IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Van Der Voort v. Keating, 2006 NSSC 11

Date: 20060110
Docket: 1201-48767, SFH D 020833
Registry: Halifax

Between:

John Gerrard Van Der Voort

Applicant

v.

Judy Starr Keating

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Heard:	December 5, 2005, in Halifax, Nova Scotia
Written Decision:	January 10, 2006
Counsel:	John Gerrard Van Der Voort, self represented Judy Starr Keating, self represented

By the Court:

[1] In October 2004 the father commenced an application to vary a Corollary Relief Judgment granted October 21, 1994. That Judgment required the father to pay, for the support of his two daughters, the sum of $350 per month when he was working and $200 when he was unemployed and receiving what was then called Unemployment Insurance and now is called Employment Insurance. Because this was a pre child support guideline judgment, the father can deduct these payments from his Income Tax obligation. The child support provisions of the Corollary Relief Judgment have never been varied.

[2] In his application the father seeks to terminate child support for his eldest daughter, calculate, pursuant to the child support guidelines, the child support he should pay for the younger daughter, and receive a retroactive downward recalculation of the amount of child support he should have paid since 2001.

[3] The mother resists the father's application and has applied for a variation of the amount of child support to be paid by the father for both children based on the child support guidelines, for an upward retroactive recalculation of child support since the date of the Corollary Relief Judgment and in particular for special expenses since the institution of the guidelines in May 1997, and for a Order requiring the immediate payment of arrears.

[4] There have been significant changes in the circumstances of these parties and their children since the grant of the Corollary Relief Judgment.

[5] In order to address the specific requests made by each party it is necessary to determine the total income earned by each during the periods in question. Each party has also requested that I impute income to the other.

[6] The mother has provided information to substantiate her income as follows:

1993 - $8,903	1997 - $13,732	2001 - $22,912
1994 - $12,418	1998 - $11,691	2002 - $37,232
1995 - $13,000	1999 - $8,929	2003 - $38,672

1996 - $13,200 2000 - $6,194. 2004 - $41,326

[7] Until approximately 2001 the majority of the mother's income came from social assistance benefits. The mother was able to re-educate herself and she has attended university. Little evidence was provided to explain how she paid for her education nor for the many educational trips taken by her children, in particular she paid for both girls to travel and live in Germany in 2000, at a total cost of $7,479. I do note that upon her graduation her father paid for her trip to Europe. The father suggests I should impute additional income to the mother should I decide to retroactively vary child support to include special expenses. I will return to this issue later in this decision.

[8] A letter from the mother's employer indicates that her income to Oct 15, 2005 is $37,717. She is employed with the Province of Nova Scotia. She has provided pay stubs. They disclose a regular two week gross income of $1745.13. This represents a gross annual income of $45,373. I find this to be the total income of the mother for 2005.

[9] The father has provided no financial information prior to 2001. What is available has been provided by the mother.

[10] The mother has requested that I impute income to the father in an amount sufficient to provide him with a total income of $47,000 per year from October 2004, the date of his application. She arrived at this figure by extrapolating from his earned 2005 income as disclosed in a letter from his employer. However, she has not accounted for the seasonal nature of his employment and I must do so in determining his total income.

[11] The letter from the father's employer indicates that his income to October 14, 2005 is $24,434. This covers a period from April 1st 2005 until October 14. No pay stubs have been provided. The father's testimony is that he earns $17 per hour. If the employer's information is calculated based on 40 hours per week for every week since April 1st and if there is no overtime the hourly rate would be approximately $21.81 per hour. The father says he works little overtime. The father did not bring pay stubs although this is required. With more information his actual rate of pay may have been confirmed. Without this I must make sense of

what I have been given. The total income earned by the father from April 1st could only have been earned if he had a rate of pay of at least $21 per hour. Working from October 17th to the end of December at the rate of $21 per hour, with no overtime, for a 40 hour week will provide additional income to the end of this year of $9,240. Added to the earnings to October 14th this would provide a total 2005 income of $33,674. Although the father may not be employed fully to the end of the year there is a possibility he will be. I think it appropriate to include this income amount. The father's 2005 income for the purpose of calculating support based upon the child support guidelines is $33,674.

[12] The father has not provided any information to suggest he expects to earn less in 2006 than he has in 2005. If he can reestablish an Employment Claim he may earn more because he will have income during the months when there is no work because of the seasonal nature of this work. If he is unable to obtain his usual seasonal employment, he must make application to the court to recalculate child support. If he does nothing arrears will accumulate as they have in the past and inaction may result in a failure to obtain relief.

[13] Prior to April 1, 2005 the father was unemployed and not in receipt of employment insurance, his claim having ended in 2004. The father was unemployed for substantially the entire year in 2004 due, he testified, to lack of work, his illness and subsequent hospitalization and the illness and hospitalization of his father whom he attended during his illness. The mother requests I impute income for the time when the husband was unemployed at his present rate of pay.

[14] The mother, because she is seeking retroactive variation from the date of the Corollary Relief Judgment, or very shortly thereafter, has also requested that I establish the father's income for this purpose at $30,000 per year to the date of his application. This was the amount apparently used at the time support was initially established by Judge Gass, (as she then was), in her Order dated May 24, 1994. This Order was incorporated into the Corollary Relief Judgment.

[15] Exhibit #3 filed in this proceeding is a true copy of the Statement of Financial Information sworn by the father dated September 13, 1993. It attaches a portion of a summary from his 1992 Income Tax Return. This summary shows

income from employment $17,711, from family allowance $837, and from unemployment insurance benefits $11,737 for a total income of $30,285.

[16] Exhibit # 4 filed in this proceeding are true copies of Notices of Assessment issued in respect to Income Tax Returns submitted to Revenue Canada by the father. They show the following total income:

1987	$25,971
1988	$28,137
1990	$29,943

[17] The father has provided information to substantiate the following income:

2001 - $25,130	2003 - $20,528
2002 - $20,619	2004 - $14,325

[18] The father is 45 years of age. He holds a journeyman certificate as a bricklayer. Prior to 1994 he was employed by various companies as a bricklayer. He would work approximately 8 months and be on unemployment for the remaining 4 months. In 1993 he was paid $21 per hour for this work but by 1994 his usual employers had no work for him and he was forced, when his unemployment claim ended, to work in a restaurant. He continued with this work at minimum wage for two years until he became employed caulking windows for Caulking Company Atlantic. This work was also seasonal. He earned $14 per hour for an 8 hour day. He worked with this company for a number of years until 2004 when he was unemployed. The father has now been employed, since April 1, 2005 with Clearview Integrated Services caulking windows. He has not looked for work as a bricklayer because he has asthma and the dust would aggravate his condition. The father is also a heavy smoker who has tried to quit but has been unable to do so. He has reduced his smoking to half a package a day. He enjoys the caulking work and it does not effect his asthma. He would have to reapply for union membership if he were to try to obtain work as a bricklayer.

[19] The mother has suggested the father should become employed as a bricklayer because he will have a higher income and that income at this higher rate should be imputed. She acknowledges that he suffers from asthma but suggests he should stop smoking. She points out that the construction industry is booming in Nova Scotia but she had no specific information about the number of bricklayers required, their present rate of pay, nor the length of time during which a bricklayer could expect to be employed.

[20] The Federal Child Support Guidelines provide 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 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 spouse;
> (b) the spouse is exempt from paying federal or provincial income tax;
> © the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
> (e) the spouse's property is not reasonably utilized to generate income;
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
> (g) the spouse unreasonably deducts expenses from income;
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
> (I) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[21] Only 19 (a) and (d) are relevant to this proceeding.

[22] The mother suggests that the father has been intentionally under-employed because he has not pursued work as a bricklayer, an employment from which he could have earned more income than he does as a caulker. She has no direct evidence that could prove this point. I do note that his total 1992 earned income, as a bricklayer was $17,711. The only reason he earned total of income of $30,285 was because of unemployment insurance benefits in the amount of $11,737 and family allowance benefits of $837. I am not satisfied that the father could earn more by working as a bricklayer. He is not under-employed now and I do not find that he has been under-employed in the past.

[23] The mother uses similar arguments to suggest that the father has been intentionally unemployed. I have no evidence before me to suggest that he failed to accept available employment at any time. I do not find him to have been at any time intentionally unemployed. I will not impute any additional income to the father. Because I am satisfied the father was without any income from January 2005 until April his first payment of a varied child support award shall commence April 1, 2005.

[24] The father is requesting termination of his obligation to pay child support for his eldest daughter either as of June 1, 2004, or the date of her 19th birthday. He suggests she is no longer a dependent child because :

- she became 19 years of age on May 26, 2005 and is working and living with her boyfriend in a common law relationship

- prior to her birthday, on or about June 2004, she was living in a common law relationship and was working and therefore was self-supporting

[25] The Divorce Act defines a child of the marriage entitled to receive financial support from both parents as:

- a child under the age of majority (which in NS is 19) who has not withdrawn from the parents charge or

- a child of 19 or older who is unable by reason of illness, disability or other cause to withdraw from his or her parents charge or to obtain the necessaries of life

[26] The words " is unable to withdraw from his or her parents charge or to obtain the necessaries of life" has been given a broad interpretation. The fact that a child may be living with another person and may be working does not necessarily mean that the child is no longer a dependent for the purposes of the support provisions of the Divorce Act.

[27] In one of the cases provided by the father in his memorandum ,*Colonval v. Munson* (1998) BCJ No. 1178, the court ordered the father to pay support for his son who was returning to college even though the son's intent was to live with his girlfriend. A similar result occurred in the case of *Robertson v. Hibbs (1997) BCJ no. 1305.*

[28] The father testified that his only knowledge about his eldest daughter's situation was provided by his younger daughter who was not a witness in this proceeding. She informed him that her sister was living with her boyfriend. Because this was heresay further details about what the younger daughter said was not permitted.

[29] The mother testified that the eldest daughter had lived with her continuously until late May 2001. She then lived with her father until the end of December 2001 when she returned to live with her mother. She graduated early with her grade 12 certificate in January 2004 at the age of 17. In May of that year she became 18 years of age. From her graduation in January 2004, the daughter was not employed until the summer of 2004 when she worked as a waitress in the Peggy's Cove area, a drive of approximately 30 minutes from the mother's home. The daughter did

have a boyfriend who lived in Peggy's Cove and she did stay with him overnight. However, she returned to her mother's home periodically and her mother continued to provide financial assistance.

[30] In September 2004 the eldest daughter obtained employment with Teletech, a call centre located at Bayers Lake, N.S. She is still employed with this company on a part time basis, working 10 to 12 hours a week. She had been accepted to attend Bishop's University, and the University of Victoria, beginning September 2004 but decided not to attend either university because of the expense. She was accepted to and, since September 2005, has been attending Mount St. Vincent University. She and her sister are renting an apartment near the University because there was no reasonable transportation available on a regular basis from their mother's home to the University.

[31] The eldest daughter's notice of assessment indicated total earnings for 2004 of $1,107. This would not have been sufficient income from which to draw the conclusion that she was self supporting. Her boyfriend was not obligated to financially support her. The evidence before me is insufficient to support the conclusion that the eldest daughter has at any time removed herself from the charge of her parents, was able to provide the necessaries of life, and was therefore no longer a dependent.

[32] The youngest daughter resided with her father from September 2002 until May 2003 when she returned to live with her mother. She is now 18 years of age. She was accepted to and has been attending Mount St. Vincent University since September 2005. She is employed part time at Teletech. She is still a dependent child.

[33] Having determined that both children of these parents are dependent children, and therefore legally entitled to receive financial support from their father, I now must determine the amount to be paid and the date for the first payment of this new amount.

[34] Section 3(1) of the Child support guidelines directs that child support for a child under 19 is to be the table amount and special expenses as determined pursuant to section 7 unless the parents have shared custody, split custody, or

there is an undue hardship. In any of these circumstances the court may order a different amount than the table requires.

[35] The father has filed a claim for undue hardship. Section 10 (2) of the Federal Child Support Guidelines requires that he establish any one of a number of circumstances to justify an analysis of comparative household standards of living. None of these circumstances have been established. In addition his present wife is working and had and average income for the years 2001, 2002 and 2003 of $26,694. She is still employed and is earning this amount or more.

[36] Section 3(2) of the Child Support Guidelines directs that child support for a child 19 or over is either the table amount or, if it is determined that the table amount is inappropriate, the amount the court considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to the support of the child.

[37] The table guideline amount for two children at an income of $33,674 is $478 per month. Is this an inappropriate amount?

[38] There are no clear directives to assist in the determination of whether the table amount is inappropriate. A review of the case law does indicate that the table amount is often considered inappropriate when a child is attending an educational institution away from his or her home. This often is so even if the child returns periodically to his or her home in the summer. However, grossly disparate income differences, families of modest means, table amounts that are not excessive or inadequate in respect to the child's needs, may all be factors arguing in favour of a decision to order payment based on the table.

[39] In this case there is a child for whom a table award must be made, because of her age. A combined budget for both girls has been provided and indicates a deficit in the amount of $1,152 per month. This does take into account their earnings from part time employment but does not estimate any increased earnings during the summer. The budget includes deductions for entrance scholarships and a sibling discount that may not be available next year. The budget does not take into account the student loans received by each child this year. Each child has received approximately $7,000. The mother did not deduct the student loans received because it is her position the father should contribute the maximum to

their expenses to reduce their need for loans. The total deficit for these children for the period from September to May is 10,368. If the student loans received are deducted there is no deficit, there is a surplus of $3,632. However, the rental for the apartment must continue over the summer months and the children must be supported during that time if their summer earnings are insufficient. The evidence is that these children are highly motivated and capable. They are dependents and are deserving of financial support from their father. Given the facts of this situation I do not consider the table guideline amount for two children inappropriate. The father shall pay for the financial support of his daughters the table amount of $478 per month beginning November 1, 2005. Because the mother has managed and assisted her daughters with their budgets I direct the child support payment is to be made to her.

[40] The father has requested retroactive variation for the months when his children lived with him. The mother objects for the following reasons:

- the father rarely exercised access and saved himself this expense

- the father accumulated assets while she was forced to survive on social assistance

- the father never paid the child support as ordered and is in substantial arrears

- the father did not pay in accordance with the table guideline

[41] The decision to make a retroactive award is governed by a broad discretionary authority. The Nova Scotia Court of Appeal, *Conrad v. Rafuse, [2002] N.S.J. No. 208,* outlined the policy considerations and factors to be examined upon reviewing an application for a retroactive award. I have considered these in arriving at my decision.

[42] The father and mother have had, what I would define as, an acrimonious relationship. This has impacted negatively on the children who appear to have been caught in the middle. The acrimonious relationship between the parents prevented the children from experiencing regular access with their father. The father was not without responsibility for this situation. However, while he may not have had the expense other parents do when exercising access, I do not find this to be a sufficient reason, in and of itself, to deny him relief for the period when he did have the children in his daily care.

[43] The father is a joint owner with his present wife of a modest two bedroom home. The down payment was provided by his wife. The mortgage requires a monthly payment of $889. The family vehicle is leased. They have no other assets.

[44] The mother purchased the father's interest in her present residence at the time of their separation. She had legal advice when she did so. There was no "accumulation of assets" by the father to the detriment of his child support obligation. The father's present wife had no obligation to give her earnings to the father so he could make his child support payment.

[45] The father is in arrears of his child support obligation but the existence of arrears does not prevent their reduction if this is appropriate.

[46] The father was never required to pay support based on the Federal Child Support Guidelines. The mother could have brought an application requesting this change but she chose not to do so. She testified she never applied to vary the Order because she didn't consider this to be useful to her. She was not receiving money pursuant to the present Order and didn't see the point of going back to court to change the terms of the Order.

[47] The difficulty with the request each party has made for retroactive variation is his and her failure to apply for this variation in a timely manner. The eldest daughter lived with her father from late May 2001 until late December 2001; the youngest from September 2002 until mid May 2003. The father sought no variation in the amount he was to pay for their support during either of these occasions. He did not seek to vary the Order at times when he was without any sources of income. The mother, having not sought variation at the time the Child

Support Guidelines came into effect, now requests that they be applied retroactive to May 1997 and that a retroactive award be made for special expenses totalling $33,000.

[48] I consider it inappropriate, under these circumstances, to grant the father' request for a reduction without recognizing the mother's claim for retroactive recalculation based on the child support guidelines. I also consider it inappropriate to grant the mother's claim for an upward variation without considering the father's request for relief because he earned less income and occasionally had no income since the Corollary Relief Judgment was granted. However, he has not presented sufficient evidence to indicate his financial circumstances year by year. To attempt to recalculate support based upon the information before me may work a considerable injustice to one or both parties. By way of further example, although the mother has provided information about section 7 expenses (for her retroactive claim) not all these expenses are substantiated. In 2001 and 2003, the mother may have been able to substantiate all of these expenses. Similarly the father is, in respect to the mother's retroactive claim, unable to appropriately provide evidence he may have been able to provide at the time, about whether these expenses were necessary or reasonable.

[49] Both parties request for a retroactive variation is further complicated by the fact that the Order I am requested to vary was granted prior to the application of the child support guidelines. It requires different payments for months when the father is working or not working. The father has not provided me with any information about months worked or not worked while his daughters were living with him. This information may have effected the calculations to be made on a variation if the child support guidelines were not applied.

[50] Both the father and the mother, having waited so long before requesting a variation to the previous Order, have led the other to believe that the previous Order was acceptable. Each has arranged his and her financial affairs on that basis. Under these circumstances I decline to grant a retroactive award to either party. Having made this decision there is no need for a determination whether to impute income to the mother during the period in question.

[51] The father's arrears of child support to November 23, 2004 was $18,529.22. While the father has made some additional payments towards these arrears, they

remain substantially the same to date. This is money justly due to the mother and it must be paid. The present Order is being enforced by the Director of Maintenance Enforcement pursuant to the provisions of the *Maintenance Enforcement Act. 1994-95, c. 6, s. 1.*

[52] The varied order issued as a result of this decision will be sent to the Director for Enforcement as well. The Director has the authority to issue garnishee orders both to employers and to the Federal Government in respect to certain benefits. The Director can have a drivers licence revoked. The mother has not been impressed with the actions of the Director in attempting to collect the arrears. The arrears have been outstanding for some time. I do not consider that I have the authority to require the Director to take a particular enforcement procedure. Also the mere ordering that arrears be paid immediately does not mean they will be paid. There must be income or assets to seize to provide payment. The Director has issued garnishment orders in respect to these arrears in the past and may

choose to do so in the future to ensure an orderly payment of the arrears. I decline to make any specific order about the payment of the arrears.

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Beryl MacDonald, J.