IN THE FAMILY COURT OF NOVA SCOTIA

Citation: J. C. v. C. B., 2005 NSFC 13

Date: September 18, 2005
Docket: FKISOV-038383
Registry: KENTVILLE

Between:

J. C.

Applicant

v.

C. B.

Respondent

DECISION

Judge: The Honourable Judge Bob Levy

Heard: Kentville, Nova Scotia August 22, 2005

Counsel: Jean Dewolfe for the Respondent

By the Court:

1. J. C., the mother of 12 year old Emma, resides in Ontario with Emma. C. B., Emma's father, is a member of the armed forces, is stationed at C.F.B. Greenwood, and lives in Kentville, Nova Scotia. In February, 2005 Ms. C. commenced an application pursuant to the Interjurisdictional Support Orders Act for a variation of a January, 1998 Ontario child support order whereby Mr. B. was to pay $75.00 monthly in child support.
2. Ms. C. seeks full retroactivity to March of 2004 when she first raised the matter of a variation of the child support with Mr. B.. He agrees to pay the amount of child support as provided for by the Tables of the Child Support Guidelines but objects to having to pay any retroactive support.
3. In 1998 and until January, 2003 Mr. B. had been sporadically employed or pursuing an education and earning relatively little. Hence the low order. In January, 2003 he joined the Canadian Armed Forces. In 2003 he reported a "line 150" income of $34,795, in 2004 he earned a "line 150" income of $45,883. In 2005 he reports income of $3,806 monthly (which would be $45,672 per year). However in anticipation of the imminent birth of a child of his and his common law partner, he advises that for two months he will earn "93%" of his monthly income so that for 2005 he'll earn $45,137.
4. Based on Mr. B.'s income the payment prescribed by the Tables of the Child Support Guidelines would be $382 per month. (His counsel calls it $381, but she rounded down...I prefer to round to the nearest $100 in annual income thus, as the drop in pay will be both brief and minimal, I use the figure $45,672 as his income.) The order will provide that the $382 monthly will commence with the payment due September 5, 2005.
5. Ms. C. states in her affidavit that although she raised the matter of an

increase in the support payments with Mr. B. in March of 2004 that she never heard back from him. Her affidavit does not disclose that he doubled the payments as of August of 2004. She indicates that she sought legal advice and then commenced this application. She indicates that although she had been full-time employed in 1998 when the order was granted she has since gone through a period of unemployment and now works only part-time. I don't know if she cohabits with anyone other than Emma or has access to any income other than her part-time earnings.

6. As indicated, Mr. B. is in a common law relationship and they are expecting a baby "any day", in fact the baby has probably arrived by now. His partner was employed only 16 hours weekly but I don't know if working so few was by choice. She would receive, he indicates, only minimal E.I. maternity benefits. Her plans as to returning to the work force are not before the court.

7. Mr. B. cites a number of current financial pressures relating to the long commute he has back and forth to work, the pending birth of the child, and the need for extensive repairs and renovations required by their older home as a result of which his line of credit is at it's limit. In addition, he says, his house needs a new roof although his scheduled posting to Winnipeg may allow him to avoid this expense.

8. He also pointed out the expense associated with him exercising access with Emma and notes that to date Ms. C. has insisted that the child not fly alone which causes extra expense. (One trusts, given that Emma is now 12, that absent some compelling reason Ms. C. would not continue to insist on that.) Mr. B. also told of a number of purchases that he has made for Emma including, since 2003 or 2004, a $1,500 computer, back to school clothing

and necessaries, and various items and presents for which he quotes no figures but no doubt would have been to the benefit of the child and meant a saving to the custodial parent. He has been an active and engaged parent and one who has done considerably more for his daughter than to merely pay the court-ordered support.

9. Retroactivity of child support or of variation in child support is the subject of some focus at present as appeal courts across the country have not established a consistent view and the matter is before the Supreme Court of Canada. In addition in reviewing the evidence and reading the submissions of Ms. Dewolfe, I have been referred to and referred myself to various statutes and cases. These include: -Family Law Act R.S.O. 1990 c. F.3

-Maintenance and Custody Act of N.S. and Child Maintenance Guidelines

-Interjurisdictional Support Order Acts of Ontario and N.S.

-Conrad v. Rafuse 2002 NSCA 60

-MacLean v. Walsh 2003 NSCA 127

-L.S. v. E.P (1999), 50 R.F.L. (4th) 302 (B.C.C.A.)

-Macdonald v. Macdonald 2005 CarswellBC 48 (C.A.)

-Marinangeli v. Marinageli 2003 CarswellOnt 2691 (C.A.)

-Horner v. Horner 2004 CarswellOnt 4246 (C.A.)

-Park v. Thompson 2005 CarswellOnt 1632 (C.A.)

-S. (D.B.) v. G. (S.R.) 2005 CarswellAlta 18 (C.A.)

-Henry v. Henry 2005 CarswellAlta 17 (C.A.)

-W. (L.J.) v. R. (T.A.) 2005 CarswellAlta 22

-Wood v. Legge 2004 CarswellNS 380 (Sparks, J.F.C.)

10. The leading case in Nova Scotia is Conrad v. Rafuse which adopts the analysis of Justice Rowles in L.S. v. E.P., citing in particular paragraphs 66 and 67 of that decision. This was followed by the Appeal Court in MacLean v. Walsh which seemingly approved the consideration of a number of factors not cited in Conrad v. Rafuse, (see para. 9). Indeed in MacDonald v. MacDonald the B. C. Court of Appeal stated, para. 35, that the factors it had set forth in L. S. were only "...some of the factors representing the principles governing the discretion" (emphasis added). L. S. and Conrad are erected on the premise that there is, subject to judicial discretion, a presumption against retroactivity of child support, although a retroactive variation in Conrad was upheld.

11. The Alberta Court of Appeal in the three cases cited above has adopted, aided by a thorough analysis, a different position: at the risk of oversimplifying it, in favour of a presumption of retroactivity, again subject to discretion. These are the decisions under appeal to the Supreme Court of Canada. According to Professor Jay MacLeod at least, the situation in Ontario, since the Park v. Thompson decision, is not as clear as it might be.

12. The reasoning in L.S. and Conrad v. Rafuse may fail to appreciate the fundamental 'sea change' brought about by the Child Support (Maintenance) Guidelines. Absent "lawful excuse", a parent is under a "legal duty" in Nova Scotia to provide for the "reasonable needs" of the child, (Maintenance and Custody Act, section 8). The Family Law Act of Ontario provides, section 31 (1), that every parent, "has an obligation" to support his or her child, "to the extent that the parent is capable of doing so". If these sections are to have any meaning it is

surely that the obligation exists whether the parent having the care of the child makes application or not. These provisions make it difficult to see how either the Nova Scotia or Ontario legislation can be read to create or foster a presumption against retroactivity, or a presumption against a retroactive variation. The Divorce Act has no comparable clause and may well be a different case.

13. Not only is the duty to support enshrined by statute but the Guidelines have all-but removed any uncertainty or undue complexity as to the amount. That which is to be paid is readily discernible, and in this online age, readily available. There is little to commend the proposition that the parent with care of the child must have a hair trigger with a court application lest she be accused of undue delay or 'hoarding'. This hardly squares with the principle enunciated in L.S. that any approach to retroactivity should reduce litigation, and, with respect, fails to appreciate the many valid reasons why a parent would regard a return to court with absolute dread and as the option of last resort. And, it needs to be said, it is hard to fathom why courts have gotten so exercised about the prospect of the custodial parent, (to be frank, overwhelmingly women), "hoarding", when the non-custodial parents are as much or more 'unjustly enriched' by not paying the appropriate maintenance in the first place.

14. In this case Ms. C. asked for an increase in March of 2004 of "an additional $300.00 to $400.00 per month". Mr. B. responded in August of 2004 with an increase to $150 per month. Ms. C. sought legal advice and commenced this application in February of 2005. Mr. B. maintains that he first learned of this application in August of 2005 and that he presumed her silence in the interim

signalled that she was content with the increase to $150. Now, he says, he is in tight financial straits and unable to make good on any retroactive order, and certainly if he has to do so, that this will compromise his ability to exercise access with his daughter and the well-being of his family here in Nova Scotia. He is not pleading “undue hardship” *per se* as he agrees to pay the table amount; he argues that since retroactivity is discretionary, that his situation and his explanation warrant relief.

15. The evidence does not set forth in great detail the impact on Ms. C. and Emma of Mr. B. not having paid an appropriate amount for so long. She states that she has undergone a period of unemployment at which time she was reduced to using her RRSP’s to support Emma and herself, and that now she only works part-time which enables her to be home with Emma after school. Likely one can safely conclude that things are and have been tight on her end as well. (There is a danger in these interjurisdictional cases, where one sees only one party, that one can lose the voice of the applicant, and erroneously conclude that the only party with problems is the one before you spelling them out for you in great detail.)

16. Whether there is a presumption against retroactivity or not, the cases agree that courts have a discretion to order it fully or partially. I am not persuaded that it would be right to forego retroactivity entirely. I appreciate that there was some delay in bringing this application that might have comforted a person wanting to believe that he had dodged the bullet of being obliged to pay the full freight. Embracing this belief Mr. B. may have budgeted accordingly and put himself and the well-being of his new family in some jeopardy were he all of the sudden

obliged to come up with full retroactivity. Probably his lower payment made it easier for him to be able to exercise a fuller and higher quality access with Emma and enabled him to buy things for her which would have lifted some burden off Ms. C.. One notes in passing that the court order providing for the maintenance did not call for financial disclosure. And lastly, it is to Mr. B.'s credit that he did double his payment since August of last year.

17. I will examine the numbers from April, 2004, the month after Ms. C.'s request for an increase. Mr. B.'s annual income in 2004 was $45,883. (Ms. Dewolfe argues that the court should use his 2003 income of $34,795 to calculate his 2004 payment obligation, but I disagree; there is no principle in the Guidelines that calls for payments to be always a year out of date.) At $45,883, for the nine months from April to December, payments should have been $3,438, ($382 x 9). Taking into account his increased payment as of August, Mr. B. paid $1,050. In 2005 through September, at $45,672 annual income, he should have paid $3,438, ($382 x 9), whereas he paid $1,350. Thus, from April, 2004 through September, 2005, he underpaid some $4,476, (($3,438 + $3,438) - ($1,050 + $1,350)). That is a large amount of money to both parties in their respective situations; a large amount to be underpaid and a large amount to have to pay back.

18. The circumstances justify some relief to both parties. The equities dictate a two-thirds/one-third solution, favouring the custodial parent. Thus, it will be ordered that Mr. B.would pay two-thirds of the outstanding amount, which, rounded off, would be $3,000. Given the demands on his new family and wanting to compromise his contact with Emma as little as possible, I will order that that be

paid over thirty months at the rate of $100 monthly in addition to the $382, commencing with the payment due October 5, 2005. The order will also contain a clause that Mr.. B. shall, on or before the first of June every year starting in 2006, forward to Ms. C. a copy of his Income Tax return and Notice of Assessment from the C.C.R.A..

19. Ms. C. also seeks an order that medical/dental insurance for Emma be maintained by Mr. B. through his employment. He advises this is already in place. I will simply order that it be maintained.

20. The court will prepare the order.

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Bob Levy, J.F.C.