

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nelson v. Nelson, 2005 NSSC 5

Date: 20050111

Docket: 1220-000290

Registry: Halifax

Between:

Pamela Jean Nelson

Petitioner/Respondent

v.

Glenn Edward Nelson

Respondent/Applicant

Judge: The Honourable Justice Gregory M. Warner

Heard: November 18, 2004, in Kentville, Nova Scotia
Post trial briefs from counsel received Dec 3 and 10,
2004.

Counsel: David Grant, counsel for the petitioner

Lloyd Berliner, counsel for the respondent

By the Court:

[1] This is the application by Glenn Nelson to terminate child support for his children Mariah and Joel Nelson and the cross application of Pamela MacDonald to retroactively vary basic child support and to retroactively implement extraordinary expenses pursuant to s. 7 of the **Guidelines**.

BACKGROUND

[2] Glen Nelson and Pamela Nelson (now MacDonald) were married on May 29, 1981. They have two children, Mariah, born July 29, 1983 and Joel, born June 11, 1985.

[3] They separated in June, 1993 and executed a separation agreement in May, 1994, which provided that they would have joint custody of the children with Ms. MacDonald having the day to day care and control and Mr. Nelson paying child support of \$1,000.00 per month (\$500.00 per child) based on his declared income of \$46,000.00 per year with his long term employer, Canadian National Railway.

[4] Both parties entered into new relationships.

[5] In May, 1997, when the income tax laws respecting child support payments changed, the parties signed an agreement to the effect that Mr. Nelson would not deduct child support payments from his taxable income and Ms. MacDonald would not include them. Apparently this agreement was not followed up with a confirmatory court order. While the agreement was confined to the taxation issue, I accept that the parties agreed at that time that child support would be reduced to \$800.00 per month (\$400.00 per child) based on the change in the income tax consequences for each party. Thereafter, Mr. Nelson paid child support in the amount of \$400.00 per month per child.

[6] Based on Mr. Nelson's declared income in 1994, if the **Federal Child Support Guidelines** had been applied to his income, he would have paid basic child support for both children totalling \$629.00 per month.

[7] Neither the Corollary Relief Judgment, nor the agreement signed in 1994 and 1997, required either party to disclose on an annual basis their income.

[8] In June, 2001, Mariah completed high school. In October, 2001, Mr. Nelson stopped paying monthly child support for Mariah. In September, 2002, she returned to school on a full time basis. Since then Mr. Nelson has made “voluntary” payments to her in the amount of \$6,000.00.

[9] Joel completed high school in June of 2004. He applied to go to Nova Scotia Community College too late to be accepted in September, 2004. At the present time he is employed on a full time basis while living with his mother and has been accepted to NSCC beginning September, 2005. He pays \$50.00 per week for room and board with his mother.

Child support for Mariah

[10] In June, 2001, Mariah graduated from high school and in September went to Toronto to continue her post-secondary education but dropped out and returned home after two weeks. She continued to live at home and worked until September, 2002.

[11] Her income tax return for 2001 shows earning of \$6,522.00 and for the year 2002 income of \$7,562.00. I presume most of this income was earned between the end of high school in 2001 and August 2002 after which she commenced university in Halifax. Ms. MacDonald's affidavit says that Mariah saved \$5,000.00 from this work towards her post-secondary education. I infer from this that the other \$9,000.00 was spent by Mariah on her own support.

[12] In September, 2002, Mariah entered St. Mary's University and in September, 2003, transferred to Mount St. Vincent University. She is now in the third year of a four year Science course specializing in nutrition.

[13] In the summer of 2003 Mariah continued to live and work in Halifax at a summer job related to her studies. Her 2003 tax return shows income of \$6,001.00.

[14] Ms. MacDonald has submitted a budget for Mariah's education and living expenses for the period September, 2002 to October, 2004. This includes two and one-half years of tuition and the purchase of a computer totalling slightly over \$18,000.00, and living expenses for 21 months totalling \$20,895.00. Because this budget does not follow a calendar or school year, for the purposes of this analysis,

I have converted the budget figures into 12 month sections and note that her average annual education cost is \$6,500.00 and her average annual living cost is \$12,000.00.

[15] It appears that Mariah's contribution towards these total annual expenses was her original savings of \$5,000.00, her earnings in 2003 of \$6,001.00 and her earnings to October 2, 2004 of \$5,149.00 for a total of approximately \$16,000.00 (because of her income she paid no income tax).

[16] Towards these expenses Mr. Nelson contributed \$6,000.00. The remainder was paid by Ms. MacDonald and her current husband.

[17] Mr. Nelson's income in accordance with his income tax return for the year 2002 appears to have been \$84,000.00. His income in 2003 was \$78,000.00. His income in 2004 to November 18th, is \$66,700.00 for an annualized income of \$74,000.00.

[18] Ms. MacDonald operates a small business out of her home for which her income tax return shows she takes depreciation and other business benefits. In

addition she is the beneficiary of a portion of a family trust related to her husband's business and receives annual dividends. Her tax return for the last two years shows income of \$40,000.00 and \$42,000.00 respectively (not inclusive of benefits associated with her home business).

[19] Mr. Nelson's evidence is that when Mariah commenced university he and Ms. MacDonald agreed that he would contribute such amounts as he could afford to pay.

[20] Ms. MacDonald states that she ceased insisting on the payment of the \$400.00 per month that Mr. Nelson had paid to October, 2001, because he had agreed to pay one-half of Mariah's tuition, books and bus passes, and because she did not want to "rock the boat".

[21] Since Mr. Nelson has applied to this Court to terminate all child support, Ms. MacDonald has cross-applied to have Mr. Nelson pay retroactively, based on his recently disclosed income pursuant to s. 7 of the **Guidelines** his share of Mariah's niversity expenses.

Analysis

[22] The first issue is whether Mariah is a child of the marriage.

[23] Ms. MacDonald represents to the Court that because Mariah, after graduating from high school, continued to reside with her and only had a minimum wage job and had an intention to enroll in post-secondary education, that she continued throughout to be a child of the marriage. Mr. Nelson says that when Mariah ceased her attendance at university in October, 2001, she ceased to be a child of the marriage.

[24] The Court disagrees with both parties.

[25] There is no evidence before the Court that when Mariah dropped out of school in Toronto in September, 2001 after two weeks that she intended at some future date to pursue her post-secondary education. She returned home and appears to have earned approximately \$14,000.00 in income and to have saved \$5,000.00 of that money. At some point during this time (which point was not

disclosed to the court) she decided to go back to school; as of September, 2002, she has been a full time university student.

[26] Based on the fact that Mariah earned \$14,000.00 and spent \$9,000.00 on her own support, the Court concludes that from October, 2001 until August, 2002, she ceased to be a child of the marriage and was not entitled to support. The Court recognizes that she had some parental assistance by reason of the fact that she lived in her mother's home.

[27] A child who loses her entitlement to support is not disentitled to support forever and can regain her entitlement. This position is set out in *MacLennan v. MacLennan* (2003) 202 N.S.R.(2d) 116, a decision of our Court of Appeal.

[28] This Court finds that, since September 2002, when Mariah entered university on a full time basis, she regained her status as a child of the marriage and her entitlement to support from both parents.

[29] The second question is: what is the amount of the contribution that Mr. Nelson should be making towards the support of his daughter?

[30] Section 3(2) of the **Guidelines** provides that support for a child of the age of majority (Mariah turned 19 in July, 2002) should be determined either by applying the table amounts set out in the **Guidelines** or, if the Court considers that approach to be inappropriate, an amount that it 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 her support.

[31] The appropriateness of applying the Tables versus the so-called Paras formula is discussed in several texts. One such text is page 111 - page 115 of **Annual Review of Family Law 2004** by James McLeod and Alfred Nemo (Carswell).

[32] In this case Mariah has lived in Halifax continuously since September, 2002. She does not return in the summer to live with either parent. Her summer jobs in the City are related to her studies. Her living and school expenses have been calculated by Ms. MacDonald on the basis that Mariah has lived independently since September, 2002. These facts make it inappropriate to apply the Table

amount pursuant to s. 3(2)(a), and more appropriate to apply the Paras - like formula pursuant to s. 3(2)(b).

[33] Mariah's declared costs for all of her living expenses average \$1,000.00 per month or \$12,000.00 per year. Her costs for tuition and books have increased each year and average \$6,500.00. It appears from a review of Ms. MacDonald's 2003 income tax return that she has had the benefit of Mariah's unused tax credits to the extent of approximately \$4,100.00 (as shown on Ms. MacDonald's 2003 income tax return). Based on the minimum tax rate of 27%, this has reduced Ms. MacDonald's share of Mariah's education costs by approximately \$1,100.00. In summary, it appears that Mariah's net annual expenses are \$17,400.00.

[34] Of this amount Mariah contributes approximately \$6,000.00 annually. This is approximately one-third of her total living and education costs per year.

[35] It is not unfair that a student who receives the most significant and direct benefit from post secondary education should be obligated to contribute to her own education and living expenses to the extent of her ability. Mariah's contribution of approximately one-third of her annual expenses represents a fair contribution by

her. There are several decisions where Courts have imposed upon students an obligation to borrow money in circumstances where their parents' income is limited and where the students do not contribute as significantly as Mariah does from her own employment income towards her annual expenses.

[36] Based on the total circumstances of this case, including the income of her parents, it is not reasonable to impose upon Mariah a greater obligation than to contribute one-third of her total annual expenses.

[37] Ms. MacDonald's counsel in his brief submits that Mariah should not have to contribute all of her earned income towards her own support. There are some circumstances, where students live at home in summer and pay some of their own living expenses and only save some of their summer earnings and Courts find the amount saved was a reasonable contribution towards their university expenses. In those cases and in other similar circumstances, Courts recognize that budgets for students university costs do not always include all of their living expenses. In those cases, Courts have accepted that students do need to hold back money for some day to day expenses that are not set out in their budget. Ms. MacDonald's budget for Mariah includes all of her living expenses and not just some of them.

For that reason, it is appropriate to include all of Mariah's income in calculating what will remain for her parents to pay.

[38] It is noteworthy that some Courts will impose on students an obligation to contribute to their school costs by loans; such determinations are made on a case by case basis. This Court accepts that Mariah's contribution of one-third of her actual twelve month living and school expenses is a fair contribution by her on the facts of this case.

[39] One-third of Mariah's annual expenses appears to be \$5,800.00 per year or \$483.00 per month. Ms. MacDonald, through her counsel, requested that the Court impose upon Mr. Nelson an obligation to contribute as much as Ms. MacDonald towards Mariah's post secondary education expenses. It is not unfair to require Mr. Nelson, based on his present annual income of \$74,000.00, to pay \$5,800.00 per year towards the cost of Mariah's education.

[40] The Court notes that this is less than what the Table amount for one child for a person earning \$74,000.00 per year would pay (\$594.00/month) and equals one-

half of the amount that a person with that income would make to pay for the support of two children (\$480.00/month).

[41] The Court therefore finds that based on Mariah's annual average expenses (net of tax credits) of approximately \$17,400.00, and based on Mr. Nelson's present income of \$74,000.00, he should be paying child support directly to Mariah in the amount of \$483.00 per month.

Retroactive and/or arrears for Mariah

[42] Mr. Nelson has apparently contributed since September, 2002, the sum of \$6,000.00 towards Mariah's post secondary education expenses. He represents to the Court that his other family obligations did not allow him to make any greater contribution. Since 1997 and the publication of the **Federal Child Support Guidelines**, it is well known what the financial obligations of a parent towards their children are. Parents have both a legal and moral obligation to give priority to the support of their children. The obligation is higher than the obligation for most other expenses they may incur.

[43] Ms. MacDonald has asked the Court to retroactively impose a child support obligation pursuant to s. 7 of the **Guidelines**.

[44] Based on an income of \$46,000.00 in 1994, Mr. Nelson was ordered to pay \$500.00 per child per month. This was verbally amended in 1997 to \$400.00 per month as a result of the change in the tax consequences for child support payments. Mr. Nelson unilaterally stopped paying the support on October, 2001. His daughter has been in university since September, 2002. It has been 28 months since September, 2002 and he has paid only \$6,000.00. In the absence of an order varying the existing child support obligation (or even the verbal one of \$400.00 per month) Mr. Nelson is significantly in arrears.

[45] The question is not whether or not there should be a retroactive variation of child support, but whether there should be a forgiveness of arrears of child support of \$400.00 per month that was verbally agreed to between him and Ms. MacDonald in 1997.

[46] A calculation of what Mr. Nelson should be contributing as a fair share of Mariah's post secondary education expenses, is a relevant factor in determining

whether to forgive arrears of child support or whether to vary retroactively an obligation for child support under s. 3(2)(b) of the **Divorce Act**.

[47] If the application is characterized as a request for retroactive s. 7 expenses on behalf of Mariah, then Ms. MacDonald's reference to the factors set out in **Conrad v. Rafuse** (2002) 205 N.S.R.(2d) 46 (NSCA), is appropriate. If this issue as characterized as a request by Mr. Nelson for cancellation for arrears of child support, then there is an obligation on him to justify, at least to the extent of \$400.00 per month, the forgiveness of arrears.

[48] Because Mr. Nelson has, by his testimony, no ability to borrow money and has no savings, he asks that no retroactive sum be imposed.

[49] If the Court characterizes the request as a retroactive s. 7 or s. 3(2)(b) request, Mr. Nelson owes \$483.00 for 28 months, less \$6,000.00 already paid, or about \$7,500.00.

[50] If the Court characterizes the request as a request to enforce arrears, Mr. Nelson owes \$400.00 for 28 months, less \$6,000.00 already paid, or about \$5,200.00.

[51] This Court orders that the amount of arrears of child support, or alternatively, the amount of retroactive child support that remains outstanding and unpaid shall be the sum of \$3,000.00, which sum shall be made payable to Mariah, through the Maintenance Enforcement program at the rate of \$125.00 per month commencing January 1, 2005, and continuing monthly thereafter for 24 months or until paid in full.

[52] The factors considered by the Court in arriving at this figure include:

- (a) Mr. Nelson has no savings or ability to borrow to pay off arrears as a lump sum;
- (b) The shortfall required to provide for Mariah in the last 28 months was made up by her mother and stepfather. There is no evidence that they had to borrow to provide this help or had to decrease their life style to help Mariah.
- (c) The delay in applying for the arrears and/or retroactive payment is unexplained. The application appears to have been made simply in response

to Mr. Nelson's application to terminate child support. Because of the delay in applying, Mr. Nelson's means of paying arrears and/or a retroactive amount and at the same time continue to fulfill his obligation to Mariah, will be compromised;

(d) Mr. Nelson believed the arrangement by which he contributed \$6,000.00 during the last two years was agreed to by Ms. MacDonald. Ms. MacDonald was not aggressive in her requests for help (she says she did not want to rock the boat). While it should have been clear to Mr. Nelson that Ms. MacDonald was not happy with his contribution, he did promise to pay one-half of Mariah's tuition and books and has not done so; and

(e) Mr. Nelson has ongoing child support obligations that in the Court's view, in light of the present state of his finances, imposes a significant obligation on him in any event.

SUMMARY

[53] The Court orders Mr. Nelson to pay effective January 1, 2005, ongoing child support of \$483.00 per month directly to Mariah and to pay arrears and/or

retroactive payments totalling \$3,000.00 at the rate of \$125.00 per month commencing January 1, 2005, until paid in full.

CHILD SUPPORT FOR JOEL

Facts

[54] Joel graduated from high school in June, 2004. Because of his late application, he did not get admitted to Nova Scotia Community College in September, 2004. He applied for admission for the year beginning September, 2005. Since the court hearing on November 18, 2004, his application for admission into the mechanics course at the Ackerly Campus of NSCC in September, 2005, has been accepted.

[55] In the meantime Joel lives with his mother and has been working full time at Adessa. Apparently he washes and details vehicles. No documents were tendered to show what his income has been since he commenced the job. Based on the oral evidence as to his hours and rate of pay, it appears that he makes at least \$300.00 per week(\$15,000.00 per year).

[56] His mother recently commenced charging him \$50.00 per week for his room. The first question is whether, since graduating from high school, he has remained a child of the marriage as defined in the **Divorce Act**.

[57] Because Joel is able to contribute to his own support to a significant degree and is presumably paying many of his living expenses that would normally be covered under the table amount of the **Guidelines**, and because his mother is charging him rent, and because he is of the age of majority, it is inappropriate to determine child support in accordance with s. 3(2)(a) of the **Guidelines**, but rather more appropriate to make a determination as to the appropriate amount of child support in accordance with the Paras formula which is incorporated in s. 3(2)(b).

[58] The evidence is that Mr. Nelson has paid and continues to pay \$400.00 per month child support. In addition his evidence is that he has accumulated \$2,300.00 in an account towards Joel's secondary education costs.

[59] No budget was provided to the Court as to the extent of any assistance Joel needs in order to live at this time. In the absence of such evidence this Court is left to conclude that between July, 2004 and until August, 2005, the amount of

assistance that Joel needs from either parent is significantly less than the table amount. Somewhat arbitrarily, and in the absence of better evidence, this Court determines that a fair quantum of child support payable by Mr. Nelson for the support of Joel for the period July, 2004, to and including August, 2005, is the amount that Joel is paying to his mother for board. That is, \$50.00 per week.

Retroactive claim

[60] Ms. MacDonald seeks a retroactive adjustment of child support based on the disclosure as part of this application of Mr. Nelson's actual income for the years 2002, 2003 and 2004.

[61] The analysis and decision of our Court of Appeal in **Conrad v. Rafuse**, **supra**, as written by Roscoe, J.A., is the relevant standard to apply in the case at bar. This decision has been followed frequently in the short time since it was published, including in the decision of Fergusson, A.C.J., in **Horner v. Horner**, a copy of which was attached to Mr. Nelson's brief, and which the Court found cited as (2003) CanLII 30653.

[62] The factors in favour of a retroactive adjustment of child support include:

- (a) the fact that Mr. Nelson's income in the last three years would have, if the table amounts applied, resulted in a higher child support payment;
- (b) even though no order appears to have existed requiring Mr. Nelson to disclose his income on an annual basis, he did not in fact disclose this to Ms. MacDonald.

[63] The factors mitigating against a retroactive order include:

- (a) the quantum of child support paid from 1994 exceeded what Mr. Nelson would have been required to pay, if the **Guidelines** had been in effect at that time;
- (b) there was no notice by Ms. MacDonald to Mr. Nelson of an intention to pursue disclosure, or more maintenance, and her evidence is that she did not want to “rock the board” and did not request any information or change;
- (c) there is no evidence that the children suffered financially or went “without”, or that Ms. MacDonald had to sell any capital assets or incur any debts, or make any sacrifices to make up the deficiency;
- (d) the first demand for disclosure and a retroactive adjustment was made in October, 2004, in response to Mr. Nelson's application to terminate child

support. The delay in making the application or giving notice of the intent to make the application is unexplained;

(e) Mr. Nelson now does not have any ability to pay, or to borrow money to pay, any retroactive child support;

(f) payment of any retroactive amount would severely prejudice Mr.

Nelson's ability to contribute to the present and future needs of Mariah and Joel in pursuing their post secondary education.

[64] On balance these would mitigate against a retroactive order.

[65] A fair adjustment is to order that Mr. Nelson continue to pay the \$400.00 per month child support for Joel to and including August, 2005, even though, on the Court's analysis pursuant to s. 3(2)(b) of the **Guidelines**, Joel's needs during this period are less than \$400.00 per month.

[66] With respect to future child support, if and when Joel enters Nova Scotia Community College in September, 2005, (which is his present intention and has been acted upon) this Court makes the following conditional order:

- (a) Mr. Nelson shall pay one-third of Joel's actual and reasonable living and education expenses (net of income tax credits) while he is at N.S.C.C.;
- (b) based on Mr. Nelson's evidence that he has already accumulated \$2,300.00 for Joel's post secondary education, this sum shall be paid by Mr. Nelson to Joel or directly to the school, on September 15, 2005, as part of Mr. Nelson's share of Joel's next year expenses;
- (c) if the parties are unable to agree by September, 2005, as to the quantum of Joel's actual and reasonable living and education expenses, they are free to make an application to this Court for a determination of that amount.

Mr. Nelson's income

[67] Most Courts accept that their role is to determine what a payor's income will be in the next twelve months, as child support is paid from future income and not past income.

[68] It is recognized that it is counter productive to make two calculations of a payor's annual income - one before the year starts and a retroactive adjustment after the year is over. Such would be contrary to the intent of the **Guidelines**

which were to simplify the calculation of child support. Applications for retroactive adjustments are not encouraged and are usually unsuccessful for this reason.

[69] However, the most accurate method of determining future income is to examine past income. The Court does not know what Mr. Nelson's income was before 2002 (except for the year 1994). His income has declined steadily since 2002, from \$84,000.00 to \$78,000.00 to \$74,000.00.

[70] Mr. Nelson states that his income will be \$55,000.00 next year. The Court is sceptical of this estimate on the part of Mr. Nelson in light of his past non-disclosure and the fact that his contribution, based on his self-professed inability to contribute more, have not amounted to what the **Guidelines** would dictate for a person with his income.

[71] For the above reason the Court determines that Mr. Nelson's income is \$74,000.00 per year. If, in fact, it does turn out to be \$55,000.00 in 2005, then he is free to use that information as the basis for an application to vary for the year 2006.

COSTS

[72] Costs usually go to the winner but are in the discretion of the Court.

[73] Each of the parties to this application have been successful in some of their arguments and unsuccessful in other of their arguments. Any order with respect to costs would, in the Court's view, interfere with the ability of the parties to make contributions for the future support of their children. The Court exercises its discretion not to award any costs in this matter.

J.