IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Gilby v. Edwards, 2008 NSSC 185

Date: 20080620
Docket: 1201-42012
Registry: Halifax

Between:

Gregory Vincent Gilby

Applicant

v.

Kelly Lynn Edwards

Respondent

Judge:	The Honourable Justice Deborah Gass
Heard:	May 12, 2008, in Halifax, Nova Scotia
Counsel:	Gregory Vincent Gilby, self-represented Kelly Lynn Edwards, self-represented

By the Court:

[1] This decision relates to an application dated August 23, 2006 brought by Gregory Vincent Gilby to terminate an order dated February 21, 1996 relating to child support of $300/month for Andrew Glendon Gilby, born November 30, 1986. The Respondent, Kelly Lynn Edwards, filed a response, seeking a retroactive variation of child support, for tax purposes only. The parties agreed to the termination of the order effective June 30, 2007. This left the issue of retroactive variation.

[2] The order sought to be varied is a "pre-Guidelines" order. The child support of $300/month was deductible by the payor and included as income to the recipient for tax purposes. In May, 1997, with the introduction of the Federal Child Support Guidelines, new orders for child support would no longer carry these tax implications.

[3] For orders made prior to May 1, 1997, (as this one was) payments continued to be deductible after May 1, unless the parties filed a joint election with Revenue Canada declaring that the payor would no longer deduct the payment from income; they entered a written agreement to no longer deduct; or an order varying maintenance was made. The introduction of the Guidelines themselves were deemed to constitute a change in circumstances on which to substantiate a variation application.

[4] The applicant's evidence is that when the Guidelines came into effect, he was advised by H & R Block that he could no longer claim the child maintenance as a deduction, and he acted accordingly. The Respondent's evidence is that they filed the joint election with Revenue Canada to reflect the removal of the tax treatment. The Applicant denies signing such a form or discussing this document with the Respondent. Canada Revenue Agency has no record of the joint election form T1158 in its files.

[5] Whatever happened, and for whatever reason, neither spouse claimed child support for tax purposes after May 1, 1997.

[6] Mr. Gilby was subsequently advised by Maintenance Enforcement that he was in arrears of $10,000 as of November, 2002. During the years 2003 - 2005 he paid the arrears in monthly installments.

[7] When the current application came before the court, with the requirement to provide financial disclosure, including tax returns, Mr. Gilby states he was advised that he could have claimed his support payments.

[8] He says he then began the process of refiling his tax returns to claim the maintenance payments for tax purposes, including the $10,000 arrears payments. His assessments for 2003, 2004 and 2005 resulted in Ms. Edwards being reassessed and billed for taxes on the child support she had received during those same years, including the arrears. Her reassessment was for an amount of $8,334.85 in income tax plus $831.45 (GST) and $280.05 (CTB).

Changes in Circumstances

[9] Has there been a change in circumstances to warrant a variation of the order?

[10] For whatever reason, and the parties' evidence differs on this point, both the Applicant and the Respondent stopped claiming child support payments for tax purposes after May 1, 1997. There was already a garnishee order in place as of May 1, 1997, but the parties clearly had some discussion after May 1, 1997, because they eventually withdrew from the Maintenance Enforcement Program in or around January, 1998. The understanding was that he would pay her directly $200/month and share the cost of Andrew's extra-curricular activities and school expenses. The Respondent re-enrolled with the Maintenance Enforcement Program in November, 2002, when, according to her, he did not follow through with this arrangement.

[11] It was clearly their intention, for whatever reason, not to claim the payments for tax purposes.

[12] The change occurred when the Applicant began retroactively claiming his payments, which resulted in him being reimbursed, and she being billed for significant taxes.

[13] That in my view is a basis for a variation of the order.

Effective Date

[14] The tax changes occurred May 1, 1997. Although the order was never varied to reflect those changes, the parties clearly operated as if it had been, as of that date. It was not until this current application was commenced that the reversal of what had been their intention occurred. There was no prior reason to bring the application earlier because they were operating under the assumption that the order was $300/month tax free, and for a time, $200/month plus a splitting of the extra-curricular costs and school expenses.

[15] If one examines the intention of the parties in light of what the guideline table amounts would have been, at least for the years for which there is income information, the table amount and a contribution towards extra-curricular and school expenses would roughly equate to a tax free monthly payment of $300.00.

[16] Therefore, on the whole of the evidence, I a satisfied that the order ought to be varied to remove the tax treatment, that is that the maintenance not be claimable as a deduction or declared as income effective May 1, 1997.

J.