Drygala v. Pauli
[Indexed as: Drygala v. Pauli]

61 O.R. (3d) 711
[2002] O.J. No. 3731
2002 CanLII 41868
Docket No. C36273

Court of Appeal for Ontario,
Laskin, Borins and Gillese JJ.A.
October 2, 2002

Family law -- Support -- Child support -- Child Support Guidelines -- Imputation of income -- Bad faith or specific intent to avoid child care obligations not required before income can be imputed under s. 19(1)(a) of Child Support Guidelines -- Trial judge not erring in finding that father acted "intentionally" within meaning of s. 19(1)(a) of Guidelines when he chose to attend university full-time rather than to work -- Trial judge reasonably finding that father was capable of working part-time while attending school but erring in imputing annual income of $30,000 when father had rarely earned that much from full-time employment -- Child support should be ordered based on imputed income of $16,500 -- Federal Child Support Guidelines, SOR/97-175, s. 19(1)(a).

During the marriage, the respondent earned $21 per hour as a certified tool and die maker. After the parties separated, the respondent did not look for any employment. He was on the payroll of his stepfather's company for the years 1997 to 2000, but substantial portions of his income were retained by the company to reduce his alleged indebtedness. In 2000, the respondent enrolled as a full-time student in a Bachelor of Arts program with the goal of becoming an elementary school teacher. He was substantially supported by his mother. The parties were granted a divorce in 2001 and the respondent was ordered to pay child support for the parties' one child in the amount of $266 per month based on an imputed annual income of $30,000. In imputing income to the respondent, the trial judge relied on s. 19(1)(a) of the Child Support Guidelines. Child support was ordered retroactive to June 15, 1998, the date of the original petition for divorce. The respondent appealed. Except for $6,000 of child support arrears paid into court to avoid a stay of the appeal, he paid no child support.

Held, the appeal should be allowed in part.

Section 19(1)(a) of the Child Support Guidelines permits a court to impute income to a spouse if it considers it appropriate in the circumstances, which circumstances

include "the parent or spouse is intentionally under-employed or unemployed." There is no need to find a specific intent to evade child support obligations before income can be imputed. Read in context and given its ordinary meaning, "intentionally" in s. 19(1)(a) means a voluntary act. The parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. That parent is intentionally unemployed when he or she chooses not to work when capable of earning an income. There is no requirement of bad faith in s. 19(1)(a), nor is there language suggestive of such a requirement. The trial judge found that the respondent intentionally chose under-employment. While it might more properly be characterized as unemployment rather than under- employment, there was no doubt as to the correctness of the finding that the respondent acted "intentionally" within the meaning of s. 19(1)(a) when he chose to attend university rather than to work.

An exception is made under s. 19(1)(a) of the Guidelines where the under-employment or unemployment is required by the reasonable educational needs of the parent or spouse. The trial judge must first determine whether the educational needs are reasonable. A spouse is not to be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations. Section 19(1)(a) also dictates that the trial judge determine what is required by virtue of a spouse's educational needs. The spouse has the burden of demonstrating that unemployment or under-employment is required by virtue of his or her reasonable educational needs. Inferentially, the trial judge in this case found that the respondent's educational goals were reasonable. He appeared also to have determined that the respondent's intentional under-employment was required for that period in which he was on academic probation. That determination had implications for the period in which child support could be awarded.

Section 19 of the Guidelines is not an invitation to the court to select arbitrarily an amount as imputed income. The trial judge imputed income to the respondent on the basis of part-time employment. Having decided that the appropriate basis upon which to impute income was part-time employment, there was an obligation upon the trial judge to give some indication of how he arrived at the figure of $30,000. While significant deference must be given to trial judges in relation to support orders, a consideration of the respondent's prior earnings history demonstrated that the figure of $30,000 was unreasonable for part-time employment given that he seldom earned that much when working full time. It was reasonable to assume that the respondent could work 50 per cent of a normal work week while attending school. He earned $33,000 in 1996. Child support should be ordered based on an imputed income of $16,500.

The trial judge did not err in awarding retroactive child support. However, he erred in two ways when making the award retroactive to June 15, 1998. As the trial judge found that the respondent cared for the child from February to September 1998 and that his care for her during that period satisfied his child support obligations, the

commencement date should be September 1, 1998. Moreover, since the trial judge found that the respondent was required by the university to carry a full course load for a period of time in order to prove himself academically, it was an error to impute income to him for that period. The retroactive award should be varied to exclude the period from January 1, 1999 to November 30, 1999.

APPEAL from an order for payment of child support.

Goudie v. Buchanan, [2001] N.J. No. 187 (Quicklaw) (Nfld. S.C.); *Hall v. Hall*, [1997] O.J. No. 453 (Quicklaw) (Gen. Div.); *Hunt v. Smolis-Hunt*, 2001 ABCA 229 (CanLII), [2001] A.J. No. 1170 (Quicklaw) (C.A.); *Ronan v. Douglas-Walsh* (1994), 1994 CanLII 3826 (ON CJ), 5 R.F.L. (4th) 235 (Ont. Prov. Div.); *Williams v. Williams*, 1997 CanLII 4486 (NWT SC), [1997] N.W.T.R. 303, 32 R.F.L. (4th) 23 (S.C.); *Woloshyn v. Woloshyn* (1997), 1997 CanLII 22945 (MB CA), 115 Man. R. (2d) 225, 139 W.A.C. 225, 28 R.F.L. (4th) 70 (C.A.), affg (1996), 1996 CanLII 18018 (MB KB), 109 Man. R. (2d) 35, 22 R.F.L. (4th) 129 (Q.B.); *Yaremchuk v. Yaremchuk* (1998), 1998 ABQB 118 (CanLII), 158 D.L.R. (4th) 180, 38 R.F.L. (4th) 312 (Alta. Q.B.), not fold

Donovan v. Donovan (2000), 2000 CanLII 10766 (MB CA), 190 D.L.R. (4th) 696 (Man. C.A.); *Hanson v. Hanson*, 1999 CanLII 6307 (BC SC), 1999 CarswellBC 2545 (eC) (S.C.); *Montgomery v. Montgomery* (2000), 2000 NSCA 2 (CanLII), 182 N.S.R. (2d) 184, 181 D.L.R. (4th) 415, 563 A.P.R. 184, 3 R.F.L. (5th) 126 (C.A.), consd

Other cases referred to *Brett v. Brett* (1999), 1999 CanLII 3711 (ON CA), 44 O.R. (3d) 61, 173 D.L.R. (4th) 684, 46 R.F.L. (4th) 433 (C.A.), affg (1996), 1996 CanLII 8095 (ON SC), 24 R.F.L. (4th) 224 (Ont. Gen. Div.); *Cholodniuk v. Sears* (2001), 204 Sask. R. 268, 14 R.F.L. (5th) 9, 2001 SKQB 97 (Q.B.); *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, 44 O.R. (3d) 736n, 177 D.L.R. (4th) 1, 246 N.R. 45, 50 R.F.L. (4th) 228; *Hoar v. Hoar* (1993), 1993 CanLII 16106 (ON CA), 45 R.F.L. (3d) 105 (Ont. C.A.)

Statutes referred to *Divorce Act*, R.S.C. 1985, 2nd Supp., c. 3, s. 26.1(2)

Rules and regulations referred to Federal Child Support Guidelines, SOR/97-175 ("*Divorce Act*"), ss. 1, 19(1)

David A. Sloane, for appellant.
Steven F. Murray, for respondent.

The judgment of the court was delivered by

[1] GILLESE J.A.: -- By judgment dated April 4, 2001, the parties were granted a divorce. The respondent mother, Anna Drygala, was given custody of the child, Marina Rebeka Rosie Pauli, born October 7, 1994. The appellant father, Anthony Pauli, was given access and ordered to pay child support in the amount of $266 per month based on an imputed annual income of $30,000. Child support was ordered retroactive to June 15, 1998.

[2] Mr. Pauli appeals. He asks that no income be imputed to him. Alternatively, he asks that the amount imputed be reduced substantially and that child support not be made retroactive.

Facts

[3] Marina is the result of a very short relationship between Ms. Drygala and Mr. Pauli. Marina was conceived while Ms. Drygala was 19, living at home and still in high school. Mr. Pauli was 25, sharing accommodation with his cousin and working sporadically as a tool and die maker.

[4] After Marina's birth, Mr. Pauli brought proceedings in which he claimed joint custody, access and blood tests to determine paternity. The parties resolved their differences, the initial court action was dismissed and the parties married in April of 1996. Their final separation occurred less than a year later, in April of 1997.

[5] In 1996, during the marriage, Mr. Pauli earned $21 per hour as a certified tool and die maker working over 40 hours per week. He was asked to work further overtime for which he would have received over $30 per hour. He refused to work the overtime and quit his job.

[6] Mr. Pauli looked after Marina from February 1998 to September 1998 when Ms. Drygala was employed.

[7] In January of 1999, Mr. Pauli enrolled in a Bachelor of Arts program at the University of Waterloo and took an introductory psychology course one evening per week. In May of that year, he took two further introductory level courses, one in computer usage and the other in sociology. In September, he took an additional two courses, one in sociology and one in psychology. Mr. Pauli became a full-time student in January of 2000.

[8] At trial, Mr. Pauli testified that his goal is to become an elementary school teacher. He expects to complete his B.A. in psychology in one-and-a-half to two years after trial. Thereafter he intends to take a one-year Bachelor of Education program. Mr. Pauli testified that he thought Marina should wait until he had graduated from

university to receive any financial support from him. At that point, Marina would be almost ten years of age.

[9] At trial, copies of Mr. Pauli's income tax returns were filed showing that he had reported total income to Revenue Canada in the following amounts for the following years:

1993 - $30,271.84

1994 - $23,845.12

1995 - $17,200.95

1996 - $33,235.92

1997 - $22,596.00

1998 - $24,055.62

1999 - $6,693.10

2000 - $6,679.04

[10] Mr. Pauli's mother placed him on the payroll of his stepfather's company, Gemar Tool Inc., for the years 1997 through 2000. Mr. Pauli did not work for Gemar during that period.

[11] Gemar allocated employment income to Mr. Pauli and issued T4 slips to him for tax purposes. However, Mr. Pauli did not actually receive all of such income. Instead, substantial portions of the income were retained by Gemar and used to reduce Mr. Pauli's indebtedness to the company. On Mr. Pauli's evidence, during the period 1997 to 2000, the sum of $19,380.87 was repaid.

[12] Mr. Pauli's income from Gemar during those years is summarized in the following table:

Year Gross Income Tax Amount Net Payment Employment and CPP allocated to to appellant Income from Deducted Miscellaneous Gemar, on T4 Accounts Payable

1997 $10,073.00 $2,288.56 $7,700.00 $11.44 1998 $23,820.00 $4.745.53 $10,000.00 $9,074.47 1999 $6,514.40 $1,451.75 $1,456.04 $3,606.61 2000 $6,679.04 $1,189,72 $224.83 $5,264.49

[13] At examination for discovery on February 8, 2000, Mr. Pauli admitted that he had not looked for any employment, either part-time or full-time, in the preceding two-and-a-half years.

[14] According to Mr. Pauli's actual budget, as set out in his Financial Statement sworn November 1, 1999, his monthly expenses were $4,028.78 or $48,345.36 annually. All of his expenses were paid for by way of funds received by Mr. Pauli from his stepfather's company or from his mother.

[15] On his Financial Statement, Mr. Pauli showed debts totalling $7,300, consisting of legal fees of $1,500 and a debt to Gemar of $5,800. At the time of trial, these debts had been paid and Mr. Pauli admitted that he was debt free.

[16] Ms. Drygala began a divorce action on June 15, 1998, seeking a divorce and custody. Mr. Pauli countered, seeking joint custody, shared residency, liberal access, an apprehension order, a restraining order and costs.

[17] After a court-ordered report from the London Custody and Access Project failed to resolve the issues of custody and access, Ms. Drygala amended her petition to include claims for child support, both retroactive and ongoing, and costs.

[18] The trial proceeded on all issues in January of 2001.

[19] The appeal was taken on the issues of child support and costs but only the issue of child support was pursued at the hearing of the appeal.

[20] Except for $6,000 of child support arrears paid into court to avoid a stay of this appeal and two payments, Mr. Pauli has paid no child support.

The Trial Judgment

[21] For ease of reference, the full text of that part of the reasons of the trial judge relating to child support is set out below.

> Mr. Pauli openly admits he did not actually pursue his trade as a tool and die maker and his inadequacies at that calling. Having said that, he has gone through something of a metamorphosis since January of 1999. He has been a student at the University of Waterloo. His marks show an obvious concentration and effort for someone removed from academic rigors for a considerable period of time. He now has a specific goal to become an elementary school teacher. Whatever criticisms existed with respect to his lack of motivation have now been dissipated. The only detraction from his achievement is that it appears to be completely at the expense of his mother who either channels funds to him directly or through his

being a nominal employee of his stepfather's company. This is the last hurdle for Mr. Pauli, his ability to provide for himself and his dependants financially. He has proven himself academically and his goal is a realistic one which will give him fiscal independence.

. . . . .

Mr. Pauli has not, save and except for two payments and the babysitting he provided, provided support for Marina since the separation of the parties. His employment as per Exhibits 27 and 33 appears to be spotty and contrived. His employment with Gemar Tool Inc. is portrayed as a device by which his debts to his mother and the company are repaid. Yet he himself has acknowledged in discovery at page 48, question 323, he has no debts.

For the court to place any significance in the convoluted explanation provided by his mother, Mrs. Schaeffer, would be to condone the providing of false information to Revenue Canada.

. . . . .

Mr. Pauli is a qualified tool and die maker. Exhibit Number Eight reveals the existence of job opportunities for such a trade. Unfortunately, Mr. Pauli has allowed his skills in this area to atrophy, partly because of his commitment to further education. However, the needs of Marina continue to exist. Parenthood conveys the privilege of being involved in the parenting of a child, and it also generates responsibilities. A parent is to provide for the material well being of a child.

Mr. Pauli has chosen not to pursue being a tool and die maker. He found he did not like the trade and he admits he was not that good at it. He has chosen to pursue another career. His actions cannot be characterized as anything but "intentional". Is the imputation of income avoided because of what appears to be a reasonable educational need on his part? His underemployment is perhaps justified at the initial stages of his university education where he sought to establish his admission as a mature student. He has, however, demonstrated that academically he can "do it". One would think that he could accommodate part-time employment at this stage. Because of his trade, it is not unreasonable to believe that there is a lucrative part-time employment available to him.

Applying the principles espoused by Doctor Julien D. Payne, who wrote Imputing Income, "Determination of Income; Disclosure of Income" Child Support in Canada, published by Danrab Inc. (August 3, 1999) as set out by Justice Martinson in *Hanson v. Hanson*, 1999 CanLII 6307 (BC SC), 1999 CarswellBC

> 2545 at paragraph 14, I impute to Mr. Pauli income in the amount of $30,000 which will require that according to the guidelines he pay $266 per month.
>
> There is a power in the court to make the support order retroactive. The parties separated in April 1997. However, as previously mentioned, Mr. Pauli did in a way contribute by providing childcare, definitely in 1998. Under the circumstances, I consider June 15, 1998, the date of the issue of the original petition for divorce, the appropriate start for his support obligations.

The Relevant Legislation

[22] The trial judge relied on s. 19(1)(a) of the Regulations Establishing Federal Child Support Guidelines, SOR/97-175 (hereinafter "Guidelines" or "Child Support Guidelines"), as amended, when imputing income. Section 19(1)(a) reads as follows:

> 19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> > (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 a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the parent or spouse[.]

Application of Section 19(1)(a) of the Guidelines

[23] In my view, in applying this provision, the trial judge was required to consider the following three questions.

1. Is the spouse intentionally under-employed or unemployed?

> 2. If so, is the intentional under-employment or unemployment required by virtue of his reasonable educational needs?
>
> 3. If the answer to question #2 is negative, what income is appropriately imputed in the circumstances?

Intentional Under-Employment or Unemployment

[24] The meaning of the word "intentionally" in s. 19(1)(a) has received inconsistent application in the courts. On the one hand, there are the so-called bad faith cases in which the word "intentionally" has been interpreted as meaning a deliberate course of conduct for the purpose of undermining or avoiding the parent's support obligation. These cases act on the explicit assumption that a court should not impute income in the absence of such a motive, as to do so results in an onerous financial obligation on

a parent who chooses to make a career change. *Williams v. Williams* (1997), 1997 CanLII 4486 (NWT SC), 32 R.F.L. (4th) 23, [1997] N.W.T.R. 303 (S.C.); *Hall v. Hall*, [1997] O.J. No. 453 (Quicklaw) (Gen. Div.); *Hunt v. Smolis-Hunt*, 2001 ABCA 229 (CanLII), [2001] A.J. No. 1170 (Quicklaw) (C.A.); *Yaremchuk v. Yaremchuk* (1998), 1998 ABQB 118 (CanLII), 38 R.F.L. (4th) 312, 158 D.L.R. (4th) 180 (Alta. Q.B.); *Goudie v. Buchanan*, [2001] N.J. No. 187 (Quicklaw) (Nfld. S.C.); *Ronan v. Douglas-Walsh* (1994), 1994 CanLII 3826 (ON CJ), 5 R.F.L. (4th) 235 (Ont. Prov. Div.); *Woloshyn v. Woloshyn* (1996), 1996 CanLII 18018 (MB KB), 22 R.F.L. (4th) 129, 109 Man. R. (2d) 35 (Man. Q.B.), affd (1997), 1997 CanLII 22945 (MB CA), 28 R.F.L. (4th) 70, 115 Man. R. (2d) 225 (C.A.).

[25] On the other hand, there are a number of conflicting cases in which the courts have held that there is no need to find a specific intent to evade child support obligations before income can be imputed. See, for example, *Montgomery v. Montgomery* (2000), 2000 NSCA 2 (CanLII), 181 D.L.R. (4th) 415, 3 R.F.L. (5th) 126 (N.S.C.A.); *Donovan v. Donovan* (2000), 2000 CanLII 10766 (MB CA), 190 D.L.R. (4th) 696 (Man. C.A.); *Hanson v. Hanson*, 1999 CanLII 6307 (BC SC), 1999 CarswellBC 2545 (eC) (S.C.).

[26] In my view, the latter approach is correct.

[27] I begin by considering the words of s. 19(1)(a). The modern approach to statutory interpretation has been repeatedly stressed by the Supreme Court of Canada as one that is contextual and purposeful. Words in legislation are to be read in their entire context, giving them their grammatical and ordinary meaning in a way that is in harmony with the scheme, objects and intention of the legislation. (See, for example, *Francis v. Baker*, 1999 CanLII 659, [1999] 3 S.C.R. 250, 177 D.L.R. (4th) 1.)

[28] Read in context and given its ordinary meaning, "intentionally" means a voluntary act. The parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. That parent is intentionally unemployed when he or she chooses not to work when capable of earning an income. The word "intentionally" makes it clear that the section does not apply to situations in which, through no fault or act of their own, spouses are laid off, terminated or given reduced hours of work.

[29] I note that there is no requirement of bad faith in the provision itself, nor is there language suggestive of such a requirement.

[30] A consideration of the scheme of the legislation and its objects reinforces the conclusion that bad faith is not required. Section 26.1(2) of the *Divorce Act*, R.S.C. 1985, 2nd Supp., c. 3, as amended, says that the Guidelines "shall be based on the principle that spouses have a joint financial obligation to maintain the children of the

marriage in accordance with their relative abilities to contribute to the performance of that obligation".

[31] Section 1 of the Guidelines stipulates that one of its objectives is to establish a fair standard of support for children to ensure that they benefit from the financial means of both parents after separation.

[32] Imputing income is one method by which the court gives effect to the joint and ongoing obligation of parents to support their children. In order to meet this legal obligation, a parent must earn what he or she is capable of earning.

[33] The reason given in the cases that have required a bad faith finding relates to the needs of the spouse. It is said that to require spouses to support their children to the maximum of their earning capacity fails to recognize the fundamental importance of work to a person's life, including the pursuit of work which provides not only livelihood but also a sense of identity, self-worth and emotional well-being.

[34] The contrary view stresses the paramountcy of parents' obligation to provide support for their children and notes that a focus on the detrimental effect that attribution of income may have for a parent obscures the detrimental consequences that may ensue when a parent fails to provide for the children to the best of his or her ability.

[35] I am of the view that the debate is unwarranted. As will be seen in the following portions of these reasons, the legislation provides the necessary flexibility to respond to both sets of considerations. The need to ensure appropriate financial support for the children is dealt with by imputing income. The need to enable a parent to pursue meaningful work is to be addressed by the trial judge both when considering what the reasonable educational needs of the parent require and again when determining how much income is appropriately imputed.

[36] A plain reading of s. 19(1)(a), done in a contextual and purposive fashion, leads me to conclude that the provision is unambiguous. There is no bad faith requirement.

[37] The learned trial judge found that Mr. Pauli intentionally chose under-employment. While I would have characterized it as unemployment rather than under-employment, there is no doubt as to the correctness of his finding that Mr. Pauli acted "intentionally" within the meaning of s. 19(1)(a) when he chose to attend university rather than work. I see no error in the trial judge's determination to impute income to the appellant.

Reasonable Educational Needs

[38] There is a duty to seek employment in a case where a parent is healthy. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income. Thus, once it has been established that a spouse is intentionally unemployed or under-employed, the burden shifts to that spouse to establish what is required by virtue of his or her reasonable educational needs.

[39] There are two aspects to this stage of inquiry. The trial judge must first determine whether the educational needs are reasonable. This involves a consideration of the course of study. A spouse is not to be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

[40] But, s. 19(1)(a) speaks not only to the reasonableness of the spouse's educational needs. It also dictates that the trial judge determine what is required by virtue of those educational needs. The spouse has the burden of demonstrating that unemployment or under-employment is required by virtue of his or her reasonable educational needs. How many courses must be taken and when? How much time must be devoted in and out of the classroom to ensure continuation in the program? Are the academic demands such that the spouse is excused from pursuing part-time work? Could the program be completed over a longer period with the spouse taking fewer courses so that the spouse could obtain part-time employment? If the rigours of the program preclude part-time employment during the regular academic school year, is summer employment reasonably expected? Can the spouse take co-operative courses as part of the program and earn some income in that way? These are the types of considerations that go into determining what level of under- employment is required by the reasonable educational needs of a spouse.

[41] The burden of proof is upon the spouse pursuing education as he or she is the person with access to the requisite information. The spouse is in the best position to know the particular requirements and demands of his or her educational program. He or she will have information about the hours of study necessary to fulfill such requirements, including the appropriate preparation time. He or she is in the best position to show whether part-time employment can be reasonably obtained in light of these educational requirements.

[42] By implication, the trial judge found that Mr. Pauli's educational goals are reasonable. He appears also, in effect, to have determined that Mr. Pauli's intentional under- employment was required for that period in which he was on academic probation. This determination has implications for the period in which child support can be awarded, as will be seen later in these reasons in the context of retroactivity of child support.

Quantum of Income to be Imputed

[43] The trial judge imputed an annual income of $30,000 based on s.19(1)(a) of the Guidelines. No reasons are given for the choice of amount. All that is said is that it is not unreasonable to believe that lucrative part-time employment was available to Mr. Pauli.

[44] Section 19 of the Guidelines is not an invitation to the court to arbitrarily select an amount as imputed income. There must be a rational basis underlying the selection of any such figure. The amount selected as an exercise of the court's discretion must be grounded in the evidence.

[45] When imputing income based on intentional under- employment or unemployment, a court must consider what is reasonable in the circumstances. The factors to be considered have been stated in a number of cases as age, education, experience, skills and health of the parent. See, for example, *Hanson*, *supra*, and *Cholodniuk v. Sears* (2001), 2001 SKQB 97 (CanLII), 14 R.F.L. (5th) 9, 204 Sask. R. 268 (Q.B.). I accept those factors as appropriate and relevant considerations and would add such matters as the availability of job opportunities, the number of hours that could be worked in light of the parent's overall obligations including educational demands and the hourly rate that the parent could reasonably be expected to obtain.

[46] When imputing income, the court must consider the amount that can be earned if a person is working to capacity while pursuing a reasonable educational objective. How is a court to decide that when, typically, there is little information provided on what the parent could earn by way of part-time or summer employment? If the parent does not provide the court with adequate information on the types of jobs available, the hourly rates for such jobs and the number of hours that could be worked, the court can consider the parent's previous earning history and impute an appropriate percentage thereof.

[47] It was open to the trial judge to find that some or all of the amounts received by Mr. Pauli from his mother and from his stepfather's company should have been considered when determining imputed income. The fact that he has chosen to rely upon his mother for his own support does not justify a failure to provide child support. Nor does it lessen Mr. Pauli's obligation to provide such support as is appropriate in the circumstances.

[48] $30,000 is significantly less than Mr. Pauli's annual expenses, which exceed $48,000, and all of which are being paid without him incurring any debt. Mr. Pauli's financial statement shows that he has disposable and discretionary income, including $240 per month for cigarettes. Such information may have been relevant, as well, when determining an appropriate income figure.

[49] The appellant has clearly failed to recognize his child support obligation. He has done well financially and despite that, he has paid almost nothing for child support. These, too, are relevant factors when determining the quantum of income to impute.

[50] However, the trial judge imputed income on the basis of part-time employment, not Mr. Pauli's other sources of income. Having decided that the appropriate basis upon which to impute income was part-time employment, there was an obligation upon the trial judge to give some indication of how he arrived at the figure of $30,000. While significant deference must be given to trial judges in relation to support orders, a consideration of Mr. Pauli's prior earnings history demonstrates that the figure of $30,000 is unreasonable for part-time employment given that he seldom earned that much when working full-time.

[51] The trial judge had evidence of Mr. Pauli's age, education, experience, skills and health. He had, as well, various newspaper advertisements that Ms. Drygala presented at trial, indicating that local businesses were seeking tool and die makers.

[52] It was entirely appropriate, on the record, to impute income to the appellant. The evidence shows that Mr. Pauli was taking three courses per term. He spends three hours of classroom time each week for each of the three courses for a total of nine hours of classroom time. After making an appropriate allowance for study time outside of class, it is reasonable to assume that Mr. Pauli could work 50 per cent of a normal work week. 1996 is the last year in which Mr. Pauli earned income from a job. He earned $33,000 in 1996. Child support shall be ordered based on an imputed income of $16,500.

Retroactive Child Support

[53] The purpose of child support is to assist the custodial parent in meeting the day-to-day expenses of raising children. A party seeking retroactive child support must provide evidence that the child suffered from a lack of financial support during the period in question. Ability to pay, as well as need, must be considered by the trial judge in the exercise of his or her discretion. *Brett v. Brett* (1999), 1999 CanLII 3711 (ON CA), 44 O.R. (3d) 61, 46 R.F.L. (4th) 433 (C.A.); *Hoar v. Hoar* (1993), 1993 CanLII 16106 (ON CA), 45 R.F.L. (3d) 105 (Ont. C.A.).

[54] A trial judge has the discretion to award retroactive child support that is fit and just in the circumstances. As part of the exercise of discretion, the trial judge must

consider the fairness of such an award including whether it will create an unreasonable debt obligation on the part of the payor.

[55] Ms. Drygala's testimony, at trial, of her financial need after separation provided the necessary evidentiary basis of need. At the time of trial, Mr. Pauli had paid off the debts owing at the time of separation, was debt free and continued to enjoy a comfortable standard of living. These facts amply demonstrate an ability to pay.

[56] I see no error in the trial judge's decision to award retroactive child support. It is consistent with the governing legal principles and fully justified on the evidence.

[57] I am of the view, however, that the trial judge erred in two ways when making the award retroactive to June 15, 1998.

[58] The first error relates to the commencement date of June 15, 1998. The trial judge found that Mr. Pauli contributed by providing childcare for Marina in 1998. Mr. Pauli cared for Marina from February to September of 1998. Having decided that Mr. Pauli's care for Marina during that period satisfied his child support obligation, I fail to see how child support can be awarded retroactively for a portion of that period. As a result, in my view, the commencement date should be September 1, 1998.

[59] A second error arises from the trial judge's finding that Mr. Pauli's unemployment was required in the initial stages of his university education. The trial judge held that Mr. Pauli was capable of accommodating part-time employment after he had demonstrated that he could handle the academic demands of university coursework.

[60] Mr. Pauli began his university education in January of 1999. In a letter dated November 15, 1999, he was informed that he had been approved for full-time studies. It is reasonable to assume that the letter signifies the point in time at which it was clear that Mr. Pauli was capable of handling university coursework. Given the trial judge's finding that Mr. Pauli could accommodate part-time employment after he had proven himself academically, it is an error to impute income to him for the period of January 1, 1999 to November 15, 1999. For that reason, the retroactive award shall be varied to exclude the period from January 1, 1999 to November 15, 1999.

Conclusion

[61] The appeal is allowed in part. The judgment of the trial judge shall be varied to show that $16,500 of income shall be imputed to Mr. Pauli annually. Child support for one child based on that amount is $127 per month. The commencement date for the retroactive award of child support shall be varied such that the commencement date is September 1, 1998 and the obligation is suspended for the period of January 1, 1999

to November 15, 1999. Accordingly, it is ordered that the trial judgment be varied in accordance with my reasons.

[62] The parties have asked for the opportunity to make submissions in respect to the $6,000 paid into court by the appellant and costs. Brief written submissions on both are to be made within 30 days of the date of release of these reasons.

Appeal allowed in part.