SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Richards v. Richards, 2013 NSSC 127

Date: 20130424
Docket: 77175
Registry: Sydney

Between:

Alexis Richards

Applicant

v.

Donald Richards

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: January 15 and 16, 2013, in Sydney, Nova Scotia

Oral Decision: April 24, 2013

Written Decision: April 26, 2013

Counsel: Candee McCarthy, for the applicant
Darlene MacRury, for the respondent

By the Court:

[1] **Introduction**

[2] Liam and Aubrey Richards are the young children of Donald Richards and Alexis Rudderham. Since the parties' separation, Liam and Aubrey have been in the joint and shared custody of their parents.

[3] The majority of the issues facing the parties were settled by the issuance of a consent order in February 2012, and then by way of a further agreement in February 2013. The unresolved issue to be determined by this court concerns retroactive child support from August 2008 to January 2012.

[4] **Issues**

[5] The court will determine the following issues in this decision:

- Is the court precluded from determining the retroactive support issue because of an agreement reached between the parties?

- Should a retroactive child support order issue?

[6] **Background**

[7] The parties were married on July 10, 2004. Liam was born on * , 2005; Aubrey was born on *, 2007. The parties separated on August 11, 2008.

[8] Mr. Richards is a teacher who is employed in Eskasoni. Between 2008 and 2011, his income increased from $52,327 to $58,616. In addition, Mr. Richards earned rental income from boarders and tenants. For a period of time, Mr. Richards also earned money by delivering flyers.

[9] Mr. Richards continues to reside in the former matrimonial home, with his sons, his partner, and her six year old son.

[10] Ms. Rudderham was a stay at home mom prior to separation. She also operated a daycare from the matrimonial home. Difficulties maintaining this

business arose following separation because Ms. Rudderham was charged with assaulting Mr. Richards. Although the charges were later dropped, Ms. Rudderham initially had difficulty accessing the home because of an undertaking. She lost clients because of the disruption in child care services. By the end of August 2009, Ms. Rudderham closed her business. At this time, Ms. Rudderham began to work as a temp by providing administrative services through the Billmac Temp Agency. In the fall of 2010, Ms. Rudderham left and started employment with Advance Glazing in a full time position as their marketing and sales coordinator.

[11] Ms. Rudderham eventually had to terminate her employment with Advance Glazing. Ms. Rudderham was finding this work increasingly more difficult as she was attempting to balance the needs of her children, and in particular Liam, with the demands of her employer. Liam, at the time, was experiencing bowel difficulties. Ms. Rudderham was frequently called to school, approximately two to three times each week, to address Liam's needs. Ms. Rudderham always responded to the school's calls because Mr. Richards was unable to leave his employment in Eskasoni to attend to Liam's needs. Ms. Rudderham was put on medical leave and then her workplace was declared hostile. Ms. Rudderham was therefore eligible to collect EI benefits. Through funding and programming, Ms. Richards established her own business known as *Gourmet Vous*.

[12] Ms. Rudderham currently resides in a rented home with her sons and her partner.

[13] The first formal court application was commenced by Mr. Richards filing an application with the Family Division of the Supreme Court on September 1, 2011. Ms. Rudderham filed a response on September 22, 2011. A consent order addressing the issues raised in the pleadings, with the exception of retroactive support, issued in February 2012. The retroactive support claim was reserved for further hearing, which was scheduled for December 5, 2012.

[14] In November 2012, Ms. Rudderham filed another variation application. The parties agreed to consolidate the applications and the matter was adjourned until January 15 and 16, 2013. Each of the parties testified at the hearing and submissions were provided. The matter was adjourned for oral decision on April 24, 2013.

[15] **<u>Analysis</u>**

[16] **Is the court precluded from determining the retroactive support issue because of an agreement reached between the parties?**

[17] *Position of the Parties*

[18] Mr. Richards states that the court is precluded from determining the retroactive child support issue because the parties had reached agreement on that issue. He noted that because of the shared custody arrangement, Mr. Richards agreed to cover all child care expenses, activity and transportation expenses, and the cost of his employment health plan in lieu of paying child support to Ms. Rudderham. In this way, the needs of the children would be met. Mr. Richards states that Ms. Rudderham consented to these terms.

[19] Mr. Richards states that he is not, and was not, able to afford child support. In fact, he noted that he would take food regularly from the Feed Nova Scotia program at his school, and further that other teachers who worked with him, donated Christmas gifts for the children one year because of his financial circumstances.

[20] In contrast, Ms. Rudderham denies there was any agreement between the parties on the issue of child support. She stated that her circumstances were dire. She said that she consistently requested child support from Mr. Richards. He refused to pay. Ms. Rudderham said that she eventually went along with the interim arrangement proposed by Mr. Richards pending a court appearance, but subject to adjustments being made once the court process was activated.

[21] *Decision*

[22] The onus of establishing, on a balance of probabilities, that there was an enforceable agreement fell on Mr. Richards: **Deluney v. Deluney**, 2004 NSCA 72 (C.A.). Mr. Richards did not dislodge this burden. I find that the parties did not reach agreement on the issue of child support for the period between August 2008 and January 2012. In reaching this conclusion, I note that I have made credibility determinations in keeping with the principles set out in **Baker-Warren v.**

Denault, 2009 NSSC 57 at paras 18 - 21. Where the evidence of Ms. Rudderham and Mr. Richards conflicts, I accept the evidence of Ms. Rudderham.

[23] *Parents Cannot Barter Away Child Support*

[24] Courts are always permitted to intervene in settlements concerning children. Child support is the right of a child, and as such, parents are not permitted to barter away this right in a settlement agreement: **Richardson v. Richardson** [1987] 1 S.C.R. 857 at para 14, although in most circumstances, agreements reached between the parties should be given considerable weight, unless the actual support obligations of the payor parent have not been met: **S. (D.B.) v. G. (S.R.) et al**, 2006 SCC 37, paras. 75 to 78.

[25] *No Consensus Ad Idem*

[26] The parties did not have a meeting of the minds over the terms of the alleged agreement. There was no consensus ad idem. The parties did not agree on essential terms. A loose support arrangement was put into place at the end of 2009 after Ms. Rudderham closed her child care business and was working as a temp.

[27] Mr. Richards interpreted the 2009 child support arrangement as relieving him of his obligation to pay child support to Ms. Rudderham. Ms. Rudderham interpreted the arrangement as a temporary measure, that would alleviate, to a limited extent, her difficult financial circumstances, until such time as the parties could appear before the court and have the matter addressed according to the law.

[28] The loose arrangement came into being in December 2009. On December 18, 2009, Ms. Rudderham emailed Mr. Richards as follows, and in part:

> "So just to be clear as of now you are agreeing to pay the entire cost of the child care, in lou of paying me any child support. So I will not be giving you the regular payments of $50.00 bi-weekly that I have been giving you since October 1st. Previous to that I gave you two payments for the month of September. The first being $20.00 and the second being $175.00. This is only an interim agreement made between you and I. And upon going to court and having the province assess our situation, I will then do what is recommending from the courts."

This email does not constitute a final and binding contract or settlement.

[29] Further, this email stemmed from Mr. Richards' earlier email to Ms. Rudderham, which states, in part, as follows:

> "... From now on, I will pay for all of it. You will no longer pay for any of their childcare. On top of this, you continue to take all of their CTTB, Universal Childcare, and GST. I will also continue to transport them to and from daycare, and to and from your place and mine. ..."

However, Ms. Rudderham did not, in fact receive all of the Universal Child Care benefit for both children. Mr. Richards claimed and received the Universal Child Care Benefit for one of the children.

[30] The lack of agreement on the child support issue, is also evidenced by the letter which Mr. Richards signed, and had witnessed in April 2011, in which he states as follows:

> "I, Donald Nelson Richards, do swear that, upon receipt of the money owed to me by Revenue Canada, I will pay Alexis Marie Rudderham/Richards her half of the child benefits owed to us as the legal parents of Aubrey Donald Isaac Richards for the period of time from January 2008 to July 2008. Furthermore, I, Donald Nelson Richards, do swear that I will pay Alexis Marie Rudderham/Richards money for child support incurred during the period of time from August 2008 to present."

[31] I reject Mr. Richards suggestion that the term "child support" actually referenced "the payment of all child care expenses for the boys." This takes away from the ordinary meaning of the words.

[32] Further, the email sent from Ms. Rudderham to Mr. Richards dated April 5, 2011, likewise, does not indicate a final agreement. In fact, it states the contrary, and as follows:

> "I don't agree with all of that."
> ....
>
> "That seems fair enough in the interim until I get word back from both Candee and my accountant. I think as long as we are keeping each other up to date on our actions it will all work out."

There is nothing final or which can be interpreted as final in this letter. There was no agreement reached.

[33] *Lack of Disclosure and Independent Legal Advice*

[34] There was no financial disclosure or independent legal advice. Full and complete financial disclosure is a necessity before settlement agreements can properly be created, especially in the child support context. Independent legal advice is helpful to ensure the parties understand their rights and obligations and to ensure agreements accurately reflect the intentions of the parties.

[35] *Disparity in Bargaining Power*

[36] There was significant disparity in the bargaining power of the parties. Mr. Richards was living in the matrimonial home, was employed as a teacher, had a motor vehicle, and had possession of the vast majority of the matrimonial assets. In contrast, Ms. Richards had no vehicle, was living in an apartment with her brother, and was experiencing financial difficulties. At one point, she applied for social assistance. Further, Ms. Richards, for a period, was also facing criminal charges because of a complaint laid by Mr. Richards, a complaint which he later withdrew.

[37] *Summary*

[38] For the above reasons, I find that there was never an agreement on the issue of child support for the period between August 2008 and January 2012. Ms. Rudderham consistently requested child support from Mr. Richards, and he continually refused to pay child support, other than $20 on one occasion. The loose arrangement that provided that Mr. Richards would be solely responsible for child care after January 2010, was one that Ms. Rudderham was forced to accept in the circumstances. This loose arrangement was not in the childrens' best

interests and created a significant financial disparity between the parents. This loose financial arrangement did not meet the financial needs of the children.

[39] **Should a retroactive child support order issue?**

[40] *Position of the Parties*

[41] Ms. Rudderham seeks a substantial retroactive child support payment of approximately $25,000 from August 2008 until January 2012.

[42] Mr. Richards vehemently disagrees for several reasons, including the following:

- He had no prior knowledge that Ms. Rudderham was seeking retroactive child support until September 22, 2011 when Ms. Rudderham filed a response to his application. Ms. Rudderham had no reasonable excuse for the delay.

- He did not act in a blameworthy fashion. Mr. Richards states that he paid the vast majority of the children's expenses, including all transportation and activity expenses during the contested period. He did everything within his power to ensure that the needs of the children were met and the matrimonial assets preserved by paying the family debt.

- The children lived in the joint and shared custody of both parties. Despite this fact, he was mainly responsible for the transportation and activity expenses of the children, even when they were in the care of Ms. Rudderham. He was exclusively responsible for all child care expenses and the cost of the family medical plan.

- He states that the children were properly cared for; they were not in want or in need while in Ms. Rudderham's care.

- He notes that a retroactive award would cause him significant hardship. He is not in a financial position to pay a retroactive award given his current obligations and budget.

[43] In contrast, Ms. Rudderham states that she is in desperate need of a retroactive award for several reasons, including the following:

- She states that her continuous requests for child support were left unheeded, save for one payment of $20. She was unable to proceed to court earlier because of personal circumstances.
- Mr. Richards acted in a blameworthy fashion by failing to pay child support, despite her ongoing requests and despite the disparity in their standards of living.
- She requires the retroactive child support to address the needs of the children.
- Mr. Richards has the means to pay a retroactive order.

[44] *Law*

[45] Basic child support principles were reviewed by the Supreme Court of Canada in **S. (D.B.) v. G. (S.R.),** ***supra***. These foundational principles will be detailed so that the parties gain a better appreciation of the binding law on the issue of retroactive child support. The principles, from **S.(D.B.) v. G.(S.R.)**, ***supra***, are as follows:

- Child support is the right of the child and such right survives the breakdown of the relationship of the child's parents [para 38].
- The child loses when one of his/her parents fails to pay the correct amount of child support [para 45].
- Parents have an obligation to support their child according to his/her income and this obligation exists independent of any statute or court order [para 54].
- Absence special circumstances, it is unreasonable for a payor parent to believe he/she was fulfilling his/her obligation if child support has not been paid [para 80].

- The payment of a retroactive award is not an exceptional remedy [para 97].
- A retroactive maintenance award should be payable from the date the payee parent gave effective notice to the payor parent [para 118]. It is generally inappropriate to make a retroactive award more than three years prior to the date when formal notice was provided to the payor parent [para 123].
- The quantum of a retroactive award must be tailored to fit the circumstance of the case, and strict compliance with the table amount is not recommended [para 128].

[46] In **S. (D.B.) v. G. (S.R.), supra**, the Supreme Court of Canada directed trial courts to examine and balance four factors when determining the issue of retroactivity. The first factor concerns the reasonableness of the payee parent's excuse for failing to make a timely application in the face of the nonpayment of child support or in the face of an insufficient payment of child support at paras 101 and 104, which provide as follows:

> ¶ 101 Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see Chrintz v. Chrintz (1998), 41 R.F.L. (4th) 219 (Ont. Ct. (Gen. Div.)), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.
>
> . . .
>
> ¶ 104 In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent: Richardson, at p. 869. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her

> children, and to determine the most appropriate course of action on the facts.

[47] The second factor relates to the conduct of the payor parent. If the payor parent engaged in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based upon objective indicators [para 108] and the court should take an expansive view as to what constitutes blameworthy conduct in the face of the nonpayment or insufficient payment of child support at paras. 106 and 107, which state in part, as follows:

> ¶ 106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. ....
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> ¶ 107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see A. (J.) v. A. (P.) (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; Chrintz.

[48] The third factor to be balanced focuses on the circumstances, past and present [para 10] of the child, and not of the parent [para 113], and include an examination of the child's standard of living [para 111].

[49] The fourth factor requires the court to examine the hardship which may accrue to the payor parent as a result of the payor parent's current financial circumstances and financial obligations [para 115], although hardship factors are less significant if the payor parent engaged in blameworthy conduct [para 116].

[50] *Decision*

[51] In determining if a retroactive award should issue, I have placed the civil burden of proof upon Ms. Rudderham. She must provide clear, convincing, and cogent evidence to prove entitlement: **C. (R.) v. McDougall**, 2008 SCC 53. I have considered all of the evidence, the legislation, case law, and the submissions of the parties. I have also made credibility determinations. In making credibility

findings, I prefer the evidence of Ms. Rudderham when it conflicts with the evidence of Mr. Richards.

[52] I am granting a retroactive child support award, although less than in the amount claimed. My reasons are outlined below.

[53] *Reasonable Excuse*

[54] Ms. Rudderham had a reasonable excuse for failing to make a formal court application before 2011. Ms. Rudderham was constrained as a result of personal circumstances. Her finances were desperate. At one point, she even applied for social assistance. She was living in a two bedroom apartment that she shared with her brother. Initially, Ms. Rudderham's chief means of transportation was by foot or borrowed vehicle. For a period of time, Ms. Rudderham even walked about 2 km every morning around 6:00 a.m. to arrive at the matrimonial home in sufficient time to care for the children so that Mr. Richards could leave for work, including in the bitter winter. Ms. Rudderham did not receive an equalization payment for her share of the matrimonial assets until 2012.

[55] In addition, Ms. Rudderham was charged with assaulting Mr. Richards. Although this charge was eventually dropped, Ms. Rudderham was facing criminal sanctions, and initially barred from the home. Ms. Rudderham was correctly concerned about the long term ramifications of proceeding with a civil claim for child support.

[56] Further, Ms. Rudderham was also dealing with a sick child and a difficult work place. She was hoping to resolve matters amicably.

[57] These personal circumstances created a reasonable excuse for the delay in filing an application for child support.

[58] *Blameworthy Conduct*

[59] Mr. Richards engaged in blameworthy conduct by placing his own interests over his childrens' right to an appropriate amount of support. Ms. Rudderham consistently, and repeatedly, requested child support from Mr. Richards. On one occasion, he gave $20. This was the sole direct payment of child support despite

the marked disparity in the standard of living that the children enjoyed while living with their father versus while with their mother. Mr. Richards' income always hovered between $50,000 and 58,000 per annum, plus unreported income from boarders, tenants, and even from delivering flyers. In contrast, Ms. Rudderham's income was significantly lower, running between $13,000 and $33,000 per year. Even though the children were in a shared parenting arrangement, it is, and should have been clear that some child support was payable. Mr. Richards' failure to pay maintenance voluntarily in such circumstances amounted to blameworthy conduct.

[60] This blameworthy conduct is mitigated to some extent by the fact that Mr. Richards did pay for the childrens' expenses, including tax deductable, child care after September 2009, although Ms. Rudderham provided limited contribution for about three months. Before 2009, no child care costs were incurred because Ms. Rudderham was caring for the children. Mr. Richards also paid for more of the childrens' activity and transportation than did Ms. Rudderham.

[61] *Circumstances of the Children*

[62] Ms. Rudderham requires retroactive child support to meet the needs of the children retroactively and at present. She incurred debt because she was unable to meet their needs in the past. I am confident that Ms. Rudderham will use the retroactive support for the children.

[63] *Hardship Factors*

[64] I recognize that Mr. Richards has ongoing expenses to meet, however, he does nonetheless have discretionary income. He and his partner acquired a boat for approximately $12,000. Although Mr. Richards did not classify this purchase as a "big ticket item," it does indicate that he has an ability to acquire nonessential recreational vehicles.

[65] Further, Mr. Richards is now sharing expenses with his partner and maintains a tenant. He does have some flexibility and means to pay a retroactive order. Finally, it must be acknowledged that Mr. Richards is largely responsible for the substantial award outstanding because of his failure to pay ongoing support

to Ms. Rudderham after being requested to do so. Mr. Richards should not benefit from his blameworthy conduct, nor should the children be penalized.

[66] *Retroactive Order*

[67] I have determined that a retroactive award is appropriate in the amount of $17,000. This calculation is not based on a strict set-off because of the comments from the Supreme Court of Canada, and the following factors:

- the fact that the parties shared parenting of their children;
- the fact that Mr. Richards exclusively paid for tax deductible child care after December 2009; and
- the fact that Mr. Richards paid for more of the travel and activity expenses than Ms. Rudderham.

[68] The $17,000 lump sum payment will be paid by Mr. Richards to Ms. Rudderham in monthly installments of $400, and will bear an interest rate of 2.5%, that is simple and not compounded. The award will be payable through the Maintenance Enforcement Program. The payment will begin in May 2013.

[69] **Conclusion**

[70] Ms. Rudderham's application for retroactive child support is granted. Ms. McCarthy will draft the order. Any drafting concerns will be communicated to my assistant who will then arrange for a brief chambers appearance. If either party wishes to be heard on the issue of costs, written submissions are to be provided by May 15th.

Forgeron, J.