FAMILY COURT OF NOVA SCOTIA
Citation: Welsh v. Welsh, 2012 NSFC 25

Date: February 29, 2012
Docket: FKISOS-072470
Registry: Kentville

Between:

Roy Alexander Welsh

Applicant

v.

Judy May Welsh

Respondent

Judge:	The Honourable Judge M. Melvin, J.F.C.
Heard:	August 22, 2011 and October 12, 2011
Written Decision:	February 29, 2012
Counsel:	Donald A. Urquhart, Esq., for the Applicant Judy May Welsh, Not present nor represented by counsel

By the Court:

[1] This is the application of Roy Alexander Welsh who is seeking a Provisional Order varying the Ontario Superior Court of Justice, Family Court order of September 10, 2001 pursuant to the ***Interjurisdictional Support Orders Act***. Judy May Raymond (Welsh) was not present and not represented, although she had forwarded some information to the Court.

[2] The Application was made pursuant to the ***Interjurisdictional Support Orders Act***, Part II, s. 8 which states:

> **8 (1) Where the respondent is ordinarily resident in a reciprocating jurisdiction that requires a provisional order, the Nova Scotia court may, on application by a claimant and without notice to and in the absence of a respondent, make a provisional order taking into account the legal authority on which the claimant's application for support is based.**
>
> **(2) Evidence in an application under subsection (1) may be given orally, in writing or as the court may allow.**

[3] The application was heard in the Family Court of Nova Scotia in April 2011, and was adjourned so that Mr. Welsh could make a CPP application for the children. The CPP application was made and both children are eligible for payments. Pursuant to a subsequent Court appearance, a written brief was filed on behalf of Mr. Welsh on December 15, 2011.

Facts

[4] Roy Alexander Welsh and Judy May Raymond (Welsh) were divorced in Ontario. There are two children of the marriage, Kayla Alexandra Welsh, born October 31st, 1992, and Sarah May Welsh, born December 19th, 1995.

[5] An order of the Ontario Supreme Court of Justice, Family Court, dated September 10th, 2001 ("Family Court Order"), ordered that Mr. Welsh and Ms. Raymond have joint custody of the children, with Ms. Raymond having primary care, and Mr. Welsh specified access time. Mr. Welsh was ordered to pay the sum of $266.00 per month child support for both children.

[6] In November of 2009, Kayla Alexandra Welsh moved to Nova Scotia to reside with Mr. Welsh and has resided there since. She graduated from high school in June 2011.

[7] In September 2011, Kayla enrolled at the Nova Scotia Community College and the evidence of Mr. Welsh is that Kayla resides primarily with Mr. Welsh.

[8] The evidence is that Sarah resides with Ms. Raymond.

[9] Mr. Welsh ceased paying child support to Ms. Raymond at the end of 2009 when Kayla came to live with him. Mr. Welsh was contacted by Maintenance Enforcement in November of 2010 and was advised he owed arrears amounting to 9 months of child support payments.

Employment - Income of the Parties

[10] At the time of the original Order, Mr. Welsh had an income of $32,000 per annum. For the purposes of this hearing, Mr. Welsh provided tax returns showing his annual income as $33,822 for 2007; $34,468 for 2008; and $45,236 for 2009. Mr. Welsh's evidence is that in 2009 his income was abnormally high due to a one time retroactive pension/benefits payment. In 2010, Mr. Welsh earned a total income of $39,923.64. Guideline child support based on an income of $39,923 is $348.00 per month.

[11] At the time of the Family Court Order, Ms. Raymond earned $17,364 per annum. Ms. Raymond has provided copies of her 2007-2010 Notices of Assessment showing the following incomes:

Year	Income
2007	$19,859
2008	$18,850
2009	$23,392
2010	$26,867

[12] There is a handwritten note on the Notice of Assessment forwarded to the Court by Ms. Raymond, stating that as of March 28th, "I am no longer employed so my income is $0." Ms. Raymond has not provided any income information for 2011, and aside from this note, there is neither confirmation of her financial status, nor any reasons for it. The Court, therefore, can only base its decision on Ms. Raymond's income for 2010.

[13] Ms. Raymond's 2010 Notice of Assessment was not before the Court, before the Honourable Judge Levy, in January 2011, when the interim set-off amount of child support was set at $135.00 per month.

[14] Guideline child support for one child based on the Ontario tables and Ms. Raymond's income of $26,867 is $233 per month.

CPP Benefits

[15] Kayla, who resides with Mr. Welsh, is now in receipt of $218.50 per month in CPP payments. She also received $1,959.20 for CPP (retroactive) benefits. It was argued by counsel for Mr. Welsh that Sarah, who resides with Ms. Raymond, is entitled to this amount also.

Prior Orders

[16] As of November 24, 2010, Mr. Welsh was in arrears under the 2001 Order in the amount of $2,394.00 (9 months of child support at $266 per month.)

[17] Pursuant to the Interim and Without Prejudice Order granted by Judge Levy on January 26, 2011, Mr. Welsh has been paying $65 toward arrears. (Approximately $780 from January 2011 to December 2011.)

Issues

1. Has there been a material change in circumstances since the Ontario Court Order in September 2001?

2. If there has been a material change in circumstances, how should the Ontario Court Order be varied in relation to child support?

3. Should the variation to the Family Court Order take effect retroactive to December 2009? Are there any additional arrears owing under the 2001 Order?

Deliberation of the Court

[18] The facts and issues are fairly simple and straightforward in this case. As noted by the solicitor for Mr. Welsh:

> **"In McLeod and Mamo, Annual Review of Family Law (2009) the two-step process on an application to vary is summarized at page 146:**
>
> > **An application to vary involves a two-step process: first, the applicant must prove a material change; and second, he or she must prove that as a result of the change, the prior order no longer reflects the child's best interests: (citations omitted)."**

[19] Kayla left Ms. Raymond's care and went to live with Mr. Welsh. This constitutes a material change in circumstances.

[20] The parties both have primary care of one child. Section 8 of the Child Support Guidelines applies.

[21] Counsel for Mr. Welsh argues that:

> **"Mr. Welsh is agreeable to paying the set off amount of child support per Section 8 of the guidelines in the amount of $115 per month, based**

> **upon the parties 2010 incomes. As reviewed below, it is submitted the child support amount should be retroactive to December 2009 when Kayla's primary residence changed to Mr. Welsh."**

[22] In **S.(D.B.) v. G. (SR), [2006] 2 S.C.R. 231**, the Supreme Court of Canada gave clear direction in a Court's determination of retroactive child support or adjustments to child support. A retroactive award is meant to benefit children, albeit late, and eliminate any incentive for payor parents to avoid paying support when due. If the child has left the care of the recipient parent and is with the payor parent, it would defy logic for the payor to have to continue to pay child support for that child.

[23] Mr. Urquhart argues on behalf of Mr. Welsh:

> **"With respect to the various factors governing the exercise of discretion, the Supreme Court of Canada stated that in taking a "holistic" approach to the exercise of its discretion, none of the factors is decisive. As well, it wrote of the need for an overriding balance between certainty and fairness/flexibility in the law."**

[24] Mr. Welsh's position is that when it became clear that one child was to remain with him, the other with Ms. Raymond, he ceased paying child support. His perception was apparently that each parent would pay for the child that resided with that parent. The Court accepts this explanation and finds it is a logical thought for a lay person to have, given the circumstances.

[25] Mr. Welsh's position is that he was not aware of a problem until Maintenance Enforcement contacted him at the end of November 2010, at which time he sought legal advice. Unreasonable delay, as noted in **S. (D.B.) v. G (SR)** infra., does not apply in this instance.

[26] Mr. Welsh's counsel states:

> **"In any event now that Mr. Welsh has obtained legal advice he is happy to pay an amount that would have been due if the agreement had been varied appropriately in December 2009."**

[27] It is clear to the Court that the Order should be made retroactive to December 2009.

[28] Mr. Welsh argues:

> **"It is submitted that from December 2009 forward, Ms. Raymond was aware that a material change would affect the quantum of child support payable but she continued to expect payment under the Family Court Order for both children. Maintenance Enforcement did not contact Mr. Welsh until a year later to request retroactive payments."**

[29] It is clear to the Court that the Order should be made retroactive to December 2009.

[30] As of November 24, 2010, Mr. Welsh was in arrears under the 2001 Order in the amount of $2,394.00 (9 months of child support at $266 per month).

[31] Pursuant to the Interim and Without Prejudice Order granted by Judge Levy on January 26, 2011, counsel for Mr. Welsh advises he has been paying $65 towards arrears. (Approximately $780 from January 2011 to December 2011.) According to his calculations, there is approximately $1,614 remaining in arrears under the 2001 Order.

[32] It is the opinion of this Court that the child support should be varied retroactively to December 2009 when Kayla began residing with Mr. Welsh. Based on the parties 2010 incomes ($26,867 for Ms. Raymond and $39,923 for Mr. Welsh), the set-off amount owing for the past 26 months since December 2009 is $2,990 ($348 - $233 = $115 x 26).

[33] From December 2009 to February 2012, Mr. Welsh has paid child support in the amount of $2,800 ($200 per month from January 2011 - current).

[34] Although both children should be in receipt of CPP benefits, this in no way affects any child support payment.

[35] The Court finds, on a provisional basis, that the arrears owed by Mr. Welsh total $190, and that his child support payments for the child, Sarah, be based on the set-off amount as noted above in the amount of $115 per month.

[36] Mr. Urquhart is to prepare the provisional Order.

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M. Melvin
A Judge of the Family Court
for the Province of Nova Scotia