COURT FILE NO.: 1298/00
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SUPERIOR COURT OF JUSTICE – ONTARIO

RE: F. v. F.

BEFORE: The Honourable Madam Justice Lack

COUNSEL: Steven D. Benmor, for the Applicant, E.D.F.

M.T., for the Respondent, P.E.J.T. (formerly F.)

ENDORSEMENT

[1] The applicant and respondent have each brought a motion to change child support, retroactively. The provision for child support is contained in a divorce judgment dated April 1, 1998, which also provides that the parties have joint custody of their two children. The father contends that income of $50,000 per year should be imputed to the mother from January 1, 1999 and that child support payable by him should be offset by child support payable by her. The mother contends that she has had insufficient income to pay child support until January 1, 2001, and no income should be imputed to her before that time. She seeks an increase in the child support payable by the father since 1998 based on his actual income, which she contends was underestimated in 1998.

[2] The parties separated in 1995. They signed interim minutes of settlement on August 22, 1996. They agreed to joint custody of their sons M. (DOB), and R. (DOB), alternating the primary residence of the children weekly. The mother was then pregnant with a child from her new relationship. She was not working. She agreed to care for the children from 7:00 a.m. to 5:00 p.m. each weekday. The minutes stated that she would return to work in June 1997. The father agreed to pay the mother child support of $870 per month.

[3] On April 1, 1998 the parties signed final minutes of settlement. The divorce judgment incorporates provisions from the final minutes. It provides that the parties have joint custody of the children, alternating the primary residence of the children weekly. It provides that, subject to the mother's stated intention to return to work, she will personally care for the children each weekday from 7:00 a.m. to 5:00 p.m. until she returns from work. Paragraph 4 provides that the father will pay the mother $580 per month for child support, starting April 1, 1998, based on his income of $40,800. Each is to produce to the other his or her income tax return and notice of assessment by no later than June of each year, presumably for the prior year. Each is to provide written confirmation to the other of any change in employment status within ten days of change.

[4] To succeed on a motion to change child support, a party must prove that there has been a change in circumstances under section 17 of the *Divorce Act*, R.S.C. 1985, c. 3, (2nd Supp.), as amended. To do so he or she must show under subparagraph 14(a) of the *Federal Child Support Guidelines*, SOR/97-175, as amended, that there has been a change of circumstances, which would result in a different child support order under the *Guidelines.*

[5] Section 9 of the *Guidelines* provides that where a spouse exercises a right of access to, or has physical custody of a child for not less than 40 percent of the time over the course of a year, the amount of the child support must be determined taking into account the amounts set our in the applicable tables for each of the spouses; the increased costs of shared custody arrangements; and, the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[6] Throughout the years 1998 and 1999 the mother cared for the two children weekdays from 7:00 a.m. to 5:00 p.m. during the weeks when the children had their primary residence with her and during the weeks when they had their primary residence with the father. This continued until December 1999. I am not persuaded that the children were in the father's physical custody for 40 percent of the time in 1999. As a result, section 9 of the *Guidelines* does not apply to that year. The father fails in his claim for a variation in child support for the year 1999.

[7] The divorce judgment provided that child support payments starting April 1, 1998 were based on the father's income of $40,800. There has been no change in the amount that the father has paid since April 1, 1998.

[8] Section 15 of the *Guidelines* provides that a spouse's annual income is determined in accordance with sections 16 to 20 of the *Guidelines.* Section 16 provides that, subject to sections 17 to 20, a spouse's annual income is to be determined using the sources of income set out under the heading "Total income" in the T1 General form issued by Revenue Canada, adjusted in accordance with Schedule III of the *Guidelines*.

[9] Section 19 of the Guidelines provides that the court may impute such amount of income to a party, as it considers appropriate in the circumstances. One circumstance is where the person unreasonably deducts expenses from income: paragraph 19(1)(g). Subsection 19(2) provides that the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act.*

[10] The father's income from employment in 1998 was $44,607.34. He had interest income of $91.98. He operated a consulting business. He showed a loss of $1,023.62 from the business. The business had $6,774 in revenue. The expenses, which resulted in the loss, were home office expenses of $2,345,

vehicle expenses of $2,415.62, legal and accounting expenses of $1,372 and membership, subscription and other expenses of $1,665.

[11] The father's income from employment in 1999 was $50,209.48. His consulting business showed no income. The business had $7,721.25 in revenue. The expenses, which offset the revenue were home office expenses of $2,343.33, vehicle expenses of $1,978.86, capital cost allowance of $231.27, and other expenses of $3,167.79.

[12] It is difficult to accept that anyone, particularly someone who has a full-time job and two small children would engage in a sideline business for two consecutive years that produced no net benefit. No financial statements were produced for the business. The home office expense is unreasonable, particularly since the father had little accommodation expense before he purchased a home in June 1998. He had only one vehicle. The other business expenses in each year are high in relation to the revenue produced. For 1998, I exclude his home office expenses and reduce the other expenses by one-third. I impute $3,140 in business income. For 1999, I assume an increase in business income, proportionate to the increase in gross revenue over the previous year. I impute $3,578 in business income. The amount imputed for each year represents approximately 46% of gross revenues. In my view, it is unlikely that the father would have carried on business if his net return had been any less.

[13] I find the father's income in 1998 is $47,839.32. The table amount of support for two children is $671 per month. I find the father's income in 1999 is $53,787.48. The table amount of support for two children is $747 per month. There is no reason, on the evidence, to conclude that his income for 2000 will be substantially less. The mother succeeds in her request for a retroactive increase in child support for 1998 and 1999.

[14] After September 1999, both children were in school full-time. Following December 1999, the mother no longer cared for the children in the mornings during the father's weeks. I am satisfied that section 9 of the *Guidelines* applies to the determination of child support for the year 2000 and following.

[15] The father argues that the 1998 minutes of settlement amounted to a commitment by the mother to return to work. It is his position that the mother should have returned to work in January 1999, which was 6 months after the birth of her fourth child, her second child from her new relationship. He contends that the court should impute of $50,000 per year to the mother starting in January 1999, based on what she earned when she had a job.

[16] The mother has a university degree. She was employed throughout the marriage. She worked as a pension and benefits administrator for five years. Then she worked as an assistant bank manager at an annual salary of $48,000. She lost that job. At the time of the separation, she was an assistant bank

manager earning $42,000 per year. She lost that job in May 1996. She received what she termed “a reasonable settlement”. At the time of the divorce judgment, April 1998, she had not resumed employment and was pregnant with a second child from her new relationship.

[17] It is obvious that the parties expected that the mother would return to work. That, however, does not justify the conclusion that by January 1999 she should have been employed full-time at annual salary of $50,000. Neither the minutes nor the judgment specified when she was expected to obtain employment. Her childcare responsibilities may be taken into account in determining whether to impute income. She has significant childcare obligations. There are two children of the marriage, and between 1996 and 1998 she gave birth to two other children. It appears that the most she ever earned from employment was $48,000, but she was terminated from that job and from the next job.

[18] The mother outlined in her affidavit what steps has taken to find employment. She stated that she has been looking for work since the spring of 1997. She used the services of an agency. She attended training sessions to learn how “to network”. By November 1997 she was pregnant. In April 1998, she began efforts to start a business. She became involved in a government program. She attended classes in the month of May 1998. She submitted a business plan, with the business to start in September 1998. In June 1998, she registered her business. In July 1998, the baby was born. She then became involved in a networking group. In June 1999, she pursued a project but it fell through. She filed a list of over 250 potential employers to whom she submitted applications between March 1998 and December 1999. She also filed copies of application letters that she had written and replies that she had received. In December 1999, she worked at Wal-Mart for 5 weeks over the Christmas season. After these proceedings began, she received an undated confirmation of a contract with a childcare facility to layout, script and print an administration manual for its business functions. The payment structure had not been finalized but the project was not to exceed a price of $25,000 or 12 months for completion. She is on the board of directors of the organization. She deposed that the contract was effective November 1, 2000.

[19] I do not accept the mother’s evidence of her efforts to find employment. Of the over 250 posts she applied for, only two were in the banking industry. Many seem completely unsuitable for her. She does not mention having had even one job interview. She has not been candid. I am also sceptic that the undated contract with the childcare facility is a bona fide arrangement. The letter is undated, the amount of remuneration is written in by hand, and she appears to have a non-arms length relationship with the business. Nevertheless, in view of the needs of her children and in view of her employment history, it is unreasonable to expect that the mother should have obtained a job paying $50,000 a year by January 1, 1999.

[20] The mother's income from employment in 1999 was $1,171.08. In addition, she had income of $6,000 from employment insurance benefits. She had registered retirement savings income of $4,877.80. She had a business loss of $710.27 and a professional income loss of $9,819.20. On that basis, the total income she reported was $1,519.41. She reported no business or professional revenue. On her 1998 income tax return, she reported a business loss of $4,379. The business had revenue of $710. She reported a professional loss of $9,819. There was no professional revenue. No financial statements for the businesses were filed.

[21] It is extremely difficult to accept that anyone in the mother's position would run a business for two consecutive years at a loss. It completely defies common sense that she would do so where only $710 in gross revenue was generated in the first year and nothing generated in the second year.

[22] The father's counsel filed and referred to a list of cash deposits, apart from child support and income from Wal-Mart, which the mother made to her personal accounts in 1999. The amounts were January $1,710, February $1,552, March $1,832, April $2,208, May $1,016, June $800, July $816, August $2,299, September and October undisclosed, November $1,767 and December $800. These deposits from 1999 totalled $14,800. A similar pattern took place in the year 2000. The deposits for 2000 from January to September, inclusive, totalled $13,449. The mother offered no explanation for these cash deposits.

[23] The evidence establishes that the mother has carried on a business generating income, which she has neither declared for tax purposes nor declared to the court. She pursued information and training about setting up a business, developed a business plan and registered a business. She incurred expenses. She has made unexplained cash deposits to her bank accounts. She has referred to recent projects in many of the letters, which she wrote to prospective employers.

[24] Taking into account her employment income, employment insurance, registered retirement income and an average of $1,480 per month cash deposits projected over 12 months, the revenue received by the mother in 1999 was $29,808. I recognize that imputing that income to the mother makes no allowance for expenses incurred to produce income, but that is offset by the fact that a large portion of the revenue was undeclared for tax purposes. The mother's income for the year 1999 is not relevant to child support for the year 1999, apart from the issue of extraordinary expenses, since section 9 does not apply for that period. However, it is relevant to the amount of child support she should have paid in the year 2000.

[25] During 2000 there was a similar pattern of cash deposits to the mother's account. There appears to have been little change in her lifestyle or spending patterns over the years 1999 and 2000. I consider, with some scepticism, that

she acknowledges the ability to generate a contract for $25,000 payable over a twelve month period. When I consider these factors, and her training and experience, as well as her responsibilities to her children, I conclude that her income in the years 2000 was not substantially different from 1999. I conclude that her liability for payment for child support should be based on imputed annual income of $29,808. The *Guideline* amount of support for two children on $29,808 is $443 per month.

[26] For purposes of section 9 of the *Guidelines*, neither party has presented any evidence of any increased costs of the shared custody arrangement. Nor has either party asked me to take into account any conditions, means, needs, or other circumstances affecting them or the children.

[27] The mother presented a list of expenses for the school year 1999-2000 totalling $841, which she incurred for the children and characterized as extraordinary expenses. The husband makes no objection to the expenses or their characterization.

[28] For these reasons, paragraph 4 of the Divorce Judgment dated April 1, 1998, Action No. 96-MF-22-7459 in the Ontario Court (General Division) at Toronto is varied as follows:

(a) Retroactive to April 1, 1998 the father shall pay to the mother the sum of $671 per month for child support being the *Guideline* table amount for 2 children based on his 1998 income, which is found to be $47,839.32.

(b) Retroactive to January 1, 1999 the father shall pay to the mother the sum of $747 per month for child support being the *Guideline* table amount for 2 children based on his 1999 income, which is found to be $53,787.48.

(c) Retroactive to January 1, 2000, the father shall pay to the mother the sum of $747 per month for child support being the *Guideline* table amount for 2 children based on his 1999 income, which is found to be $53,787.48. Retroactive to January 1, 2000, the mother shall to the father the sum of $443 per month being the *Guideline* table amount for 2 children based on her 1999 income which if found to be $29,808. The monthly child support amount, which the mother is to pay to the father, shall be offset against the monthly amount, which the father is to pay the mother.

(d) The parties shall share extraordinary expenses for the children in proportion to their respective incomes. The father shall pay the mother the sum of $541.11 being his share of the

extraordinary expenses for the children for the school year 1999-2000.

(e) A Support Deduction Order shall issue.

[27] Counsel shall exchange and submit written submissions to me on the issue of costs within 30 days.

[30] The mother has also brought a motion to change the primary residence of the children. She has requested an order that the Office of Children's Lawyer do an assessment. Presumably the request is for an order that the Children's Lawyer investigate, report, and make recommendations concerning custody of the children under section 112 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, as amended.

[31] Copies of a great deal of correspondence between the father and mother have been included in the material filed in this proceeding. The level of acrimony between the parties, which is evident in their communications, and how it impacts on the children is a cause for concern, particularly where the current regime in one of joint custody with care of the children alternating weekly between the parents. For that reason, the requested order is granted. The mother's motion to change primary residence is adjourned to a case conference on a date to be obtained by counsel from the trial co-ordinator.

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M.L. Lack
Justice of the Superior Court

DATE: March 26, 2001