IN THE SUPREME COURT OF NOVA SCOTIA
Citation: S.I.F. v. C.G.M., 2015 NSSC 269

Date: 20150923
Docket: 1201-053085
Registry: Halifax

Between:

S. I. W.F.

Petitioner

and

C.G.M.

Respondent

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: Associate Chief Justice Lawrence I. O'Neil

Heard: November 4 and 5, 2013; March 12, 2014 and July 15, 2015 in Halifax, Nova Scotia

Written Submissions: August 2015

Counsel: Diana Musgrave, Counsel for the Applicant
Eugene Y.S. Tan, Counsel for the Respondent

By the Court:

Introduction

[1] This is a variation proceeding pursuant to s.17 of the *Divorce Act*, RSC 1985, c.3 (2nd Supp.). Ms. F. filed a Notice of Variation Application on October 25, 2012 seeking to vary the parties' Corollary Relief Order dated 1999, last amended in 2005.

[2] The parties have a child, M.M., born October […], 1993, soon to be 22 years of age.

[3] All of the issues currently before the Court are financial and pertain to past, current and future contributions to the special expenses of the parties' child or to the calculation of child support, both past and ongoing.

[4] Both parties currently live in Nova Scotia.

[5] The child moved from his mother's home to live with Mr. M. in June 2011.

[6] Evidence in this matter was heard November 4 and 5, 2013 but did not continue as anticipated on March 12, 2014. On March 12, 2014, the Court was asked to adjourn the proceeding without day pending a report on the health of the subject child who had been hospitalized because of concerns about his mental health.

[7] In the Spring of 2015, the parties asked to resume the hearing. On May 27, 2015, the matter was scheduled for completion on July 15 and 16, 2015. Written submissions followed.

Litigation History

[8] The current child support order followed numerous Court appearances between 2000 and 2005. It directs the following:

> **THAT** Mr. M. pay child support of $266 on the first of every month beginning March 1, 2003.

[9] Ms. F. says Mr. M. had minimal contact with their son, after Mr. M. moved to […] in 2003. Although Mr. M. returned to Nova Scotia for periods after that, it was only in September 2010 that Mr. M. returned to Nova Scotia to live full time.

[10] After M.M. began living with his father in June 2011, Ms. F. decided to pay $923 as child support effective September 10, 2011. The payments were discontinued in July 2012. At this time, Ms. F. decided to seek redress for the many years Mr. M. was not paying child support and was living in […] and their son lived with her in Halifax.

[11] In August of 2012, Ms. F. revisited the status of a 2003 contempt finding against Mr. M. and the obligation of Mr. M. to pay child support consistent with his income and the child support tables as required by the then outstanding order from 2003.

[12] As a consequence, an assessment of the historical child support and special expense obligations of these parents must be undertaken. Ms. F. is asking that her current or recent financial obligations to M.M. (post June 2011) be set off against those of Mr. M. that accrued since 2003.

Position of the Parties

[13] More precisely, Ms. F. seeks the following:

> 1. Costs of $1,586 flowing from the contempt finding dated February 20, 2003.
>
> 2. A credit equal to claimed child support arrears payable to her by Mr. M. in the amount of $19,420.45 for the period 2002 - 2011.
>
> 3. A credit equal to a claimed overpayment by her of child support from September 2011 to July 2012; a credit she calculates to be $2,136.70.
>
> 4. An order applying the foregoing credits to any obligation she has to pay child support for M.M.
>
> 5. An order that any obligation on her to contribute to M.M.'s university education be proportional; that payments by her be made directly to the university and that the payments be contingent upon the following:

(a) M.M. maintaining a 'C' average;

(b) M.M. not withdrawing from one or more classes; and

(c) on her receiving his grades within seven (7) days of becoming available.

[14] Mr. M. is asking the Court to:

(a) declare that M.M. continues to be a child of the marriage;

(b) suspend the garnishment of his E.I. income, which garnishment is to satisfy arrears shown on the records of the Maintenance Enforcement office; [in July 2015 the Court was advised that Mr. M. is now employed]

(c) terminate the order requiring him to pay child support and that this order be effective June 1, 2011;

(d) require Ms. F. to pay child support based on the child support tables, retroactive to August 1, 2012;

(e) require that the parties contribute on a proportionate basis to the university expenses for M.M.; and he asks the Court to make a finding that the child support paid by Mr. M. from February 2003 to the present be ruled full satisfaction of his child support obligation since then and as full satisfaction of the contempt obligation of $1,586.00; and

(f) cancel any assessed arrears of child support payable by him, including recalculated amounts.

- arrears to June 1, 2011

[15] The Maintenance Enforcement Program 'MEP' office shows arrears of child support owed by Mr. M. as $5,013.40 accrued between August 1999 and May 2011. This calculation reflects an obligation to pay $266 on the 1st day of the month as required by 2003 order (see Exhibit B to Exhibit 3).

[16] Ms. F. argues that, had Mr. M. disclosed his true income, the arrears to May 31, 2011 would be $18,082.95 after crediting Mr. M. with payment(s) totalling $2,069.51 in 2012 (see written submission received August 13, 2015).

- incomes of the parties

[17] In 2011, Ms. F.'s line 150 income was $114,611; in 2012 it was $148,906 and in 2013 approximately $120,000. Her 2014 income is projected to be approximately $120,000.

[18] In November 2013, when he first testified, Mr. M. lived with his son and his mother in his mother's apartment. Regrettably, his mother passed away in early 2015. He and his son currently live together in an apartment he rents.

[19] At the time of the hearing in November 2013 and March 2014, Mr. M. was a low income earner (Exhibit 5) earning less than $1,000 per month. He does not dispute that his earnings in the years 2003 - 2011 were as listed by Ms. F. in Exhibit 'J' to Exhibit 3 (the affidavit of Ms. F.), and as set forth in his own Exhibit 10.

[20] His income over these years was as set out below:

Filings May 7, 2013 from Mr. M.

2003 line 150 - $34,180

2004 line 150 - $43,233

2005 line 150 - $58,974

2006 line 150 - $48,477

2007 line 150 - $58,080

2008 line 150 - $49,309

2009 line 150 - $63,762

2010 line 150 - $43,092

2011 line 150 - $39,734

- relocation to […]

[21] Mr. M. says he moved to […] to start over in 2003 and to escape a gambling addiction that he felt had hurt his reputation in the automotive sector where he worked for twenty years. He said he tried to maintain contact with his son but he says his efforts were frustrated by Ms. F.'s new partner and by Ms. F..

[22] He says Ms. F. knew where he lived, where he worked and how to contact him while he was living outside of Nova Scotia. In addition, he said he believes Ms. F.'s current partner, Mr. X., while employed with the Canada Revenue Agency 'CRA" accessed his tax file, which he implies provided additional information of his home address and employment address in […]. He says the access was unauthorized and Mr. X. was forced to leave the 'CRA' because of this misconduct. The 'CRA' audit revealed unauthorized access to Mr. M.'s file commencing November 22, 2006 and ending January 8, 2010 on forty-three (43) occasions.

[23] Exhibit 'D' to Exhibit 6 is a list of all persons who accessed Mr. M.'s file over the identified period. Mr. X.'s name appears frequently on that list.

- evidence of M.M.

[24] The parties son M.M. filed an affidavit (Exhibit 7).

[25] He says his father sent him cards and gifts on occasion over the years; that his mother and her partner sometimes referred to Mr. M. in derogatory terms.

[26] He says he experienced depression and bullying while in high school and his relocation to his father's residence in 2011 was a positive change for him. He says he earned his high school diploma after moving in with his father. He says his mother did not attend his high school graduation.

[27] He says his first year at university (2012 - 2013) was difficult and he failed several courses, but he has persisted and wishes to continue in university. As of late October 2013, he says he was doing much better and his grades had improved dramatically.

[28] M.M. offers the following with respect to his recent financial history:

- his student loan for 2012-13 was $7,940

- the tuition and related charges payable directly to the university are $6,698.75

[29] Other evidence offered on July 15, 2015 placed his student loan debt as in excess of $12,000.

[30] M.M. also filed a Statement of Income (Exhibit 9) and a Statement of Expenses (Exhibit 8).

Events since the March 2014 Adjournment

[31] The parties advised the Court on July 15, 2015 that M.M. was admitted to the Abbey Lane Hospital on February 22, 2014 and remained an inpatient until May 7, 2014. His hospitalization was made necessary by M.M.'s mental health issues.

[32] Following his discharge, M.M. has lived with his father and re-enrolled in university courses for the 2014-2015 academic year.

[33] Mr. M. has not received child support for his care of M.M. since July 2012. Ms. F. says she has contributed to his care directly by giving him money; buying him clothing and other personal items and paying his university expenses, including tuition expense.

[34] Mr. M. now seeks:

(a) child support retroactive to August 2012 and ongoing;

(b) a proportionate sharing of M.M.'s educational expenses;

(c) a declaration that he has purged any contempt of Court previously ordered; and

(d) recalculation of any arrears of child support shown, effective May 2011.

[35] In response, Ms. F. says she should be permitted to assist M.M. directly but says M.M. is not eligible for child support because he is not a dependent or in full time attendance at university. However, she also says she has, "no difficulty providing support directly to M.M." but is, "concerned that any award of child support directed to C. M. would not benefit M.M.".

[36] She says she has arranged many of M.M.'s medical appointments and arranges for M.M. to attend as scheduled.

[37] Mr. M. has been employed for part of the time since the November 2013 appearance. He earned $42,807.73 in 2014; experienced unemployment from

December 20, 2014 until January 12, 2015 and after a workplace fall, was off work until July 2, 2015. His anticipated income in 2015 is anticipated to be similar to his 2014 income.

[38] On January 31, 2014 Ms. F. retired from her employment as a …] employed by the Government of Canada. She continues to work as a self employed person in the same specialty and employs Mr. X.. It is clear she is income splitting with Mr. X.. Her 2013 Notice of Assessment for 2013 shows line 150 income of $136,588; her 2014 Notice of Assessment was not provided. Her anticipated income in 2015 is expected to be consistent with the immediately preceding years.

[39] M.M.'s 2014 T1 General Tax and Benefit Return shows line 150 income of $5,181.17.

[40] When she testified on July 15, 2015, Ms. F. attributed all her son's emotional/psychological problems to his abuse of marijuana and other drugs commencing when he was a high school student. She explained his conflict with her current husband on the same basis. It is the Court's impression that M.M. is blamed by her for his having arrived at his current state. In her view, he is simply not being held responsible by Mr. M..

[41] Similarly, the determined resistance Ms. F. displays when it comes to paying child support to Mr. M. reflects a strong negative view of Mr. M.. To say she has contempt of Mr. M. would not be an over statement.

[42] It is understandable that she would be angry at the turn of events since Mr. M. returned to Nova Scotia in 2010, as far as parenting her son is concerned. In 2011, her son moved in to live with Mr. M.. Her son has no interest in her partner, Mr. X., a person Ms. F. says raised him since the age of five.

[43] Ms. F. views Mr. M. as having enabled M.M.

[44] I have considered the factors that are relevant when required to determine if a child remains or has been a child of the marriage since reaching the age of majority. These are frequently discussed. (See *Poirier v. Poirier*, 2013 NSSC 314; *Douglas v. Campbell*, 2006 NSSC 266). M.M. has suffered from debilitating emotional and

psychological problems that have rendered him dependent prior to reaching the age of majority and since. This is a state that continues.

[45] Ultimately, however, Ms. F. accepts that M.M. is making progress and remains incapable of living independently. I find that this is, in fact, the case.

[46] Mr. M. describes M.M. as having made great strides as a student when contrasted with his recent history. He remains on academic probation at […] University. However, he has advanced significantly.

[47] I am satisfied the parties' child has experienced severe mental health problems whether these are more precisely called emotional problems is not necessary for me to concern myself with. He has been incapable of independent living and remains so.

[48] Recent changes in his medication have resulted in improvements in his functionality.

[49] Ms. F. seems incapable of acknowledging her son's mental health problems may have a genesis beyond drug abuse. Notwithstanding the confidence with which she expressed her views, she is not qualified to eliminate other explanations for her son's troubles.

[50] M.M.'s discharge summary identified the family discord as a significant negative factor in M.M.'s life. After almost fifteen years post separation, the intensity of Ms. F.'s negative reaction to Mr. M. remains obvious and clouds her assessment of both her son and Mr. M.'s communications. I am also satisfied it clouds her assessment of the role both she and Mr. X. has played in their son's life. I am satisfied it has not always been constructive.

[51] Mr. M. was given an opportunity to recalculate and to pay retroactive child support now that he is back on his feet in Nova Scotia. For many years he lived in […] and did not make any child support payments. He is credited for GST and income tax garnishments over the years.

[52] He professes regret for not paying the correct amount of child support over the years and asks that Ms. F. pay the full table amount of child support. Given Mr. F.'s high income, that is a substantial amount each month.

[53] I am satisfied that Mr. M.'s child support obligation should be recalculated to reflect his actual income over the years. I have considered his request that this amount be forgiven.

[54] The Supreme Court in *D.B.S.*, 2006 SCC 37 provided guidance on the analysis a trial Court should undertake in circumstances such as these and I am satisfied forgiveness of these arrears is not justified. I discussed and incorporate by reference the principles I must apply in *Niles v. Munro*, 2009 NSSC 318.

[55] In my view, Mr. M. was aware of his obligation to pay child support; aware of his obligation to increase his support to reflect his income and made a decision to walk away from these responsibilities. He is now in a position to meet this past obligation. His means to do so arises from his current employment situation and income, as well as the substantial child support I will be ordering Ms. F. to now pay him.

[56] I have considered Ms. F.'s request to support M.M. directly and have rejected this suggestion. Each of these parties need to mature and to accept their obligations. Ms. F.'s proposal is borne out of a contempt for Mr. M., not a consideration of the best interests of M.M., her son. Each parent needs to understand that rules apply to them.

[57] In *Strecko v. Strecko*, 2013 NSSC 49 I discussed the child support obligation when a child is over the age of majority and I also discussed the principles that will govern a determination of the obligation of a parent to contribute to the university expenses of a dependent child over the age of majority. I incorporate by reference this discussion and will apply the principles reviewed in *Strecko*.

[58] Ms. F.'s line 150 income reflects a result achieved after income splitting with Mr. X., her partner. Her income for child support purposes is arguably much greater than her declared, i.e. line 150 income as shown on her income tax return.

[59] The *Child Support Guidelines* provide direction when the Court must determine the income of a payor of child support.

[60] In *Darlington v. Moore*, 2013 NSSC 103, the Court was called upon to discuss the governing principles. Beginning at paragraph 54, the Court observed:

> - determining income
>
> [54] The 'CSG' at s.15-20 outline the principles to be applied to determine a payor's income. Typically parties rely upon a payor's "line 150 income" as shown on a payor's annual tax return. However, there are a range of circumstances where a spouse's annual income can not be determined in that way.
>
> [55] Section 16 of the Guidelines provides:
>
> > Calculation of annual income
> >
> > 16. Subject to sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total income)" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[61] Ms. F.'s counsel calculated Mr. M.'s arrears of child support to be $18,082.95. I am satisfied this is correct and this will be set off against Ms. F.'s child support obligation. This will represent a purging of Mr. M.'s contempt.

[62] Ms. F.'s child support obligation to Mr. M. for the period following July 2012 will reflect her income as determined by applying the principles reviewed. The Court is not prepared to recalculate the child support obligation of Ms. F. for the period to July 2012. She seeks credit for an overpayment. She chose to pay an amount and must live with that choice and will not be essentially refunded part of that support on the basis that she over paid.

[63] It is well established that for the months to July 2012 when this support was paid the support was necessary and benefited her son as was contemplated by her.

[64] I have considered awarding a contribution to past university expenses incurred by the parties' son but decline to do so. I have reluctantly accepted Ms. F.'s line 150 income for the purpose of determining her child support obligation since 2012. I considered grossing up her line 150 income for this period after considering the income splitting with her husband. I have not done so. This is in

part because she contributed to other costs incurred for the benefit of her son and I anticipated that she will continue to do so.

[65] Effective August 2012 inclusive and on a go forward basis, Ms. F.'s child support obligation shall reflect the following:

2012 line 150 income - $148,906 Table Amount $1,211

(6 months x $1,200 = $7,266)

2013 line 150 income - $120,000 Table Amount $994

(10 months x $994 = $9,940) (less March and April 2014 when M.M. was hospitalized)

[66] The parties will alternate sharing the university/tuition deduction and dependency deduction. The party who claimed the same in 2014 will do so in even years, subject of course to M.M.'s cooperation. They shall proportionately share the university costs for M.M., i.e. tuition and related fees; bus pass; books and the other costs flowing from M.M.'s status as a student.

[67] The Court reserves jurisdiction to conclude the necessary calculations or to address unresolved issues should the parties be unable to do so.

ACJ