IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
Citation: Kohout v. Fraser, 2009 NSFC 19

Date: August 21, 2009
Docket: FNG 16332
Registry: Pictou

BETWEEN:

DOUGLAS STEPHEN KOHOUT

Applicant

- and -

TRACY LYNN FRASER

Respondent

DECISION

Judge: Before the Honourable Judge James C. Wilson,
Judge of the Family Court for the Province of Nova Scotia

Heard: Pictou, Nova Scotia, August 12th, 2009

Counsel: Douglas Stephen Kohout, self-represented

Tracy Lynn Fraser, self-represented

Decision Date:

August 21st, 2009

[1] Dr. Kohout filed an application dated June 19th, 2009 requesting the court vary the maintenance he pays to the respondent pursuant to court order, last varied on December 5th, 2006. The applicant claims that due to his student debt, excessive access costs, cost of living and a depressed economy, he is not able to maintain the order.

[2] Ms. Fraser had also placed before the court an affidavit in default as well an application to vary dated July 23rd. Ms. Fraser claims in her default affidavit that Dr. Kohout has not been maintaining the required number of access visits per year to qualify for undue hardship, a concession of $100 per month, ordered following a hearing in 2005. She also claims she has not been provided with the required financial information.

[3] At the commencement of this hearing Ms. Fraser withdrew her application to vary support retroactively for the years 2006, 2007. The financial information requested in the default has been filed as part of this application. The remaining issues before the court are essentially the determination of income and resulting support for the years 2008 and forward.

BACKGROUND

[4] These parties have been before the court approximately 25 times since 1996. An initial maintenance order of $40 per week was issued in 1996. Support payments

were suspended in 2000 while Dr. Kohout was a full time student at the Atlantic Veterinary College. In March 2002 the matter was before the court because Dr. Kohout was starting employment as a veterinarian in the United States. At that time he had a base salary of $52,800 US (then equivalent to $83,166 CND) and support commenced in the amount of $651 per month effective July 1, 2002. In March of 2005 the parties were again before the court. Ms. Fraser was claiming a number of section 7 expenses and Dr. Kohout was seeking reduction from the guideline amount due to student debt and excessive access costs. Following a lengthy hearing the court issued an order in which it found Dr. Kohout's base salary to be $52,500 (the equivalent to $63,714 CND). This amount generated a guideline order of $522. Following a detailed analysis of the circumstances of both parties, the Court allowed Dr. Kohout's claim for undue hardship based on substantial outstanding student debt and access costs for returning to Nova Scotia on an almost monthly basis to visit his daughter. The Court allowed an overall reduction of $100 per month so that the amount payable for basic support was $422 per month payable from the first of April 2005. In addition an amount for special (child care) expenses in the amount of $145.75 was ordered resulting in Dr. Kohout paying a total amount of $567.75 per month.

[5] The parties were back before the court in November of that year and consented to a upward variation in the order based on Dr. Kohout's then income of $72,000 US ($87,379 CND). This income generated a guideline payment of $687 less the

$100 undue hardship for a payment of $587 per month. In December ‘06 the parties appeared before another Judge of this Court. Following hearing, the parties consented to an order which determined Dr. Kohout’s income from all sources to be $64,000 US ($73,305 CND). This resulted in a guideline order of $632 per month commencing December 1st, 2006. That order continued the previously established $100 per month undue hardship reduction. That order also provided that future adjustments will be calculated yearly commencing in 2008 upon Dr. Kohout providing Ms. Fraser with his last pay stub for the preceding year together with disclosure of any other income. The parties agreed to apply the Bank of Canada Rate for US dollars effective on February 1st of each year. The consent order also contained a provision that unless there is a substantial change in financial circumstances, neither party will bring the matter back to court to deal with financial issues.

CURRENT EVIDENCE

[6] As I understand the evidence presented before me, the parties agreed between themselves that the amount set out in the consent order of December ‘06 required some adjustment. They apparently felt that there had been some miscalculation of income and as I understand it, an additional $100 per month was paid by agreement between the parties.

[7] It appears this current application was initiated following an adjustment the parties made on March 1st of this year. At that time the financial information of Dr. Kohout showed a US income for '08 of approximately $107,000. The parties apparently agreed that the applicable exchange rate was 1.24. This resulted in an equivalent Canadian income of $132,000 and a monthly support payment of $1,076 less the previously agreed undue hardship claim of $100. It is this amount Dr. Kohout says he is unable to pay.

[8] Dr. Kohout and his spouse reside in the state of Maine. They are employed as veterinarians at clinics in the Portsmouth, New Hampshire area. They file joint US tax returns. There is filed with the court Dr. Kohout's last pay stub (dated December 21, 2007) showing income of $92,488. His tax return for that year appears to show income of $87,500. There is no explanation for the difference in these amounts. There is also filed with the court a document indicating the exchange rate as of February 1, 2008 was 1.0051%. According to the last order, support for 2008 would be based upon income of $92,488 applying the exchange rate of 1.0051 or $93,000 CND. This would equate to a guideline order of $787 less the previously established undue hardship of $100 for monthly payment of $687.

[9] Dr. Kohout's 2008 income tax return shows total income of $101,493. Attached to that return are W-2 wage and tax statements for 2008 for Dr. Kohout showing

receipt of compensation in the amount of $99,385. Box 5 of the W-2 shows under a heading *Medicare, Wages and Tips* the sum of $107,138. There is no explanation before the court as to the difference between the amount contained in Box 5 and Box 1 of the W-2 statement. On his tax returns under *Total Income* the amount of $99,385 together with other income of $2,083 is used to determine his total income at $101,493. I take this to be the more accurate number for determining income.

[10] There is also filed with the court a statement showing Dr. Kohout's earnings of $42,500. to the end of May '09. His current earnings for this year appear to be tracking very close to his income for last year.

[11] Around March of this year the parties, following the terms of their December '06 Order applied an exchange rate of 1.24 to a US income of $107,000 and arrived at a Canadian equivalent of $132,000 resulting in a guideline order of $1076 less undue hardship allowance of $100 for a monthly payment of $976.

[12] Filed with the court is also a letter from Dr. Kohout's employer indicating that his base salary is now $60,000 US per year. In addition to the base salary, Dr. Kohout is paid an additional amount calculated at 11% of his billings or production. This shows as "bonus" on his pay stub. These so called "bonus" amounts also include extra overtime shifts. A letter from his employer indicates Dr. Kohout is working more

overtime shifts then any other veterinarian in the clinic and overtime has accounted for nearly $15,000 of his income to date. Dr. Kohout claims that the personal stress created by working the additional shifts is taking a toll and he has had to seek medical attention for stress. Unfortunately is not easy to determine from the remuneration system he works under what part of his bonus is represented by 11% of billings during his normal work week and what represents his extra shifts, over and above the basic work contract.

[13] There is no provision within the support guidelines to account for overtime. Child support is based on income and undertaking overtime hours is generally related to lifestyle decisions. Under the rules, children are entitled to share in lifestyle choices of their parents. This is not a case where additional income is being imputed to Dr. Kohout. If his income is $60,000 he pays on $60,000. If his income is $100,000 he pays on $100,000. To suggest that he is working overtime shifts only to pay child support is not credible. His budget as submitted shows a gross family income of over $16,000 per month. His expenses include a mortgage payment of over $2,000, food allowance for himself and his wife of $1000, clothing allowance of $300, pet expenses of $600, savings of $400 and holidays of $333. In addition he claims $675 per month for access costs but the evidence does not support that expenditure on a monthly basis. The court does not doubt that given his commitments Dr. Kohout must work some long hours, but there are a number of lifestyle choices within his budget.

[14] The court did a detailed analysis of the circumstances of both parties in 2005. The allowance granted at that time was based on a consideration of the circumstances of the parties and the provisions that allow an undue hardship claim under the support guidelines.

[15] When Dr. Kohout was granted the $100 per month reduction on child support, the outstanding student loans of he and his spouse were approximately $85,000. While there is no evidence before this court on what amounts are outstanding for his spouse, Dr. Kohout did testify that his student loans have been reduced to approximately $27,000.

[16] The last order required that he maintain regular contact with his daughter through access visits as a condition of maintaining his undue hardship. While he has not maintained 10 visits per year I am satisfied that he has maintained reasonably regular contact and that there is substantial cost, if not the $675 per trip he claims, associated with that access. Given Mikaela is older, the frequency of visits is less significant. I am satisfied that given the circumstances, he has and continues to make reasonable efforts to maintain the parent child relationship and will continue to be entitled to some financial consideration for that.

[17] Under the *Child Support Guidelines*, S. 20(1), a support payor who is a non-

resident of Canada shall have his income determined "as though (he) were a resident of Canada". There is a proviso contained in S. 20(2) as follows:

> (2) Where a spouse is a non-resident of Canada and resides in a country that has effective rates of income tax that are significantly higher than those applicable in the province in which the other spouse ordinarily resides, the spouse's annual income is the amount that the court determines to be appropriate taking those rates into consideration.

[18] Dr. Kohout has argued he should be entitled to some reduction, in addition to his student debt and access costs because of the differences in cost of living between his home in the US and rural Nova Scotia. There are undoubtedly differences, but there is no evidence before the court that would allow me to conclude Dr. Kohout falls within the exceptions of S. 20(2). Housing costs may be higher in the US, but mortgage costs are a deductible; health benefits and social security taxes may be high but income tax rates are lower (their effective rate is 20%). Indeed there are substantial differences within the Province of Nova Scotia in living costs between our urban and rural areas. The *Guidelines* are intended to average these out and there is no provision for deductions based on these differences.

[19] Dr. Kohout also claims relief from maintenance during periods his daughter Mikaela is with him. The only consideration allowed in the *Guidelines* is when the access time amounts to 40% or more of the child's time. That is certainly not the case before the court. The *Guidelines* presuppose children spend time with the non-custodial parent and

acknowledge that during those times parents incur costs of maintaining the child. However, other costs associated with the child, such as maintaining accommodation, clothing, and activity expenses, continue in the custodial home and for that reason support is not abated during access periods.

CONCLUSIONS:

[20] I believe both parties are worn down and tired by these constant negotiations. I believe they have attempted to resolve some issues between themselves but with limited success. These are complicated issues and each parties' circumstances are unique. Ms. Fraser's position is that she simply seeks the guideline amount given Dr. Kohout's income. Dr. Kohout is struggling with the reality that his finances are not improving as he undoubtedly hoped they would at this point in his career. He is recognizing that there are limits to how much he can work and indeed limits to what he can make.

[21] Child support guidelines recognize the fundamental responsibility of parents to support their children financially. The guidelines acknowledge the need for a parent to first of all support themselves and for that reason some low incomes are exempt from support obligations. The law is that the children are to be supported consistent with their parent's income. The intent is that the children should enjoy a lifestyle commensurate

with the parent's lifestyle or ability to earn. In this case Dr. Kohout is a professional earning approximately $100,000 per year. His circumstances are special only insofar as he is burdened by his educational debt and some unusual access costs. The court has attempted to recognize that with the undue hardship previously granted. The court is required to balance the entitlement of the child with parental resources. In the court's opinion it is not a matter of an unusual cost of living in one jurisdiction as compared to another nor is it a matter of someone being forced to work unreasonable hours to maximize income. It is simply a matter of determining income and payment accordingly, subject only to those very few exceptions provided by the Child Support Guidelines.

[22] As noted above, there was very little evidence placed before the court at this hearing other then the documentation itself. In those circumstances I am prepared to continue a reduction in the amount of $100 per month for undue hardship for the reasons earlier advanced. There continues to be outstanding student debt which has to be retired over the next few years and there is excessive access costs for the time Dr. Kohout does spend with his daughter. The reductions in place are nominal but do recognize the reality.

[23] I am satisfied that there are included in Dr. Kohout's current income monies attributable to overtime which it is not reasonable that he sustain over the longer term. I do however recognize, given Dr. Kohout's other obligations (separate and apart from

child support), he is likely to continue working hours very similar to what has occurred in the past. That is simply a reality of his financial obligations.

[24] Given his base salary which is currently $60,000 and given his other substantial commitments other than child support, he is likely to continue working something more than base hours. It may well be that in the current economy fewer hours are available to him. In the circumstances I believe a US salary of $90,000 is a reasonable income to impute to him for support purposes on an ongoing basis effective August 1st, 2009.

[25] The current order provides for an exchange rate to be fixed as of February 1st. I have serious concerns with isolating any particular date to pick an annual exchange rate. The court takes judicial notice that exchange rates have varied widely over the past year and isolating on any particular day has the potential to be unfair to either or both parties. The February ‘08 exchange rate of 1.005 represented virtually parity with the US dollar. The February ‘09 exchange rate of 1.24 represents about an 80 cent dollar. A weighted average would be the fairest method to calculate, but would require constant adjustment. In the alternative I am fixing an exchange rate effective August 1st of 1.11%. This represents an approximately 90 cent dollar and is midway between the rates used over the previous year and I believe more accurately reflects the average exchange rate. In fixing that as the exchange rate, the court is prepared at a future date to review the

matter,` but only if the evidence supports a material change over an extended period of time. Pending application to vary, that will be the exchange rate applied February 1st based on proof of income as of the end of the preceding year. Dr. Kohout will continue to disclose his income as agreed in the previous order.

SUMMARY

Support payable:

2008 - $92,488 @ bank rate 1.0051 = $93,41760	$790
Less undue hardship amount	-$100
TOTAL MONTHLY PAYABLE 2008	**$690**

2009 (Jan. 1-July1) - $101,493US @ bank rate 1.24% = $125,851.32CND

Guideline Amount	$1,032	
Less undue hardship	-$100	
TOTAL MONTHLY PAYABLE (Jan to July) 2009		**$932**

2009 (July forward) - $90,000US @ bank rate 1.11 = $99,990 CND

Guideline Amount	$839	
Less undue hardship amount	-$100	
TOTAL MONTHLY PAYABLE 2009		**$739**

[26] As there is no evidence before me with respect to payment, it is left to the parties to adjust amounts owing under the above calculations with payments received to

date.