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Court file No. D42460/06

Antoine v. Baptiste

Counsel for Applicant mother – Roger Rowe

Counsel for Respondent father – Elaine Gordon

Endorsement on motion for final order argued September 24 and November 24, 2015

At issue is the support payable by father for two children of the relationship. The father does not dispute that he is responsible for paying child support. The issue is the amount of the father's income upon which child support ought to be based.

The father is a self-employed person who runs a trucking business, operating under the business name of JEB Company. His line 150 income, as assessed by Canada Revenue Agency for the years 2012-2014 is respectively:

2012 – \$4,702

2013 - \$25,524

2014 - \$18,577

The mother does not agree that support should be based on the foregoing amounts and, instead, is seeking to impute income to the father in the amount of \$150,000 per year, for child support purposes.

I start by noting that persons who are self-employed have the legal onus of clearly demonstrating the basis for both their gross income as well as their net income. This

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obligation includes the requirement to establish the existence and the legitimacy of the claimed expenses which have been deducted from gross income in order to arrive at the claimed net income. See *Whelan v. O'Connor* 2006 28 RFL (6th) 433.

Father's income tax return for the year 2012 contains his statement of Business Activities, revealing gross income of \$148,085. His itemized expenses for that year total \$144,583, for a net income of \$3,502.

Included in the father's claimed expenses are:

Property taxes - \$2,800. However, the father does not own any property (although his present wife may own property).

Legal, accounting and other professional fees - \$37,700. However, there is no underlying documentation to support these claimed expenses.

Miscellaneous expenses - \$45,966. However, the documentation provided by the father adds up to less than \$5,000. And many of these claimed expenses are questionable.

As I go through all of the various claimed expenses on the father's 2012 income tax return and compare them with the underlying documents disclosed by the father, there is little or no correlation between the two.

Part of the reason for this is the father's failure to make full disclosure. Another reason is the father's inclusion in his income tax return a claim for expenses which clearly do not exist in the particular line category.

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In circumstances such as this, it is difficult, if not impossible for the court to go through each piece of paper and attempt to discern which of the claimed expenses are legitimate for business purposes, and which are not. That obligation fell on the father, and he failed to meet his legal obligation in this regard.

Obviously, some business expenses are necessary to run a trucking business, but the father's claimed expenses amount to approximately 98% of his total revenue. That percentage, combined with the father's failure to accurately demonstrate each and every business expense lead the court to conclude that the claimed net income of \$3,502 cannot be accepted for child support purposes.

The 2013 income tax return reveals gross business revenue of \$284,284. The claimed business expenses are \$258,880. The same kinds of deficiencies to which I referred in respect of the 2012 income tax return apply to the 2013 income tax return. And while the expenses claimed do not amount to 98% of the total revenue, they do exceed 90% of the gross revenue.

The 2014 income tax return reveals gross business revenue of \$353,142. The claimed expenses are \$335,064. Once again, deficiencies from the 2013 and 2012 income tax returns are similarly repeated for the 2014 return. The claimed expenses are approximately 95% of the total gross revenue.

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When this matter came before me for argument for a final order on September 24, 2015, the father's disclosure was substantially incomplete and presented in a very disorganized fashion, even though he had almost 3 months to prepare for that hearing. With considerable reluctance I granted the father a further adjournment to better organize and produce his documentation to enable to court to attempt to arrive at a result based on the merits of the case.

Regrettably, when father appeared with counsel on November 24, 2015 the father's documentation which he had produced in the interim was disorganized and incomplete, and did little to substantiate the expenses as claimed in his business statements as set out in his income tax returns. Despite repeated attempts on the part of the court to obtain the underlying evidence, through questions of father's counsel, it appeared that evidence necessary to support the father's position was either not available, or could not be found in the various briefs which father had filed.

From the court's perspective the father has another, equally difficult problem in attempting to persuade the court that his claimed net income figures are correct for the years in question.

The Court of Appeal in *Drygala v. Pauli*, 2002 CanLII 41868 (ON CA) has made it clear that support payors are intentionally unemployed or underemployed in circumstances where they are not maximizing their income-earning capacity. In the present case, the father is clearly operating a substantial trucking business, as evidenced by the fact that

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he is generating annual revenues – at least for the past two years – in amounts exceeding one-quarter and one-third of a million dollars annually. And yet, despite these revenues he is claiming net income that barely exceeds minimum wage (for 2013) and falls below minimum wage (for 2014).

This makes little sense to the court. If the father is incapable of generating an income well beyond minimum wage in the face of such an extensive revenue-producing business, then he should have directed his efforts elsewhere.

Furthermore, the claimed expenses on the father's business statements amount to an unreasonably large proportion of gross revenues – ranging from 90%-98%. Common sense suggests it would be difficult for a business to survive with expenses eating up such a large percentage of income.

But, if it was truly the case for father's business that his expenses were that substantial, he had an obligation to place before the court, in a cogent and understandable fashion, the evidence upon which he relied, to make out that argument.

As I noted earlier, the disclosure provided by the father was either incomplete or did not match up with the various line item expenses shown on the business income portion of his income tax returns.

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In *Jones v. Hugo* [2012] O.J. No. 1735, the respondent provided incomplete and inadequate disclosure to substantiate the expenses in his self-employed business which was generating gross revenues of about \$200,000 per year. Justice Sherr held that it was reasonable to allow 50% as a global deduction for expenses, and he imputed income of \$100,000 per year to the respondent.

A similar approach and result was taken in *Lisa Ludmer v. Brian Ludmer*, 2013 ONSC 784.

Obviously, different types of businesses will, by their very nature, have proportionately different expense percentages which are necessary in order to generate the gross revenues of those businesses.

However, I have concluded that in this case, where the onus is on the respondent to prove his expenses, and where he has failed to do so, it is reasonable for the court to take a global approach to expenses and deduct 50% from gross revenues in order to arrive at a net income for child support purposes.

In the result I find that the respondent's income for child support purposes for each of 2012, 2013 and 2014 is as follows:

2012 – gross revenue \$148,085 – net income \$74,042;

2013 – gross revenue \$284,284 – net income \$142,142; and

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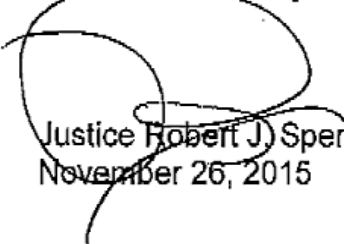
2014 – gross revenue \$353,142 – net income \$176,571.

While these amounts are considerably higher than what the father was prepared to concede, I find them to be more than reasonable, particularly given that the mother did not request the court to gross up these amounts for income taxes which would have otherwise been payable by the father on such amounts.

Accordingly, the father shall pay child support:

1. for the child Z., only from January 1, 2012 to June 30, 2013, in accordance with the table amount of support based on the foregoing income amounts which I have found as net revenue for child support purposes; and
2. for both children, commencing July 1, 2013, and ongoing, in accordance with the table amount of support based on the foregoing income amounts which I have found as net revenue for child support purposes.

If I have made any mechanical errors in the various calculations set out in this endorsement I may be spoken to briefly, and in writing by 14B



Justice Robert J. Spence  
November 26, 2015