

ONTARIO COURT OF JUSTICE

B E T W E E N :

AMANDA HEWKO

Applicant

— AND —

DYLAN LARGEY

Respondent

Before Justice M.B. Pawagi

Heard on January 30, 2012

Reasons for Judgment released on February 10, 2012

Sherri D. Moss for the applicant

Robert Shawyer for the respondent

PAWAGI, J.:

1: NATURE OF CASE

[1] This is Mr. Largey's Motion to Change two final Orders; the first dated August 19, 2010 regarding child support and the second dated December 1, 2010 regarding babysitting expenses. The first Order was made on consent pursuant to Minutes of Settlement. It provided that Mr. Largey shall pay child support for the parties' then five-year-old son in the amount of \$211 per month commencing September 1, 2010, based on Mr. Largey's annual income of \$25,000 and Ms. Hewko's income of \$18,000. The second order was made on a default basis, Mr. Largey not appearing in court, and provided that Mr. Largey shall pay 60 per cent of the babysitting expenses based on the parties' respective incomes as noted in the first consent order. This worked out to Mr. Largey being ordered to pay \$3,180 for babysitting from February 2010 to December 2010 (which is 60 per cent of Ms. Hewko's babysitting expenses for that period of \$5,300); and \$318 per month commencing December 1, 2010 (which is 60 per cent of Ms. Hewko's monthly babysitting expenses of \$530).

2: MR. LARGEY'S POSITION

[2] Counsel for Mr. Largey argued that both the arrears and the ongoing child support and babysitting amounts ought to be lowered on the following grounds:

[3]

1. Mr. Largey made \$19,084 in 2010, not \$25,000.
2. Ms. Hewko made \$22,639 in 2010, not \$18,000.
3. Mr. Largey paid Ms. Hewko directly \$360 per month in child support from September 2007 to April 2010 (for a total of \$10,040). This overlaps by three months with the babysitting expenses he was ordered to pay (\$3,180 for February 2010 to December 1, 2010). Thus he should receive a credit toward babysitting expenses he owes.
4. Mr. Largey paid Ms. Hewko directly in the amount of \$1050 (five payments of \$211 per month) and should be credited with those payments.
5. The Family Responsibility Office garnished \$2,379 from his income tax refund and he should be credited with that amount.

3: MS. HEWKO'S POSITION

[4] Counsel for Ms. Hewko argued that the Motion to Change should be dismissed as Mr. Largey has failed to demonstrate a change in circumstances.

4: THE LAW

4.1: Test for Motion to Change

[5] The court may vary a child support order if the party seeking the variation demonstrates that there has been a change in circumstances and/or that there is evidence available now that was not available at the previous hearing. And any such variation shall be in accordance with the *Child Support Guidelines*.

[6] Subsection 37(2.1)(2.2) of the *Family Law Act*, R.S.O. 1990, c. F-3 as amended, states:

(2.1) *Powers of court: child support.* – In the case of an order for support of a child, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines or that evidence not available on the previous hearing has become available, the court may,

- (a) discharge, vary or suspend a term of the order, prospectively or retroactively;
- (b) relieve the respondent from the payment of part or all of the arrears or any interest due on them; and
- (c) make any other order for the support of a child that the court could make on an

application under section 33.

(2.2) Application of child support guidelines— A court making an order under subsection (2.1) shall do so in accordance with the child support guidelines.

The *Child Support Guidelines* set out what qualifies as a change in circumstance. It provides that where the previous order was made in accordance with the table, any change in circumstance that would result in a different order under the table qualifies.

Circumstances for variation

14. For the purposes of subsection 37 (2.2) of the Act and subsection 17 (4) of the *Divorce Act* (Canada), any one of the following constitutes a change of circumstances that gives rise to the making of a variation order:

1. In the case where the amount of child support includes a determination made in accordance with the table, any change in circumstances that would result in a different order for the support of a child or any provision thereof.
2. In the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either parent or spouse or of any child who is entitled to support.
3. In the case of an order made under the *Divorce Act* (Canada) before May 1, 1997, the coming into force of section 15.1 of that Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).
4. In the case of an order made under the Act, the coming into force of subsection 33 (11) of the Act. O. Reg. 391/97, s. 14; O. Reg. 446/01, s. 3.

4.2 Disclosure requirements

[7] The disclosure that is required from parties in child support cases is set out in several different places: Rule 13 of the *Family Law Rules*, s. 21 of the *Child Support Guidelines* and the forms themselves. Rule 13 sets out what disclosure is required when bringing a Motion to Change; namely a Financial Statement attaching income tax information for the past three years and proof of current income:

13(1) Financial Statement with Application, Answer or Motion — If an application, answer or motion contains a claim for support, a property claim, or a claim for exclusive possession of the matrimonial home and its contents,

(a) The party making the claim shall serve and file a financial statement (Form 13 of 13.1) with the document that contains the claim.

13(6) Full Disclosure in Financial Statement — A party who serves and files a financial statement shall,

(a) Make full and frank disclosure of the party's financial situation;

- (b) Attach any documents to prove the party's income that the financial statement requires;
- (c) Follow the instructions set out in the form; and
- (d) Fully complete all portions of the statement.

[8] The instructions on the form are clear. Paragraph 3 requires the attaching of year-to-date income from all sources which for a self-employed person is set out as "statement of income and expenses/professional activities." Paragraph 5 requires the attaching of copies of personal income tax returns for each of the past three taxation years, including any materials that were filed with the returns, and a copy of the notices of assessment and reassessment for each of the past three years (or where notices of assessment and reassessment are not available, an income and deductions printout from the Canada Revenue Agency).

[9] Section 21 of the *Child Support Guidelines* sets out what must be filed by a party applying for child support and whose income information is necessary to determine the amount of support (and by virtue of Section 2(4) applies to the varying of child support orders):

Obligation of applicant

21. (1) A parent or spouse who is applying for an order for the support of a child and whose income information is necessary to determine the amount of the order must include with the application,

- (a) a copy of every personal income tax return filed by the parent or spouse including any materials that were filed with the return for each of the three most recent taxation years;
- (b) a copy of every notice of assessment and reassessment issued to the parent or spouse for each of the three most recent taxation years;
- (c) where the parent or spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime, or, where such a statement is not provided by the employer, a letter from the parent's or spouse's employer setting out that information including the parent's or spouse's rate of annual salary or remuneration;
- (d) where the parent or spouse is self-employed, for the three most recent taxation years,
 - (i) the financial statements of the parent's or spouse's business or professional practice, other than a partnership, and
 - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the parent or spouse does not deal at arm's length;
- (e) where the parent or spouse is a partner in a partnership, confirmation of the parent's or spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;
- (f) where the parent or spouse controls a corporation, for its three most recent taxation years,

- (i) the financial statements of the corporation and its subsidiaries, and
- (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;
- (g) where the parent or spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements; and
- (h) in addition to any information that must be included under clauses (c) to (g), where the parent or spouse receives income from employment insurance, social assistance, a pension, workers compensation, disability payments or any other source, the most recent statement of income indicating the total amount of income from the applicable source during the current year or, if such a statement is not provided, a letter from the appropriate authority stating the required information. O. Reg. 391/97, s. 21 (1); O. Reg. 446/01, s. 7; O. Reg. 25/10, s. 5.

5: ANALYSIS

[10] Mr. Largey brings his motion to change on two grounds: one, that he made payments for which he should be given credit and two, that there has been a change of circumstance in that his income is not \$25,000 but rather is only \$19,000 and thus both his child support payments and his contributions to babysitting expenses should be decreased.

5.1: Past payments

5.1(a): Credit for past payments toward babysitting expenses

[11] Mr. Largey does not dispute the amount of babysitting expenses incurred by Ms. Hewko. He just seeks credit for payments he says he made towards these expenses. He filed with the court a receipt dated May 7, 2010 wherein Ms. Hewko acknowledges that she received from him \$360 per month from September 2007 to April 2010 for a total of \$10,040 in child support during that period. Counsel for Mr. Largey argued that since the court ordered child support was only for \$211 per month the difference between \$360 and \$211 should be credited toward what he owes for babysitting expenses for the period of time where the order for retroactive babysitting expenses overlaps with the period he paid \$360 per month. Mr. Largey was not able to provide this receipt to the court on December 1, 2010 when the order regarding babysitting expenses was made, as he states he made a mistake about the court date.

[12] Assuming, without deciding, that this receipt qualifies as evidence that was unavailable at the previous hearing, the question is, does it prove that he made payments toward babysitting expenses?

[13] Ms. Hewko's position is that the \$360 per month was for child support, not babysitting expenses. I find that her position is supported by the following:

1. The receipt itself refers to the payments as "child support" not babysitting expenses;
2. The Order that Mr. Largey pay \$211 per month in child support was made after the period of time covered by the receipt; and
3. The period of time covered by the receipt is the same as the time covered by a separation agreement signed by both parties on July 9, 2007 wherein they agreed that Mr. Largey would pay child support of \$382 per month starting August 1, 2007 based on his income of \$41,600, which is the table amount for one child.

[14] Thus, I find that Mr. Hewko has not demonstrated that he paid any money toward babysitting expenses prior to the December 1, 2010 order being made.

5.1(b): Credit for direct payments for child support

[15] Mr. Largey seeks credit for five payments of \$211 that he claims he made directly to Ms. Hewko. He filed copies of receipts for seven payments signed by Ms. Hewko. Ms. Hewko filed a Director's Statement of Arrears dated July 5, 2011 which gives him credit for three payments acknowledged by Ms. Hewko. There is some duplication between the receipts themselves and between the receipts and the acknowledgements on the Statement of Arrears.

[16] I note the following problems with the receipts: The typed receipt signed by both parties on November 5, 2010 for two payments (September and October 2010), has a handwritten third payment (November 2010) inserted in it that is not initialized by the parties. Another receipt (a handwritten one by Ms. Hewko) has the date as 02/04/11 and the signature is not clear on the photocopy. If the date is taken as day/month/year that would be April 2, 2011. But Mr. Largey's affidavit sworn May 27, 2011, states that he continued to make child support payments directly to the Applicant until "March 2011," thus it seems it cannot be a receipt for April 2011. However, if the date is read as month/day/year that would be February 4, 2011 which is a payment she has already acknowledged and he has received credit for according to the Director's Statement of Arrears.

[17] Furthermore, no up to date Director's Statement of Arrears was provided thus I do not know if he has been given credit already for any other payments.

[18] For these reasons I find that Mr. Largey has not demonstrated he should be given

additional credit for any direct payments.

5.1(c): Credit for income tax garnishment

[19] Mr. Largey seeks a credit of \$2,379 for an income tax garnishment but provides no evidence to support his claim. Such garnishments by the Family Responsibility Office are typically contained in the Director's Statement of Arrears but, as mentioned above, no up to date Statement of Arrears was provided to the court. I find Mr. Largey has not demonstrated that he was subjected to an income tax garnishment for which he was not given credit.

5.2 Change in Mr. Largey's income

[20] Counsel for Mr. Largey argued that Mr. Largey has demonstrated a change in circumstance by showing that his income for 2010 was \$19,040, not \$25,000 and that, along with the fact that Ms. Hewko's income was higher, means that his child support and contributions to babysitting expenses should be decreased dating back to the previous orders themselves.

[21] Mr. Largey's evidence regarding his income was the following:

1. His Financial Statement sworn June 16, 2011, showing \$19,084 as his "self-employment income" for 2010.
2. His 2010 Tax Return Summary showing \$19,084.81 as "employment income".
3. His T1 General 2009 showing his gross business income to be \$16,133 and his net business income to be \$9,258.55
4. T1 General 2008 showing his gross business income to be \$23,500.95 and his net business income to be \$11,500.95.

[22] Mr. Largey's financial disclosure is completely inadequate. Full income tax returns (including statement of business activities) were not provided for any of the last three years, leaving the court unable to determine the reasonableness of his business expenses. And there is a discrepancy between his Financial Statement and his 2010 Tax Return Summary regarding whether the \$19,084 is employment income or self-employment income.

[23] Section 19(2) of the *Child Support Guidelines* provides that "the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act (Canada)".

[24] The case law is clear that a self-employed person has the onus of demonstrating clearly the basis of his or her gross and net income, including demonstrating that the deduc-

tions claimed from gross income should reasonably be taken into account in the determination of income for child support purposes: *Whelan v. O'Connor*, [2006] O.J. No. 1660 (Ont. S.C.J.); *Meade v. Meade*, [2002] O.J. No. 3155 (Ont. S.C.J.).

[25] Furthermore, Mr. Largey has filed no information whatsoever regarding his income in 2011 and 2012, though he continues to operate his business.

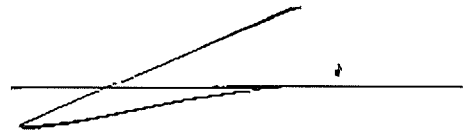
[26] There is no evidence upon which the court could find that there has been a change in circumstances and consequently Mr. Largey's Motion to Change is dismissed.

[27] Counsel for Ms. Hewko's submissions on the motion included a request for costs, for \$2,000 for the December 5, 2011 appearance (which had been reserved) when the hearing was adjourned to give Mr. Largey an opportunity to serve and file additional financial disclosure, and \$1,500 for the hearing of the Motion to Change. I find that Ms. Hewko was entirely the successful party on the hearing and that Mr. Largey acted unreasonably in bringing a Motion to Change child support without the required financial disclosure and that costs should be awarded as requested.

6: ORDER

1. Mr. Largey's Motion to Change is dismissed.
2. Mr. Largey shall pay costs in the amount of \$3,500, to be offset by the costs Ms. Hewko was ordered to pay on July 4, 2011 of \$800, with the result that Mr. Largey shall pay costs in the amount of \$2,700.

Released: February 10, 2012



Justice M.B. Pawagi