

COURT FILE NO.: 173/09

DATE: June 18, 2012

Citation: *Costello v. Costello*, 2012 ONCJ 399

ONTARIO COURT OF JUSTICE

RE: JOHN COSTELLO and LYNNE COSTELLO

BEFORE: Justice Roselyn Zisman

HEARD: January 9 and March 23, 2012

COUNSEL: John Costello-self represented applicant

Lisa I. Bombardieri – counsel for the respondent

ENDORSEMENT

1. INTRODUCTION

[1] The applicant (father) seeks to reduce his obligation to pay child support and reduce or rescind the outstanding arrears. He seeks to vary the terms of an Amended Separation Agreement dated April 18, 2009 on the basis that he is no longer earning \$70,941.00 as a result of losing his employment as a probation officer because of criminal convictions for impaired driving. The respondent (mother) is opposed to any variation and seeks that the motion to change be dismissed and that the father comply with the terms of the Amended Separation Agreement.

2. ISSUES

[2] To succeed on this motion the father will need to prove, on a balance of probabilities, that there has been a change in his circumstances that would justify a change in the support order. The issues that the court needs to determine are:

1. Whether there has been a change in his income since the execution of the Amended Separation Agreement?

2. If there is a change in his income, should the court vary the support obligation based on the father's actual income or impute income to him? In this regard, the court will have to consider:

(i) that the loss of employment was a result of the father's misconduct;

(ii) whether the father has made his best efforts to obtain alternate employment and

(iii) the effect of the father's lack of disclosure.

3. If income is imputed to the father, what should the amount be?

4. Whether or not the outstanding arrears should be reduced or rescinded?

3. BACKGROUND

[3] The parties were married on August 12, 1995 and separated on June 1, 2005. There are two children of the marriage, Blake William Costello born on [...], 1997 and Dylan Christopher Costello born on [...], 1999.

[4] The parties initially entered into a separation agreement dated June 1, 2005 that they both complied with. The agreement provided that the children reside with each parent in alternate weeks, child support based on the shared parenting arrangement and for the father to pay spousal support.

[5] In April 2008, the father was charged with a drinking and driving offence. He took a leave of absence from his employment so that his employer would not find out about his outstanding criminal charge.

[6] The father was employed as a young offender probation officer through the Ministry of Children and Youth Services.

[7] In February 2009, the father was charged with a second drinking and driving offence. He spent 22 days in pre-trial custody.

[8] On April 18, 2009, as a result of this charge the parties entered into an Amended Separation Agreement. The parties agreed as follows:

1. The respondent (mother) would have sole custody of the children;
2. The children would reside in the primary residence of the mother;
3. The father would pay child support in accordance with the Child Support Guidelines, commencing March 1, 2009, based on an income of \$70,941.00 in the amount of \$1,350.00 per month consisting of table support of \$1,054.00 and \$296.00 being his share of the section 7 expenses at the time.
4. The father's obligation to pay spousal support was suspended until further review.

[9] The father was terminated from his employment on July 20, 2009 as a result of his criminal convictions. He received a severance payment of \$22,964.00 representing about five months of employment income.

[10] The father pleaded guilty to the two driving and drinking charges on August 6, 2009 and was placed on probation for 2 years and received a 3 year driving prohibition.

[11] The mother testified that she registered the Amended Separation Agreement with the Family Responsibility Office in September 2010. She testified that she registered the agreement for enforcement as a result of the father not meeting his support obligations. The father confirmed that he was aware, in any event, that the terms of that agreement provided it could be registered with the Family Responsibility Office.

[12] In March 2011, the father commenced this motion to change wherein he sought to vary his child support obligation retroactive to July 2009 when he lost his employment. He is requesting that the court impute \$25,500.00 of income to him and that he pay child support of \$382.00 per month.

[13] As of January 5, 2012, the statement of arrears filed in this motion indicated that the father owed child support of \$19,062.70.

4. POSITION OF THE PARTIES

[14] It is the position of the father that he “grossly overpaid” child support and he is waiting for the court determination to acknowledge he has paid what he should pay as a result of his change in his employment income. He alleges that when he executed the Amended Separation Agreement he did not know that he would lose his employment and the amount of child support should be readjusted to the date he lost his employment.

[15] It is further his position that he has used his best efforts to obtain employment but has not been able to earn the same amount he previously earned. In the father’s words, “This is a simple motion. I am making what I am making and trying my best.”

[16] He is also seeking to rescind or reduce any outstanding arrears as he does not have the financial means to pay such arrears.

[17] The mother is opposed to any change in the father’s child support obligation or any reduction or rescission of arrears. It is her position that the terms of the Amending Separation Agreement should remain of effect.

[18] It is her position that the father’s unemployment or underemployment is a result of his own actions and misconduct.

[19] The mother states that the father is intentionally underemployed and that he has diverted income, not disclosed income and failed to provide financial disclosure.

5. STATUTORY FRAMEWORK and RELEVANT LEGAL PRINCIPLES

[20] The prerequisite to any variation of an existing support order, is a finding that there has been a change in circumstances since the making of that order that would result in a different child support order. Therefore in this case, the onus is on the father, as the applicant, to prove on a balance of probabilities, that since entering in to the Amended Separation Agreement in April 2009 that his financial circumstance have changed.

[21] The relevant legislation provision is subsection 37(2.1) of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended, provides that:

(2.1) 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. 1997, c. 20, s. 6

[22] Therefore, it is clear that the court has the discretion to grant the relief sought by the father however, the granting of any variation of ongoing or retroactive child support and the reduction or recession of child support arrears is discretionary.

[23] A court also has the discretion to impute income to a parent in an amount it considers appropriate. Subsection 19 (1) (a) of the Child Support Guidelines, O. Reg. 391/97, as amended, provides that:

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

6. ANALYSIS AND FINDINGS OF FACT

6.1 What is the father's actual income?

[24] The father's evidence regarding his income was almost totally lacking in supporting documentation and not trustworthy evidence. Except for his income in 2009, I am unable to ascertain with any certainty his actual income for the years 2010 to the present. However, based on the evidence it is fair to assume that it was less than \$70,941.00 being the income that was the basis of his support obligation in the Amended Separation Agreement.

[25] In 2009, the father's income was \$67,063.00 based on his Notice of Assessment that consisted of employment income of \$41,864.00, severance income of \$22,964.00, and employment insurance of \$2,235.00. This is only \$3,878.00 less than the income contemplated in the Amended Separation Agreement. Despite the fact that the father's income was terminated in July 2009, for that year, he received his severance income that purported to cover the period up to December 1, 2009. However, the father did not continue to pay child support. He testified that he used these funds to pay his rent and other debts. He testified that he did not work from September 2009 to May 2010 and was only in receipt of employment insurance.

[26] In 2010, the father's income was \$25,115.00 based on his tax return. The income consisted of employment insurance of \$23,244.00 and employment income of \$1,871.00 from Peel Halton Dufferin Brain Injury Services (PHABIS). He did not produce his Notice of Assessment, any T-4s or any proof of the terms of his employment.

[27] The father denied working for his current employer, Tim Simon who is the owner of Mr. Fix-it and who is also his fiancée's brother, in 2009 or 2010. But then he testified that he worked for him a few times but did not get paid as the mother threatened to report him to Canada Customs and Revenue Agency.

[28] The mother testified that she believed the father worked in 2009 and 2010 but did not declare any income earned. She based this on the fact that the father sent her an email on January 5, 2011 saying that he had worked for a contractor he met through Randstad but not been paid in a month. On another occasion he joked about not being use to physical hard labour. She also testified that in May 2010, the father told her that he couldn't pay child support because he lost his job with Mr. Fix-it when he broke up with his fiancée. But when they resumed their relationship he again began to work for Mr. Fix-it but told the mother that he needed to help his fiancée support her children as their father was not paying child support. The mother testified that in was in this context that she threatened to report the father to Canada Customs Revenue Agency.

[29] In 2011, the father's income from Mr. Fix-it was \$11,329.50. This is based on earning \$10.50 per hour and only working part-time. The only proof the father filed was a letter from Tim Simon. He did not provide any other back up documents.

[30] There is therefore no dispute about the father's 2009 income and the father admitted in cross-examination that he should have continued to pay the current amount of child support for that year as his income was very close to that amount he had anticipated when he signed the Amended Separation Agreement.

[31] It is usually very difficult for any support recipient to prove what actual income is earned by a support payor and this case is no exception. However, for reasons that I will more fully develop, where the evidence of the parties differ, I accept the evidence of the mother. However, even though I accept the evidence of the mother that the father worked for cash or has not disclosed all of the income he earned, it is still impossible for the court to fix an actual amount of income.

[32] Therefore, I accept that on a *prima facie* basis the father earned less income in 2010, 2011 and currently in 2012 than the \$70,941.00 he anticipated he would earn when he signed the Amended Separation Agreement.

6.2 Should the father's support obligation be varied?

[33] The next issue to be determined is whether or not the father's child support obligation should be varied and in this regard there are several issues that must be considered.

(i) Should a support payors' child support obligation be reduced when the reasons for loss of employment are due to his own conduct?

[34] In this case, the father lost his employment because he chose to drink and drive and was subsequently arrested and convicted.

[35] The mother testified that after the father was charged with his first drinking and driving offence in February 2008, she assisted him in covering this up with his employer by suggesting that he obtain a medical leave of absence. The father did not deny this evidence.

[36] Knowing that his job may be in jeopardy, nevertheless the father then again drove while under the influence of alcohol and was charged again about 10 months later. When questioned about the circumstances of the offences he stated that with respect to the first offence, his father had died and he was distraught. With respect to the second offence, he testified that he had broken up with a girlfriend and was upset. He denied that he had a problem with alcohol.

[37] The father testified that when he entered into the Amended Separation Agreement he believed that he might be able to keep his job. The mother disputed this evidence and testified that the father was aware that he would lose his job. She testified that when the father was 17 or 18 years old he had been convicted of a drinking and driving offence and had to apply for a pardon to obtain a position as a correctional officer. She testified that he was aware that it was the policy of the Ministry of Children and Youth Services that an employee could not have a criminal record.

[38] Even if the father hoped that he might somehow keep his position, at the very least he must have known that he faced a serious risk of losing his job otherwise why did he cover up the first offence. As a common sense proposition it is unlikely that a youth probation officer whose job it is to monitor his clients' compliance with the terms of probation and assist youths on probation would be allowed to keep his job if he himself was being monitored and assisted by another probation officer, even if it was in the context of the adult criminal justice system.

[39] Further, I note that the father's obligation to pay child support, in the Amended Separation Agreement, was not contingent on him retaining his employment.

[40] I adopt the reasoning of Justice Czutrin in the case of *Lucky .v Lucky*[1] wherein he stated as follows:

Should the dependent children also have to pay the price of this loss of employment? A court will grant relief of support where the payor loses the ability to provide support for reasons beyond the payors' control.

The courts have long recognized that where a payor parent quits his or her employment for selfish or for "bad faith" reasons, the courts will not grant a variation of support based on a material change in the means of the applicant. After all, as the court comments in *Ronan v. Douglas Walsh (1994)*, 1994 CanLII 3826 (ON CJ), 5 R.F.L. (4th) 235 (Ont. Prov.Div.) at page 238:

.....a payor spouse who has contracted to pay child support in a separation agreement and then quits his or her employment or changed the nature of his or her employment in bad faith should not be able to rely on that change.

[41] In the case of *Lucky v. Lucky*, the support payor lost his employment because he was convicted of assaulting a co-worker. The court did not vary his support obligation as this was an event over which he had control. The court found that it could not condone the parent's actions of assaulting a co-worker to create legitimate inability to pay support that justified a variation.

[42] Similarly, in the case of *Myatt v. Myatt*[2], a police officer who lost his job as a result of a drug conviction could not rely on such a loss of employment to reduce his support arrears.

[43] I find that as the father lost his job because of his criminal behaviour, that occurred not just once but twice, he is the author of his own destiny and he should not be able to rely on his own misconduct as an excuse to avoid his obligations to his children. Even though I accept that the father did not commit these offences to avoid his obligation to pay child support, the court should not condone such conduct.

6.2(ii) Has the father used his best efforts to maximize his earning potential?

[44] Based on my findings above, I do not strictly need to consider if the father after losing his employment as a probation officer has used his best efforts to maximize his earning potential. I do so not only because the parties spent considerable time and effort in tendering evidence about this issue but also because it is vital that the father understands that he has an ongoing legal obligation to earn what he is capable of earning. Based on the evidence I accept I find that the father has been quite cavalier in making efforts to maximize his earning potential.

[45] The ability of a court to impute income is the way the court gives effect to the legal requirement that a parent must earn what the parent is capable of earning if the parent worked to his or her full capacity[3].

[46] The following principles apply when determining capacity to earn income:

- (i) 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;
- (ii) 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;
- (iii) A person'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.
- (iv) Persistence in unremunerative employment may entitle the court to impute income;
- (v) A parent cannot be excused from his or her child support obligation in furtherance of unrealistic or unproductive career aspirations.
- (vi) As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income[4].

[47] In imputing income, the court does not need to find a specific intent to evade child support obligations or bad faith. A parent required to pay child support is intentionally under-employed if that parent closes to earn less than he or she is capable of earning[5].

[48] Applying these principles to the facts of this case, I find that the father has not used his best efforts to earn what he is capable of earning based the following facts:

1. He only provided proof that he applied for 6 jobs in 4 days on 2009 and 10 jobs in 2010;
2. He admitted that he was not qualified for some of the jobs he applied for;
3. He gave vague and nonresponsive evidence about meeting with someone from a employment agency but could not recall the name and testified that he was given “some names to contact”;
4. He did not undertake any retraining or upgrade his education;
5. He denied knowing that he could have attended upgrading courses free of charge through Careers Ontario while he was in receipt of employment insurance, whereas the mother testified she told him about these opportunities;
6. He admitted that he took no steps to find out where he could obtain retraining, skills testing or any other assistance in finding employment while he was in receipt of employment insurance; whereas the mother testified that she told him about such services that were available through Service Canada.
7. Although he has computer skills and is literate in MS Word, Excel, Powerpoint and HTML, his resume does not mention that he has any computer skills;
8. He was evasive when asked if he met with any career specialist or other employment specialist that might have done testing of his skills and abilities to see what type of employment he might qualify for or to assist in helping him find a new career path;
9. He did not produce in evidence any of the covering letters he sent with his job applications;
10. He testified that he quit his job at PHABIS because he was hired with the promise of a full-time position and earnings of \$21.00 per hour but quit because his shifts and hours were reduced but offered no evidence to substantiate this allegation and then had no explanation as to why his record of employment indicated he had been fired;
11. He testified that he enjoyed the work he was now doing and is not looking for more lucrative employment; he admitted that he was only working part-time for \$10.50 per hour and that he works about 28.2 hours a week and earns \$296.10 a week, that he does paying any taxes and no deductions are being made from his income.
12. The father has a university education and has gained experience working as a youth probation officer; he is healthy and has no other obligations that would prevent him from working full-time.

[49] Based on this evidence and applying it to the legal principles relating to the imputing income, I find that not only did the father not take reasonable steps to obtain employment; he virtually took no steps to find reasonable employment. Further, he and made no attempts to obtain

assistance in attempting to use his considerable experience, skills and knowledge to apply them to a new career.

6.2 (iii) What relevance is the lack of financial disclosure on the court's ability to impute income?

[50] I also find that the father's lack of disclosure would provide further reasons why the court would not vary his support obligation in this case.

[51] I make this finding based on the following evidence that I accept:

- (i) The father admitted that he did not respond to the correspondence dated April 19, 2011 from the mother's counsel requesting financial disclosure regarding his income and efforts to find employment;
- (ii) He admitted that he had received 7 disclosure requests directly from the mother that he failed to respond to;
- (iii) He admitted that he did not provide the financial disclosure or seek mediation before commencing his motion to change as required by the terms of the Amended Separation Agreement;
- (iv) He admitted the first appearance clerk advised him to provide the financial disclosure requested by the mother's counsel and that he stated that he did not intend to do until ordered by the court;
- (v) He admitted that although ordered by the court to provide various items of disclosure on July 20, 2011, September 2, 2011, November 7, 2011 and December 2, 2011 he had still not fully complied with these orders at the trial;
- (vi) He admitted that he did not disclose in the initial financial statement he filed with the court that he had a pension; he testified that he did not disclose his pension as he felt it was "irrelevant" and that the mother was not entitled to any portion of his pension;
- (vii) I accept the mother's evidence that the father told her he received "next to nothing" as severance pay and she only found out the amount through his financial statement;
- (viii) He admitted being in breach of the court order of November 7, 2011 that required he provide a copy of his application to transfer his pension, that he transferred the pension from OPSEU to the Bank of Montreal without providing any documentation and that he did not provide his pension statements for the months of January to July 2011;
- (ix) He failed to advise that he had employment with a contractor in 2010 but he testified that he did not get paid or pursue payment and that he worked for Mr. Fix-it, while in receipt of employment insurance, in 2009 and 2010 but then testified that he worked without payment;
- (x) He admitted he breached the court order that required he advise of any employment by not advising of his employment with PHABIS; he further admitted that he was

angry with the mother when she registered the Amended Separation Agreement with the Family Responsibility Office and was angry when the Family Responsibility Office began to garnish his income;

- (xi) He admitted that he breached the court order that required that he produce a sworn affidavit setting out all of the interviews he attended and recruitment agencies that he met with;
- (xii) He admitted that he was in breach of the bulk of the financial disclosure that he had been ordered to produce when the trial commenced. Further, when the trial continued on another day and he was directed to provide further disclosure regarding his income, he again failed to produce any further disclosure, except for another letter from his employer but again without any supporting documentation to verify his hours of employment or employment income.
- (xiii) He claimed that he had sent out “hundreds of applications” and the reason he did not provide all of applications for the jobs he applied for was because “quite frankly, I don’t have the ink or paper to print them all” but he could not even name the places or agencies he applied with or provide any details whatsoever;
- (xiv) He admitted that his current employer keeps a calendar book that he writes down what the employees do each day and admitted that he did not provide this book;
- (xv) He admitted that he is paid in cash and he keeps no record of the hours he works even though he was in the midst of litigation and he had been ordered to provide that information; and
- (xvi) He admitted that he kept track of his hours by storing them in his phone but then, in breach of the court order, did not provide this information;

[52] Based on this lack of financial disclosure I draw a negative inference about the father’s financial resources and his ability to earn an income.

[53] I was especially concerned about the father’s evidence regarding his pension. The existence of the pension was not even mentioned in the first financial statement he filed with his Motion to Change. Then when asked to provide a copy of his application to permit him to withdraw portions of his locked-in pension fund on a yearly basis if he met the financial hardship criteria, he failed to do so. His evidence about whether or not he even tried to file an application for the withdrawal of some of his pension funds was unclear and convoluted. However, he eventually agreed in cross-examination that he did not properly complete the application and that “the reality is that it is my pension” and further that there was no court order that he needed to use it to pay child support.

[54] However, it was clear from the terms of the application that as long as the father’s income was less than \$33,400.00 he could have applied for the release of some of these funds.

[55] Despite being ordered to provide full disclosure of all documents related to his pension and all documents relating to his ability to request a release of a portion of those funds, he failed to comply.

[56] I draw the inference that he did not disclose a copy of his bank statements from January to July 2011 to cover up the fact that he transferred the funds out of his OPSEU account to another account at the Bank of Montreal. I draw the inference that he did whatever he could to ensure that the mother could not attach these funds with respect to his outstanding support arrears or ongoing support obligation.

[57] I also draw the inference that the father organized his “termination” with PHABIS as he was angry that the Family Responsibility Office was garnishing his income. The father testified that he was promised a full-time job and when his shifts and hours were reduced he quit that employment. However, when it was pointed out to him in cross-examination that his record of employment stated that was terminated, he testified that he never noticed that and denied knowing he had been fired and then stated, “I know it doesn’t look good on me.”

[58] I also draw the inference that the father is earning more than he states with Mr. Fix-it in view of the non-arms’ length relationship with his employer, the fact that absolutely no documentation was produced that substantiated his hours of work or income other than a letter from his employer and the fact that the employer was not called as a witness.

[59] I find that the father could certainly have earned more income than \$10.50 per hour since he lost his employment as a probation officer and certainly will be able to earn more in the future.

[60] Based on all of these factors, I would not exercise my discretion to vary the father’s current support obligation. The father certainly cannot expect a court to exercise its discretion to reduce his child support obligation, when he loses a well paying job because of his own reckless behaviour, fails to abide by court orders for disclosure, fails to provide any proof of any sincere efforts to find alternate employment and when he is content to work part-time for minimal income.

6.3 If income is imputed, what amount should be imputed?

[61] In view of the fact that it was the father’s reckless behaviour that caused him to lose his employment, I see no reason that income should not be imputed based on the amount he agreed to pay when he executed the Amended Separation Agreement. In view of the nature of his employment he should have been extra vigilant after his first charge of drinking and driving but to then again drink and drive borders on recklessness with absolutely no regard for his obligations to support his children.

[62] The father has not acted in good faith by failing to abide by court orders for disclosure, by arranging to be terminated from his job at PHABIS where he could have earned a good income and by arranging his affairs so that the mother could not obtain any funds from his pension.

[63] The father did not provide any credible evidence that he sincerely looked for new employment or undertook any retraining so that he could earn a salary comparable to what he previously earned.

[64] Therefore, I draw the inference that the father could have found employment commensurate with his skills and abilities and at his historical salary. I therefore find that there is no basis on these facts or in law to vary the father’s support obligations and would impute income to him in the amount of \$70,941.00 being the income set out in the Amended Separation Agreement.

6.4 Should the court exercise its discretion to vary the outstanding support arrears?

[65] The father also disputed the amount of the arrears. He testified that he had agreed with the mother that she would reduce his support obligation to \$1,000.00 per month but then she filed the Amended Separation Agreement with the Family Responsibility Office. The mother testified that she had agreed to a reduction to \$1,000.00 per month, if the father also paid 20% of the children's extraordinary expenses but when the father did not abide by this agreement she registered the Amended Separation Agreement with the Family Responsibility Office for enforcement.

[66] The father also testified that he paid for some of the children's extraordinary expenses. The mother agreed that when the father was not paying any child support she asked him and he agreed to pay for some of these expenses for the children. But it is clear from the Statement of Arrears that was filed as an exhibit that the mother gave the father credit for these payments.

[67] The father also could not explain why in his Motion to Change he did not mention that he and the mother had made this verbal agreement to reduce child support to \$1,000.00 per month plus a share of the extraordinary expenses.

[68] For many of the same reasons outlined previously, I would not vary the outstanding arrears. I also do not accept the father's evidence that the calculation of the arrears is wrong.

[69] The mother testified about the effect the father's lack of support payments has had on her and the children. The mother testified that she earns about \$48,000.00 as a youth counselor for the Peel District School Board. The mother was accepted at McMaster University to upgrade her education, but could not afford to attend. The children could no longer have hot lunches at school, not go on all of the school field trips, not keep their cell phones, reduce their extracurricular activities, and had to use their Christmas and birthday money to buy clothing and other essentials. She could not afford braces for Dylan that he required and she could not afford the cost of Blake's ongoing orthodontic expenses. Generally, she testified that they just had to do without the things they were use to doing and that it was very stressful for her and the children.

[70] The father was quite dismissive of the effect on the children of his lack of support payments and testified the braces could wait and that the children were buying expensive clothes and went on trips.

[71] I apply the following principles in the consideration of to the recession of support arrears as follows:

- a. There is a heavy onus on the person asking for a cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair to do so;
- b. If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away;
- c. Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future;

- d. A reduction or cancellation requires that details and full financial disclosure under oath that at the time the payments were to be made:
- (i) The change was significant and long lasting;
 - (ii) The change was real and not one of choice; and
 - (iii) Every effort was made to earn money (more money) during the time in question and those efforts were not successful^[6]

[72] Applying these principles to this case, the father has not provided full and frank disclosure. Therefore, I draw the inference that the father has not made every possible effort to earn more money and that he has income has not been fully disclosed.

[73] Based on the father's testimony that he expected to have his driver's license reinstated in March 2012 and then expected to have a "drastic increase" in his income. He testified that most jobs require that you have a driver's license and he thought he could earn up to \$40.00 per hour. I conclude that the change in his income will not be long lasting. Further, as previously outlined the change in his income was a result of his own actions.

[74] I also conclude that the father currently has an asset, namely his pension, which could be used to pay the outstanding support arrears.

[75] There is no evidence presented by the father that it would be grossly unfair to him to pay the outstanding support arrears.

[76] I would therefore not rescind or cancel the outstanding support arrears.

[77] **ORDER AS FOLLOWS:**

1. The Applicant's motion to change is dismissed.
2. The Respondent, as the successful party on this motion, is presumed to be entitled to her costs. The Respondent shall submit a brief written submissions as to costs with a Bill of Costs and any offers to settle within two weeks and the Applicant shall have a further two weeks to file a response.

Zisman J.

DATE: June 18, 2012

[1] (1996) 1996 CanLII 11217 (ON SC), 63 A.C.W.S.(3d)495, 1996 CarswellOnt 2237 (Ont. Gen. Div.) at paras. 7 and 8.

[2] 1993 CanLII 1144 (BC SC), 1993 CarswellBC 595, 45 R.F.L. (3d) 45(B.C.S.C.).

[3] *M. (J.A.) v. M.(D.L.)*, 2008 CarswellNB24, 2008 NBCA 2 (N.B.C.A.) at para. 31.

[4] *Hanson v. Hanson*, 1999 CanLII 6307 (BC SC), 1999 CarswellBC 2545 (B.C.S.C.) at para. 14.

[5] *Drygala v. Pauli*, 2002 CanLII 41868 (ON CA), 2002 CarswellOnt 3229, 29 R.F.L.(5th)293 (Ont. C.A.) at paras. 27- 29, *Brook v. Brook*, 2006 CarswellOnt. 2514, [2006] W.D.F.L. 2789 (Ont.S.C.) at paras.51-54.

[6] *Baldini v. Baldini*, 1999 CanLII 6717 (BC SC), 1999 CarswellBC1370, 46 R.F.L. (4th) 407 at paras. 24 and 25; *Luckey v. Luckey*, supra, at para. 12; *Myatt v. Myatt*, supra, at para. 41.