

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Vogt v. Abbott, 2007 NSSC 285

Date: 20071012

Docket: SFHMCA-047590

Registry: Halifax

Between:

Tamara Vogt

Applicant

v.

Corey Abbott

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

April 13 and July 4, 2007, in Halifax, Nova Scotia

Counsel:

Deborah I. Conrad, for the applicant
Steven Zatzman, for the respondent

By the Court:

[1] On July 12, 2006, the applicant applied for custody and child support. Her application was amended on January 23, 2007, to include a request for retroactive child support, a finding of paternity and costs.

[2] Tamara Vogt and Corey Abbott have one child together, Emily A. C. Vogt, born January 26, 2005.

[3] The parties agreed that Ms. Vogt would have sole custody. Ms. Vogt was agreeable to reasonable access at reasonable times and upon reasonable notice. Mr. Abbott sought no access.

[4] Although the father initially requested paternity testing, he withdrew his request. Paternity testing proceeded at the expense of the mother and the respondent was confirmed to be the father of this child. The cost of that paternity testing to the applicant was \$364.80. The matter of paternity is no longer in issue.

[5] The matter was set down for an organizational pre-trial conference on January 30, 2007. At that pre-trial conference, both parties were represented by counsel. Mr. Abbott indicated that he would be filing an undue hardship application. He was ordered to file his undue hardship material within two weeks of January 30, 2007.

[6] Within 14 days of receipt of that information, Ms. Vogt was ordered to file her financial information.

[7] Six weeks prior to the hearing, the applicant was to file further documentation. Four weeks prior to the hearing, the respondent was ordered to file affidavits and any further documentation.

[8] The trial commenced on April 13, 2007, without adequate documentation and disclosure provided by Mr. Abbott. The matter was adjourned for continuation of the trial in order to seek information from his accountant. The accountant could not verify the documentation without collateral information. As a result of this discussion with the accountant, counsel for the applicant requested collateral information. This was not provided in full or on a timely basis.

[9] The matter continued on July 4, 2007. Despite the order to provide information at the return date, Mr. Abbott appeared at the trial with a folder of documents not previously disclosed to counsel for the applicant. Mr. Abbott professed throughout to have little knowledge of the accounting of the business in which he is the sole proprietor. His disclosure was entirely unhelpful and inadequate.

[10] Mr. Abbott declined to involve his wife although she had prepared some of the financial information. He indicated it was “difficult” to get her involved. Ms. Abbott is the primary income earner for his family.

[11] The parties raised issues which were not relevant or helpful to this proceeding. They included the following:

- (1) The status of Mr. Vogt. The evidence confirmed that Mr. Vogt does not live with Ms. Vogt any longer. Mr. Vogt has made every effort to ensure that the children that he and Ms. Vogt have together are well-cared for and remain in their matrimonial home; and
- (2) The issue as to whether there are two pieces of property, as opposed to one on which both parties’ matrimonial home rests. That issue did not assist to address Mr. Abbott’s financial responsibility.

History and Relationship

[12] Both parties were married, each with two children. They lived next door to one another. They met in August, 2000, and commenced a relationship in 2001. Ms. Vogt became pregnant in May or June, 2004, and gave birth on January 26, 2005.

[13] The applicant separated from her husband and is in the process of a divorce. She and her husband have been living in separate houses since November, 2005. Before actual separation, they continued to live in the same home separately.

[14] The bulk of the evidence causes me to conclude that the relationship between the applicant and the respondent was the triggering event that terminated the mother’s relationship with her husband. The respondent’s family, at the time of the hearing, remained in tact.

[15] The attempts made by the respondent to suggest that the mother and her husband were still living as a couple failed. Likewise, the attempts made to suggest Mr. Vogt stood in the place of a parent failed.

[16] When Ms. Vogt requested Mr. Abbott's financial help to support the child, the relationship between he and the child ended.

[17] Although the relationship ceased, Mr. Abbott continued to see the child and look after the child and his other children until April, 2006, when all contact between the child and Mr. Abbott ceased. Relations between the two households deteriorated significantly.

[18] The applicant is requesting child support payable in accordance with the *Child Support Guidelines*, including extraordinary expenses which relate to the child care expenses. This cost has been confirmed in evidence.

[19] Before the birth of this child, the mother was enrolled in a two year course to become an early childhood educator. She was in school from September, 2005, to December, 2006. Because of the lack of support from the respondent and the need to address the child care costs, she withdrew from full-time studies. She worked three jobs, in hair design, tutoring and she also continued to work with her husband's company as part of an agreement entered into in their separation proceedings. She maintains child care for fear of losing the child's spot and she intends to complete her studies and become gainfully employed.

[20] During the course of the marriage to Mr. Vogt, Ms. Vogt worked with Mr. Vogt's father's company. She earned \$15,960 per annum. The continuation of that employment was likely to be short term and will be decided through the course of negotiations as the dissolve their marriage.

[21] Her 2005 income was \$16,250, 2004 income was \$19,689 and 2003 income was \$13,938. At the time she prepared her statement of income on December 5, 2006, her monthly earnings were \$1,250.

[22] Mr. Abbott argues undue hardship. He did not provide sufficient information to confirm this to the court's satisfaction.

[23] His 2000 income shows a line 150 income in the amount of \$30,195. In 2003, he shows income in the amount of \$58,654.

[24] Notably, in 2001, Ms. Abbott's income was \$27,349.

[25] In the payroll certificate provided by Mr. Abbott to the bank in 2002 to obtain a loan, he provided a pay stub showing, as of pay period ending May 19, 2002, total earnings in the amount of \$25,498.81 which would be an annual income of \$67,996.

[26] The bank documents list his occupation as a scaffolder earning \$5,000 a month gross. They list Ms. Abbott's income as an account administrator in excess of \$3,000 (The quality of the copy would not allow me to be more exact).

[27] In 2003 as stated, Mr. Abbott earned \$58,654. He worked with a company. Due to a shortage of work, he was laid off. He took an excavating course through employment insurance and started his own company. Mr. Abbott is now self-employed as a sole proprietor of Alltech Contracting.

[28] Ms. C. Sweeney from the respondent's bank testified. She advised that in February, 2006, the Abbotts refinanced their home for \$192,500. Mr. Abbott advised that the home was appraised at \$270,000. The bank was provided with, and used, the Abbotts' financial income for **2004** indicating Mr. Abbott earned \$2,516 per month and Ms. Abbott earned \$2,582 per month. That would yield a household income of \$61,176.

[29] In 2005, he claims he earned \$30,189.84 and his wife's statement of income indicates she earned \$22,711. His wife works for her father and Mr. Abbott claims her income this year is reduced. Ms. Abbott did not testify.

[30] In Mr. Abbott's November 20, 2006, statement, he shows monthly income in the amount of \$2,261.82 for a total annual income in the amount of \$30,189.84.

[31] In 2005, his income tax return shows gross profit in the amount of \$56,895.45 and reported income of \$16,265.09. His most significant business deduction was \$26,375.42 for motor vehicle expenses, not including CCA. The expense claim shows office furniture costing \$1,611.95, tools and equipment costing \$7,252.01 and trucks and construction equipment costing \$84,135, for total

equipment addition in the year resulting in business expenses in the amount of \$92,999.40. Ms. Abbot's 2005 income was \$18,458.

[32] Alltech Contracting provided a balance sheet as of October 31, 2006. I approached this information *cautiously* given the fact that Mr. Abbott could not speak to them, his accountant could not verify the information without collateral documentation and his wife, who assisted in the preparation and provided the information, did not testify or was not subject to cross examination.

[33] What the statement does indicate is that the capital assets include the office furniture for \$1,611.95, the motor vehicle for \$34,135.44, tools and equipment for \$7,652.16 and heavy equipment for \$50,000, with total capital assets in the amount of \$93,430.82. Total assets, including accounts receivable and other negative accounts, amounted to \$104,895 and total liabilities were stated to be \$79,893.77.

[34] Mr. Abbott is involved in many odd jobs. He is currently involved in excavation, landscaping, demolition, scaffolding, renovation and general repairs. Prior to his self-employment, he was unionized and earning significantly more money. I have no evidence to indicate whether he is currently a member of a union.

[35] His total business revenue for 2006 from January to October 31 was said to be \$161,752.62 and the total costs of goods sold was \$69,618.99. His total payroll expense was \$8,302.18 and the remainder of the expenditures relate to general administrative expenses, including insurance, interest and bank charges, outside services (not enumerated), telephone and truck expenses to list the major expenses. The total general administrative expenses amount to \$61,215.03 leaving net income in the amount of \$22,618.42.

[36] Mr. Abbott has claimed undue hardship circumstances due to the fact that he has a legal duty to assist in the support of his wife and his two children. His wife earns \$22,712.

[37] Together, he advises they have outstanding indebtedness which includes a personal line of credit, Alltech Contracting line of credit, Kubota Canada, CIBC mortgage on their house, CIBC Gold Visa, CIBC Classic Visa and TD Classic Visa, approximating by February, 2007, totalling \$300,000.

[38] The debt associated with Alltech Contracting as of February, 2007, was \$32,315. The debt for Kubota Canada is in the amount of \$30,910. The balance leaves approximately \$244,800 for personal indebtedness between the two, Mr. and Ms. Abbott.

[39] The mortgage held by the respondent and his wife shows a committed amount of \$192,500 and a principal balance of \$185,168.57. They are paying weekly payments which total \$1,534.68 monthly. The bank appraised the home at \$270,000. There is, therefore, a gross estimated equity in the amount of \$84,800, not considering penalty charges, etc.

[40] However, in 2003, Mr. Abbott shows income of \$58,654 and in 2004 he shows income of \$30,195.

[41] In 2005, his income drops to \$16,265 and Ms. Abbott's income is \$18,458 for a total income of \$34,723, considerably less than the 2003 year. The 2006 income is elevated for Ms. Abbott and shows a negative figure for Mr. Abbott.

[42] Mr. Abbott's testimony confirmed that his wife takes care of the accounting. His company is in its second year of operation. He admits he has made numerous poor decisions in establishing the business and that he was not prepared and did not understand the start-up costs. His clientele is down.

[43] He offered his opinion that he made poor decisions in purchasing his truck which cost him lots of money. In fact, at the date of the hearing, he advised both trucks were not operational. He has made mistakes on job estimates, the overhead was too high, and he readily admits he was not prepared to start a new company. He acknowledges he has no ability to master the paper management of the company. He does not expect to do better soon. In fact, he believes he will end up selling his home. He does not have very many contracts for 2007.

[44] He does not want to have to pay child support because he believes it would destroy his family and he would have to sell his family home. He advised the court, even if he sold all that he has, he still would not be able to pay.

[45] He acknowledges that immediately prior to the trial he used all of his air points to travel to the Dominican Republic with his wife in spite of the fact that

there were other options to obtain cash or other bonuses from those points given his financial circumstance.

[46] He acknowledges that he has a motor boat, ATV's, dirt bikes and that he enjoys the use of a trailer and other amenities associated with living on the lake due to his generous father-in-law. He advises he has lost a boat and truck. He advises he contributes nothing to his own family expenses.

Conclusion

[47] In reviewing the total circumstances here, we have a child who is entitled to be supported in accordance with the standard of living commensurate with her other siblings considering the total circumstances of each family.

[48] The mother of this child had to withdraw from her studies. She had to take three jobs and does not have the ability to rely on any benefits of an access parent or privileges and benefits associated with having two parents.

[49] While she lives in her current home, it is at the grace of her estranged husband and any terms that she can arrange in order to house his two children.

[50] Her work relationship is precarious given that it was provided by her estranged husband and she is earning minimal income.

[51] Essentially, the mother has borne the brunt of child care and the financial and lifestyle consequences that resulted from the relationship between her and the respondent. He has totally absolved himself from financial and emotional responsibility.

[52] The father has two children and is attempting, in preference to supporting this child, to continue in his home with his two children with little obvious change in his lifestyle. The unsubstantiated aspect of the financial documentation indicate a possibility of \$300,000 in debts largely personal.

[53] The father lives in good surroundings on a lake, as does the mother, although he has access to many more benefits and privileges given the support of his spouse and her father-in-law. He has taken no responsibility for the child either by way of

an emotional parent or a financial provider despite being asked to almost from the birth of the child on January 26, 2005.

[54] He has been advised by the court not to accumulate a debt with respect to payment of maintenance and has failed wholly to commence a system of payment to sustain his child.

[55] There is no evidence that he has taken steps to find employment outside of his self-employment or to mitigate the decline of his business.

[56] There is no evidence to confirm the reason for this decline in his income other than his admissions regarding bad decisions.

[57] He has been in his self-employed business for two to three years. He has had time to make a go of it and to show some future prospects. That has not happened.

[58] He wishes the court to order minimal child support so that he does not lose his business or his home yet there is no indication of any scheme or business plan that would appear to ameliorate his current circumstances.

[59] He is able to take vacations, engage in sporting activities, retain his home and he has offered absolutely no evidence of any attempts to increase his income by self-employment, by supplementary income, by working in other occupations or by using his former membership in the union of United Brotherhood of Carpenters and Joiners of America where he was able to earn considerable income.

[60] I conclude that he is critically underemployed and entirely avoiding his responsibility to this child.

[61] He has failed to provide significant details to substantiate the business expenditures or to confirm the indebtedness given his inability to detail in evidence his financial circumstances. I have only the historical information to go on to impute income.

[62] Debts do not take priority over child care expenses. In addition, while a court may entertain a reduction in child support to assist a parent to sustain a business venture in the hope of enhancing a child's long term stability; in this case,

there is no reasonable prospect on the evidence before me that Mr. Abbott is likely to pull himself out of his slump and begin to contribute to the support of his child.

[63] Having children for Mr. Abbott means this. Before any decision is made regarding a risky employment scheme, he must first address his parental duty to feed, clothe and shelter these children through the down times. To suggest he may defer his obligations to keep them fed, clothed and sheltered, while his own basic needs are looked after, is not in accordance with our law as stated by the Supreme Court of Canada in *D.B.S. v. S.R.G. et al*, [2006] S.C.J. No. 37.

[64] His earnings in 2006 are disturbing. If accurate, he is clearly in serious trouble with his employment. I do not have sufficient information to suggest that he is not working on a full-time basis with his company. Paperwork was provided by his partner and could not be readily tested. I have found the 2006 numbers to lack substantiation.

[65] An average over the last four years, including 2002 to 2005, would yield an income of approximately \$43,274. An average of the middle two years of \$30,195 and \$16,265, the last year of his employment and the first year of his unemployment, would equal \$23,230.

[66] It is time for Mr. Abbott to make a decision. His company has to be profitable or he is going to lose it in any event.

[67] In balancing both methods of averaging income, I set his income at **\$30,000**, setting payment at **\$268 per month** retroactive to the birth of his child in January, 2005, to create a lump sum payment owing of **\$9,112**. He had ample notice of the birth of the child, knew or ought to have know of the need for support and ought to have known he had a duty to support this child.

[68] The evidence discloses that child care expenses were paid for this child from January to September, 2005, at a rate of \$357 per month. One half of that would equal **\$1,606.50**.

[69] From January to July, 2006, child care expenses averaged 632.70 monthly. One half of the total due would be **\$1,898.10**.

[70] Exhibit "E" to the mother's affidavit proves child care expenses between August and November, 2006, at \$3,030; his share would be **\$1,515**.

[71] **The total he owes for 2005 and 2006 is \$5,019.60.**

[72] Child care costs for January, 2007, were \$690.

[73] For the year 2007, the applicant shall provide the respondent with written notice and receipts of any and all child care expenses associated with the child, those child care expenses being necessary for the purposes of finding employment or completing her degree. They shall be divided by half.

[74] The applicant shall provide written confirmation of the after tax costs and avail Mr. Abbott of **50%** of any benefit of tax relief. The total due of those three years of child care expenses shall be added to the outstanding base amount of arrears and retroactive child support.

[75] The total arrears adjusted for child care shall be fixed and judgment will be entered and registered against Mr. Abbott's interest in the matrimonial home or recovered in any other manner in accordance with the Maintenance Enforcement Program.

[76] It is the intention of the court to secure the debt in the event that the home is sold so that the child support will be payable out of the proceeds of the sale of the home or by any other means proposed by Mr. Abbott and accepted by Ms. Vogt and the Maintenance Enforcement Program.

[77] With respect to ongoing support, for the time being, Mr. Abbott shall be assessed as having an income of \$30,000 which, in my view, is extremely reasonable. He shall pay, at the commencement of October 1, 2007, through the Maintenance Enforcement Program the sum of **\$268, plus one half of the after tax costs of any child support.**

[78] Ms. Vogt shall provide immediately to Mr. Abbott through her counsel, for provision to the court, confirmation of the current child care expenses and the figure for insertion in the order of the after tax costs and proof of work, employment or enrollment in a course which will complete her studies.

[79] Ms. Conrad shall draft the order.

Legere Sers, J.

October 12, 2007
Halifax, Nova Scotia