent with Michels Canada. There is evidence that, some months before separation, the parties discussed the husband leaving his employment at Michels and pursuing employment locally to work on their marriage.

[7] The husband's line 150 income on his income tax returns for the three years prior to separation was:

2013 - $232,360
2014 - $347,270
2015 - $378,174

As well, in 2013 and 2014, the husband's Alberta corporation (of which he was the sole owner) received consulting fees of $101,115 and $87,333.

[8] Following his departure from Michels Canada in December 2015, the husband sought work in Manitoba. In 2016, he worked for Robert B. Somerville Co. Limited (Somerville) as a labourer for a local pipeline construction project for about two months and then as a labourer for Bird Construction Company for several weeks. His income in 2016 was $62,124, which consisted of a bonus of $45,000 from Michels Canada for his work in 2015, $2,952 from Bird Construction Company and $14,149 from Somerville. In or about April 2017, the husband secured part-time employment with Manitoba Hydro as a gas meter reader earning approximately $18,113. This was his only job that year. In 2018, he obtained a second seasonal job with Manitoba Hydro as a gas pipeline inspector. When he was not working as a gas pipeline inspector, he would revert to full-time meter reading. He earned $18.69 per hour as a meter reader and $22.36 per hour as a gas pipeline

inspector. When applying for a mortgage in October 2017 (the mortgage application), the husband indicated that he had two employers, Michels Canada and Manitoba Hydro, and that his income was $4,333 per month.

[9] In the summer of 2016 following the separation, the parties shared care and control of the children on a 2-2-3 rotating basis. In September 2016, the care and control regime changed to the husband having every second weekend with weekday visits and shortly thereafter into every second weekend and one weekday overnight.

[10] At trial, the husband sought shared custody of the children, which the wife opposed. The wife submitted that income be imputed to the husband in the amount of $300,000, consistent with his previous level of earnings. In support of imputation, she argued that the husband was not credible in regards to his employment situation and was attempting to punish her financially for leaving him.

The Trial Judge's Decision

[11] The trial judge viewed the parties as two good parents who exaggerated the criticism of the other. He noted that the author of the court-directed brief consultation report regarding their son was of the opinion that the children would benefit from regular, frequent contact with both parents. In ordering joint custody and a shared arrangement, he concluded, "I see no reason why maximized contact is not appropriate in this case."

[12] In rejecting the wife's request to impute income, the trial judge indicated that the real question was the reasonableness of the husband's decision to pursue local employment taking into account all of the

circumstances. He found the husband's decision to prioritise his relationship with his children and pursue local employment to be reasonable. He stated:

> In this case, the spouses had agreed to a course of action. [The wife] would stay home and be a primary care-giver, at least while the children were young, and would not be focused on her own career opportunities or future income. [The husband] would pursue great financial gain by his regular engagement in the pipeline industry.
>
> The key underpinning to this arrangement is that they would both sacrifice for their mutual benefit as a couple. The separation changed all that. [The husband] sees that his being away for extended times cost the parties their relationship and their marriage. Maybe he has determined that the sacrifice was not worth it. Now, having lost his wife, he does not want to lose his children. No court will criticize a parent for that prioritization. Under the circumstances, his pursuit of local employment is reasonable. The court declines to impose an imputation.

[13] The trial judge set the husband's income at $52,000 per annum on the basis that this was his anticipated full-time income with Manitoba Hydro going forward consistent with the figure the husband set out in the mortgage application.

Grounds of Appeal

[14] Although a number of grounds of appeal are raised, they can be distilled into two essential arguments advanced by the wife:

- that the trial judge erred in awarding joint custody and shared care and control and failing to take into account that the wife had been the children's primary caregiver and they were thriving in her care;

- that the trial judge erred in failing to impute income and finding that the husband acted reasonably and was not intentionally underemployed. She contends that part of that error was dismissing her argument that the husband lacked credibility.

Standard of Review

[15] The narrow scope for appellate review of support and custody orders is well established. Support orders are fact-based and discretionary in nature. The standard of review is highly deferential. As stated by the Supreme Court of Canada in *Hickey v Hickey*, [1999] 2 SCR 518, "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" (at para 11).

[16] This standard of review applies equally to appeals dealing with child custody (see *Van de Perre v Edwards*, 2001 SCC 60 at para 11) and has been adopted by this Court in a variety of family law cases (see *Horch v Horch*, 2017 MBCA 97).

[17] That said, as noted by Steel JA in *Delichte v Rogers*, 2013 MBCA 106, a judge's discretion is not unfettered and must be consistent with furtherance of the statutory purpose (at para 48):

> . . . [A] judge does not have an unfettered discretion to simply decide the case on the facts and his or her individual consideration of what a just outcome should be. The judge, in exercising his or her discretion, must apply the applicable principles of law set out in the statute and apply those principles to the facts in a manner consistent with the purpose of the statute. . . .

See also *Gosse v Sorensen-Gosse*, 2011 NLCA 58.

Custody and Control

[18] The wife argues that the trial judge erred in ordering joint custody and shared care and control as he failed to give appropriate weight to the *status quo* before the separation, which she asserts is the most important consideration in a custody case.

[19] The trial judge understood that the basis for the wife's position was that she had been the primary caregiver and the children continued to thrive in her care. His reasons demonstrate his concern for the best interests of the children. He considered all of the evidence, including the *status quo*, and the testimony regarding the husband's parenting ability. He quoted extensively from the brief consultation report referring to the author's view that the children would benefit from regular, frequent contact with both parents. He found that, while both parties could be faulted for certain things, their criticism of each other was exaggerated and they were both good parents. After considering all the evidence and weighing the factors, he concluded, "I see no reason why maximized contact is not appropriate in this case."

[20] As noted in *Van de Perre*, custody and access are inherently a matter of discretion. Absent reviewable error, weight is a matter for the trial judge. The trial judge's finding that the children's best interests required an order of joint custody and shared care and control was reasonably available to him to make on the evidence. I am not persuaded that an error in principle was made, that a significant misapprehension of the evidence occurred or that the custody order was clearly wrong. There is no basis for appellate intervention on this ground of appeal.

Imputation of Income

[21] Section 18(1)(a) of the Manitoba, *Child Support Guidelines Regulation*, Man Reg 58/98 (the Guidelines) provides that the court may impute such amount of income to a parent as it considers appropriate where a spouse is intentionally underemployed or unemployed. It states as follows:

> **Imputing income**
> **18(1)** The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child or by the reasonable educational or health needs of the parent.

[22] The objectives of the Guidelines are found in section 1:

> **Objectives**
> **1** The objectives of these guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they benefit from the financial means of both parents;
>
> (b) to reduce conflict and tension between parents by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of parents and children who are in similar circumstances.

[23] The primary focus of the Guidelines is to meet children's interests for financial support (see *Hunt v Smolis-Hunt*, 2001 ABCA 229).

Section 26.1(2) of the *Divorce Act*, which provides the power to make the Guidelines, speaks directly to the financial obligation on parents:

> **Principle**
> **26.1(2)** The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

[24] In Manitoba, the leading decision on imputing income is *Donovan v Donovan*, 2000 MBCA 80. A specific intent to evade child support obligations is not required nor is a finding of bad faith. The parent required to pay is intentionally underemployed if that parent chooses to earn less than he or she is capable of earning. Parents are still entitled to make decisions in relation to their career path so long as those decisions are reasonable at the time they are taken considering all the circumstances.

[25] Importantly, "the concept of reasonableness must be assessed in light of the joint ongoing legal obligations of the parents to maintain their children" (*Donovan* at para 20).

[26] In *Donovan*, the following principles were endorsed as relevant when determining whether income should be imputed (at para 21):

> . . .
>
> 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).
>
> 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under

> the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
>
> 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
>
> 4. Persistence in unremunerative employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[27] I will first deal with the wife's argument that the trial judge erred in failing to find that the husband was not credible and left the pipeline industry to punish her financially for leaving him. The trial judge acknowledged, as the wife contended, that the husband's vagueness about his ongoing relationship with Michels Canada and inaccurate description of his employment status in the mortgage application "do speak to credibility." Nonetheless, it is apparent from his reasons that he accepted that the husband pursued local employment because of a genuine desire to spend more time with his children. The trial judge was entitled to so find and committed no palpable and overriding error in doing so.

[28] In this case, there is no dispute that the husband was intentionally underemployed in the sense that he was capable of earning more income given his past level of earnings, but voluntarily reduced his income by taking local employment. Even where a parent is intentionally underemployed, the court may exercise its discretion not to impute income where the parent establishes the reasonableness of his or her decision (see *Duffy v Duffy*, 2009 NLCA 48; and Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2020* (Toronto: Irwin Law, 2020) at 180).

[29] Changing employment to avoid being regularly away for extended periods to spend more time with your children may well be reasonable. However, as noted in *Donovan*, that is not the relevant question. In *Donovan*, the Court agreed that the father's decision to retire as a police officer was reasonable, but stated that the relevant question was whether his present situation was one where income should be imputed. The Court upheld the motion judge's decision to impute income on the basis that the decision to become a screenwriter was not reasonable. Reasonableness is based on a number of factors including past income, the income-earning situation at present, and future capacity to earn.

[30] The fundamental question in this appeal is whether the trial judge erred in finding that it was reasonable for the husband to prioritise his relationship with his children and pursue local employment at a drastically reduced income level to be near them. While the trial judge reviewed the relevant principles applicable to the imputation of income, I agree with the wife that he erred in his conclusion that the husband acted reasonably by failing to give proper consideration to the parties' obligation to maintain and

support their children. This is particularly so in light of the onus on the husband to establish that reasonableness, as I will explain.

[31] A parent's arguments on imputation must ultimately be viewed from the perspective of the objectives of the Guidelines and, in this case, the objective of a fair standard of support. Illustrative of this approach are the comments of Monnin JA in *Sharpe v Sharpe*, 2004 MBCA 26. In denying an appeal from an imputation order, he stated (at para 18):

> . . . [T]he father's argument on this issue must be viewed from the perspective of the objectives of the *Guidelines* and more particularly, the objective set out in s. (1)(*a*) which states, "to establish a fair standard of support for children that ensures they continue to benefit from the financial means of both spouses after separation."

[32] In my view, the trial judge erred in principle in applying his discretion in a manner that was inconsistent with the primary objectives of the Guidelines (see *Delichte* at para 48). He limited his consideration to the husband's wish to be with his children and did not assess the reasonableness of the underemployment in light of the parents' obligation to ensure a fair standard of support. Of course, a parent's desire to spend more time with his or her children is something to be encouraged and valued, but that has to be balanced against the parent's obligation to provide financial support.

[33] Importantly in this case, the size of the decrease in income is a relevant factor to the reasonableness analysis (see *Sullivan v Mahoney*, 2018 ONSC 7211). Here, the income discrepancy was dramatic. The last three years before separation, the husband averaged income of about $375,000 and the trial judge found the husband's income to be $52,000.

[34] One of the striking aspects of this case is the lack of evidence by the husband regarding his income-earning situation. Indeed, once a party seeking the imputation of income presents the evidentiary basis suggesting a prima facie case for imputation of income (established here by the sheer drop in income), the onus shifts to the individual seeking to defend the income position he or she is taking (see Payne at page 175). It was the husband's onus to satisfy the Court that his present employment was reasonable given his work experience, his skills, his health, his age and his education (see *Steele v Koppanyi*, 2002 MBCA 60).

[35] In my view, the husband failed to satisfy the onus of establishing that it was reasonable for him to leave high-paying employment and accept a job locally earning drastically less given his past earnings, his work experience, his skills, his health, his age and his education. He provided no evidence of efforts to secure higher-income employment opportunities in Manitoba to maximise his earnings. In fact, there was evidence that he had worked on pipeline projects for Somerville in Manitoba in the past. As well, the husband earned $1,000 per day as a superintendent and $900 per day as an assistant superintendent at Michels Canada. There was no evidence as to whether Michels Canada could have accommodated different hours or a reduced work structure, to allow him to have sufficient and regular opportunity to see his children. There was no evidence that the husband explored with the wife any possible schedule of care and control which could have allowed him to continue this lucrative employment in the pipeline industry in some capacity and still have frequent contact with his children.

[36] This case has parallels with that of *Haskey v Haskey*, 2015 MBQB 129. There, the father was an oil field worker away for long periods of time

who wanted to spend more time with his children. Menzies J imputed income, noting (at paras 45, 47, 53):

> . . . [I]t is reasonable for someone to arrange their affairs to enable them to be able to be close to their children. Even if those arrangements result in a decrease in income, the decision would still be reasonable. However, not all changes in employment can be justified by the need to be available for the children.
>
> . . . There was no evidence that father attempted to arrange a schedule of care and control that would have allowed him to take advantage of his non-working days if he remained in the oil field. . . .
>
> I am not satisfied that the evidence establishes father could not have maintained his employment in the oil industry if he had wanted to and still had ample opportunity to see his children.

[37] The husband argues that the trial judge did not err, as the context for assessing the reasonableness of his decision was the parties' agreement, prior to their separation, that he would leave his employment at Michels Canada to work on the marriage. To begin with, the trial judge did not reach his conclusion on the basis of any such agreement. In any event, this does not establish the reasonableness of the underemployment for the reasons I have already outlined. As well, a parent cannot waive or bargain away the rights of their children to appropriate child support (see *Kopp v Kopp*, 2012 BCCA 140).

[38] Having determined that the trial judge erred in failing to find that the husband was intentionally underemployed within the meaning of section 18(1)(a) of the Guidelines, the next question is the level of income which this Court should impute. In my view, it should not be at the level of $300,000 as the wife contends. When imputing income based on intentional

underemployment, a court should consider what is reasonable and fair (see *Van Gool v Van Gool* (1998), 166 DLR (4th) 528 (BC CA); and *Duffy*). The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations. Case law has recognised that a relevant factor that can be taken into account includes parenting obligations (see *Bayliss v Bayliss*, [2000] MJ No 52; and *Keating v Keating*, 2017 ABCA 428). It would be unfair to impute to the husband an income that reflects the full amount of what he previously earned which required travelling often and for lengthy periods of time and would impact substantially on his ability to care for his children.

[39] It is trite law that the amount of income to be imputed must not be arbitrary. There must be a rational basis underlying the figure, and the exercise of the discretion must be grounded in the evidence (see *Drygala v Pauli* (2002), 219 DLR (4th) 319 (Ont CA)). However, the quantum by its nature will involve a degree of imprecision (see *Duffy*).

[40] As I previously mentioned, there is an absence of evidence concerning the husband's ability to work in the pipeline industry in some limited capacity or his job prospects in Manitoba at a higher-income level. Given the delay and cost involved, it is not reasonable to remit the matter back to the trial division for further evidence. In the circumstances, it is appropriate for this Court to do the best it can on the available evidence.

[41] There is evidence that, in the past, the husband worked in Winnipeg as a labourer on local pipeline projects for Somerville, which were relatively more lucrative than working for Manitoba Hydro. In 2014, his T4 income from Somerville was $10,517.76 for work from November 17 to

December 16, 2014. In 2015, he earned $9,625.77 for work for Somerville from February 3 to March 7, 2015. As I mentioned before, in 2016, the husband earned $14,149 working for Somerville for about eight weeks. He also worked for Bird Construction Company for a couple of weeks in 2016 earning $2,952. Extrapolating these earnings to a full year averages in the range of $100,000. I therefore consider it reasonable to order child support based on imputed income of $100,000.

[42] As for the matter of retroactive support, counsel have confirmed that if this Court were to impute income, which would change the child support payments, this would automatically affect the retroactive amount ordered by the trial judge. In other words, this is simply a calculation issue.

[43] Finally, I would add that, should the husband choose to work for a period of time outside of Manitoba, the Court would anticipate that the wife would be flexible and accommodating in granting other periods of care and control to make up for those time periods.

[44] If the parties cannot agree on the matter of costs, counsel are to advise the registrar within seven days of the release of this decision to make arrangements for further brief written submissions in this regard.

Spivak JA

I agree: Hamilton JA

I agree: Cameron JA