

CITATION: Seigel-Nudelman v. Nudelman, 2020 ONSC 7252
NEWMARKET COURT FILE NO.: FC-19-57778-00
DATE: 20201125

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marla Seigel-Nudelman, Applicant

AND:

David Stephen Nudelman, Respondent

BEFORE: The Honourable Justice J. Bruhn

COUNSEL: David Anthony, Counsel for the Applicant

Glenn Ridler, Counsel for the Respondent

HEARD: November 18, 2020

RULING ON MOTION

RELIEF SOUGHT

- [1] The Respondent brings a Motion to Change base child support from \$1,614 to \$577 per month and spousal support from \$4,646 to \$1,189 per month commencing July 1, 2020. The request is based on a reduction in the Respondent's income from \$193,754 to his estimated 2020 income of \$62,110. The Applicant's income is \$0.00 and the parties' child, Zackary Nudelman, born January 8, 2006 ("Zackary") resides primarily with the Applicant.
- [2] The Respondent is also requesting that support be reviewed and adjusted in 2021 based on his 2020 income, with the adjusted amount of support commencing on July 1, 2021. The Respondent is requesting that these orders be made on a without prejudice basis to either party's right to seek a retroactive variation to the amount of base child support or spousal support. The Respondent is also seeking his costs of this motion.
- [3] The Applicant asks that the Respondent's motion either be dismissed with costs payable to the Applicant or adjourned with the issue of s. 7 expenses to be dealt with at the same time; a timetable for the delivery of documents; and a request that costs of the motion be reserved. Finally, the Applicant is requesting an Order compelling the Respondent to answer the Applicant's Request for Information dated November 4, 2020.

BACKGROUND

- [4] The parties were married on August 29, 2004 and separated on December 22, 2018.

- [5] There is one child of the relationship, namely Zackary Nudelman, born January 8, 2006 (“Zackary”). Zackary is autistic. There is a dispute between the parties as to the nature and extent of Zackary’s challenges; however they agree that he is a very intelligent young man. Zackary attends Everest Academy, a private school for student-athletes, where he is enrolled in sports such as hockey, lacrosse and rugby. He also participates in therapy which is paid for privately.
- [6] A temporary Order for support was made on July 16, 2019 (“the July 16, 2019 Order”). The Order was on consent, without prejudice to either party. The July 16, 2019 Order provides that the Respondent shall pay the Applicant base child support in the amount of \$1,614 per month and spousal support in the amount of \$4,646 per month based on the Respondent’s 2018 income of \$193,754, the Applicant’s income of \$0.00, and Zackary residing primarily with the Applicant. It is this Order that the Respondent seeks to vary.
- [7] There was also a Consent dated January 10, 2020 (which Consent has not been incorporated into an Order) providing, among other things, that on a temporary basis the parties shall share Zackary’s s. 7 expenses on a 60/40 basis, with the Respondent paying 60% and the Applicant paying 40%. The agreed upon s. 7 expenses include Zackary’s tuition, uniform and mandatory books at Everest Academy as well as a Developmental Autism Program, counselling, reintegration therapy and extracurricular sports and other reasonable and necessary expenses agreed to by the parties in advance. The issue of a possible variation of the s. 7 expenses is not before the Court today.
- [8] The Respondent is an employee of Harkel Office Furniture Limited (“Harkel”), where he sells office furniture. The Respondent has been employed by Harkel since August 2005 and has been a fully commissioned employee since July 2006. The Respondent states that he receives two incentives/bonuses per year, of \$5,000 each, if he reaches certain sales targets.
- [9] The Respondent’s income, as set out in his Notices of Assessment, has been as follows:
- | | |
|--------|-----------|
| 2017 - | \$200,144 |
| 2018 - | \$193,754 |
| 2019 - | \$178,603 |
- [10] The Respondent states that there has been a significant reduction in his income in 2020 and that this change is not voluntary but rather is due to the Covid-19 pandemic; currently companies are not buying new office furniture as they had in the past.
- [11] The accounting manager at Harkel, Sujatha Ratneswaran, states that the Covid-19 pandemic has had a tremendous impact on the office world which has caused a significant decrease in the Respondent’s income as well as other sales representatives at Harkel.

- [12] The Respondent advises that due to the reduction in his income, he is unable to pay support as provided in the July 16, 2019 Order and he has been unable to contribute to Zackary's s. 7 expenses as agreed in January 2020. Significant arrears have arisen. The Applicant received \$29,666.05 in June 2020 by way of a diversion of the Respondent's 2019 income tax refund towards the arrears of base child support and spousal support. There have been no payments to the arrears of s. 7 expenses, as further provided below. The arrears of base child support and spousal support currently stand at \$21,421.92.
- [13] The Respondent estimates his 2020 income at \$62,110, based on his paystub for the period ending November 6, 2020. It is this income on which the Respondent seeks to base his current base child support and spousal support obligations.
- [14] The Respondent states that he is hopeful that his income will get back to past levels, however he has no idea when or if that will happen, but he will continue to do his best in the meantime.
- [15] The Respondent states that he has not addressed the s. 7 issue in this motion as he believes it will require a one hour motion of its own, particularly with respect to Zackary's private school costs for Everest Academy.
- [16] The Respondent argues that his recent paystub is the most up-to-date and reliable income information available for him and that it would be unjust not to vary the support in accordance with that income and, further, it would be unjust to vary the support using his 2019 income.
- [17] The Respondent points out that a trial of this matter is not imminent. The parties have not yet attended a Settlement Conference and there are significant parenting issues to be resolved in addition to the support issues.
- [18] The Applicant acknowledges that there may have been a reduction in the Respondent's employment income, however, she takes the position that the disclosure provided by the Respondent to date is insufficient to determine his financial means and his ability to pay support.
- [19] The Applicant points out that there is no evidence from Mr. Ratneswaran or Harkel as to how many of Harkel's other sales employees have suffered similar decreases in income to that claimed by the Respondent. There is also no evidence as to whether the reduction in the Respondent's employment income is voluntary (i.e. due to a reduction in the Respondent's work hours). The Applicant believes that the Respondent is intentionally underemployed and points out that he has provided no evidence of his efforts to increase his income.
- [20] The Applicant also states that the Respondent's employment income does not accurately reflect his current financial means or ability to pay support. The Applicant advises that the Respondent has historically earned cash income. In addition the Respondent's parents are financing his lifestyle (for example by paying for his housing and his vehicle) thereby enabling him to reduce his employment income while still continuing to live

comfortably. Finally, the Applicant states that the Respondent appears to be making withdrawals from an RRSP that is not reflected on his Financial Statement.

- [21] The Applicant made requests for further disclosure from the Respondent on July 29, 2020 and October 7, 2020, most of which was not provided. What was provided came in the context of the Respondent's motion materials. The Applicant served a Request for Information on the Respondent on November 4, 2020. This Request has not been responded to, except to the extent that an updated sworn Financial Statement has been provided. The Respondent states that the requests for disclosure made by the Applicant are either irrelevant or disproportionate to the issue of an adjustment to ongoing support. The Applicant states that this information and documentation is necessary to assess the Respondent's true financial means and that proceeding with this motion without it would be unfair to the Applicant.
- [22] The Applicant states that if the Court reduces the Respondent's support payments as requested, she will not be able to meet Zackary's basic needs or her own, and she certainly will not be able to pay for Zackary's s. 7 expenses, including his private school and his therapy, which are critical to his development and safety.
- [23] The Applicant also states that the Respondent has a poor payment history for base child support and spousal support and, as noted above, has not made any payments to Zackary's s. 7 expenses since the January 2020 Consent.
- [24] The Applicant takes the position that the Court should not proceed on a piecemeal basis but rather should resolve all issues (base child support, add-ons, and spousal support) together because they impact one another.

ANALYSIS

- [25] The Respondent is seeking to vary a temporary Order. As Justice Gauthier stated in *Innocente v. Innocente*, 2014 ONSC 7082 (CanLII) "Although the variation of interim orders should be an infrequent event, it is not beyond the jurisdiction of a superior court, where the circumstances justify it". Justice Gauthier noted that those circumstances would need to be exceptional:
- (a) to prevent undue hardship;
 - (b) where the failure to make the interim order would be incongruous or absurd;
 - or
 - (c) where there is a pressing and immediate urgency.
- [26] The jurisdiction to vary the support Order in this case is found at s. 17 of the *Divorce Act* which states as follows:
- (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; ...

...

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change of conditions, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and in making the variation order, the court shall take that change into consideration.

...

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

- [27] I am therefore satisfied that I have the jurisdiction to vary the July 16, 2019 Order if I find that there has been a material change in the Respondent's ability to pay support and that not varying the support would create undue hardship, would be incongruous or absurd, or where there is pressing and immediate urgency to do so.
- [28] The onus is on the Respondent to establish a material change in circumstances since the last support Order was made.
- [29] The Respondent relies on his recent pay statement as well as an Affidavit from the accounting manager at his place of employment. Although it would certainly appear that there has been a significant reduction in the Respondent's income, it is not clear that this reduction is involuntary, or entirely involuntary. Even if the reduction in employment income is completely involuntary, that does not fully answer the question of the Respondent's financial means or his ability to pay support. Although the interim support Order is based on the Respondent's Line 150 income and not on an imputed income, that does not foreclose the argument of imputation at this point, as the July 16, 2019 Order was made on a temporary, without prejudice basis on the consent of the parties. There was no finding by the Court as to whether an imputation of income would have been appropriate.
- [30] More evidence is required to determine the Respondent's income for support purposes. For example, are the other salespeople at his place of employment experiencing similar reductions in their income? What were his hours of work, both in 2019 and in 2020? How is he supporting himself with the apparent reduction in his employment income? What cut-backs has he made in his own spending as a result of the apparent reduction in his income? What efforts has he been making to increase his income in the

meantime? The Respondent's bank account, investment account, credit card account and line of credit statements may be instructive in this regard.

- [31] The Applicant seeks an Order compelling the Respondent to comply with her Request for Information. Although the Applicant did not file a motion for this relief she did put the Respondent on notice that was seeking this relief in her Affidavit. Further, the Applicant requested part of this disclosure from the Respondent back in July 2020 and followed up in October 2020, however it was not provided. The Court is not in a position to fairly and justly adjudicate the support issues without a number of the items of disclosure requested by the Applicant. Pursuant to the primary objective of the *Family Law Rules* to deal with cases justly, including saving expense and time, I find that I have the authority to make an Order for the Respondent to comply with the Applicant's Request for Information and I will do so, as provided below.
- [32] The lack of more complete disclosure on the part of the Respondent is particularly troubling given his poor payment history. Even when the payor was earning \$178,603 in 2019, he was regularly in arrears of at least a few thousand and often in arrears of over \$10,000.
- [33] The very significant impacts that such a change in support would have on Zackary, in particular with respect to his schooling and therapy, also cause the Court to proceed with caution in the absence of full and complete disclosure.
- [34] For the reasons noted above, I am not satisfied on the evidence before me that the Respondent has met the onus of proving a material change in circumstances justifying a change to the July 16, 2019 support Order.
- [35] The Applicant also asked that the Respondent's motion be adjourned or dismissed because he was not dealing with s. 7 expenses at the same time as he was dealing with base child support and spousal support. While I do not agree that the issue of s. 7 expenses has to be dealt with at the same time as base child support and spousal support, I agree that it would be more efficient to do so, if possible within the time limits and page limits allowed.

ORDER

- [36] The Respondent's motion is dismissed, without prejudice to his right to file another motion after he has provided the disclosure requested in the Applicant's Request for Information dated November 4, 2020 at paragraphs 5 to 13, 15, 18 and 19.
- [37] The parties are encouraged to try to settle the issue of costs between themselves; however, if they are unable to do so, the parties may make submissions on costs in writing to me. The submissions are not to exceed two pages in length, excluding their Bill of Costs and any Offers to Settle. The Respondent shall serve and file his submissions within 21 days of today's date and the Applicant shall serve and file her submissions within 14 days thereafter. If no submissions are received within the time period set out herein, there shall be no award of costs for the motion.

[38] In the circumstances of the COVID-19 emergency, this Order is operative and enforceable without any need for a signed or entered, formal, typed Order. Approval is dispensed with. The parties may submit a formal Order for signing and entry once the court re-opens.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a series of loops and a long horizontal stroke extending to the right.

The Honourable Justice J. Bruhn

Released: November 25, 2020