IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Woods v. Gates, 2008 NSSC 358

Date: 20081015
Docket: 1201-060295
Registry: Halifax

Between:

Lana Dawn Wood

Petitioner

v.

Andrew William Gates

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	October 14, 2008, in Halifax, Nova Scotia
Written Decision:	October 15, 2008
Counsel:	Lana Dawn Wood, Self-Represented Andrew William Gates, Self-Represented

By the Court:

[1] This is an application by Ms. Lana Wood to vary the child support terms of the Corollary Relief Judgment herein as varied by way of a consent order dated May 1, 2007. The parties were married on November 19, 1993 and have two children, Dylan who is now 12 and Julianna who is now 7. They separated on or about October 31, 2004 after almost 11 years of marriage.

[2] With the assistance of counsel they signed a separation agreement dated February 9, 2005 by which they settled the various issues arising out of their separation including the division of their assets and debts, the parenting of their children, spousal support and child support. Among other things, the agreement provided that the parties would share joint custody of the children, that each would have relatively equal time with the children and each would contribute financially to the support of the children. Specifically, paragraphs 15 (a) (b) (c) and (e) of the Agreement reads as follows:

> (a) The parties agree that the income of the Wife is approximately $5000.00 per annum and the income of the Husband is approximately $102,500.00 per annum.
>
> (b) The Husband covenants and agrees to pay child support to the Wife pursuant to the Federal Child Support Guidelines and in accordance with the Nova Scotia table in the amount of $1,268.00 per month, payable in two installments of $634.00 each on the 1st and 15th of each month, commencing December 1, 2004.
>
> (c) The parties covenant agree to share, in proportion to their respective incomes the net cost of child care expenses incurred for the children of the marriage taking into account any subsidies, benefits or income tax deductions or credits relating to the childcare expenses.
>
> ...
>
> (e) The parties agree to exchange Income Tax Returns by July 1st of each year, commencing July 1, 2005. The parties agree that the amount of child support payable shall be adjusted as of September 1st of each, commencing September 1, 2005, and shall be set out in accordance with the Federal Child Support Guidelines, Nova Scotia table. The amount of child support payable shall be calculated by calculating the difference

> between the amount that each party would otherwise pay if the child support order were sought against each of the parties based on each party's Line 150 Total Income as disclosed in his or her Income Tax Return from the previous year.

[3] The Respondent, Andrew Gates, also agreed to pay spousal support of $500.00 per month to the Applicant with the amount and duration of the spousal support reviewed as of September 1 each year, beginning September 1, 2005.

[4] The parties were divorced on March 7, 2006 and the Corollary Relief Judgment, granted the same day, incorporated the terms of their separation agreement.

[5] In November 2006 the Applicant applied to vary the child and spousal support terms of the Corollary Relief Judgment. That application was resolved by way of a consent order dated May 1, 2007. By way of that Order, the Respondent transferred to the Applicant by way of a RRSP spousal rollover $40,000.00 and in return the Applicant waived her entitlement of spousal support. Regarding child support, clauses 15 (c) and (e) to which I have referred earlier were repealed and replaced with the following:

> 5(a) With the exception of private school tuition, the parties covenant and agree to share, in proportion to their respective incomes for the previous calendar year, Section 7 expenses pursuant to the Child Support Guidelines as they relate to the children of the marriage, taking into account any subsidies, benefits or income tax deductions or credits relating to any such expenses.
>
> 5(b) With regard to private school tuition, the father agrees that he shall assume full responsibility for tuition costs for each of the two children for the school years 2007-2008, 2008-2009 and 2009-2010. Private schooling shall continue for the children beyond the 2009-2010 school year only if there is agreement by both parents and an agreement with regard to funding of this expense in future years.
>
> 5(c) The parties acknowledge they have exchanged income tax returns as of July 2006 and the amount of child support for the period September 1, 2006 to August 1, 2007 has been calculated such that the father pays to the mother $1,506.00 per month ($753.00 paid on the 1st and the 15th of each month). The parties shall continue to exchange income tax returns by July 1st of each year and child support shall be adjusted as of September 1st of

> each year based upon the previous calendar year incomes of the parties. These incomes shall be based on the income tax return, line 150 Total Income of each party, plus or minus such adjustments as are appropriate pursuant to the Child Support Guidelines. The amount of child support payable shall be calculated by determining the difference between the amount that each party would otherwise pay if a child support order was sought against each of the parties based upon their incomes for child support purposes.

[6] The Applicant now seeks to vary the child support terms of that order. The Applicant submits that as of September 1, 2007 the Respondent's net child support payment to her should increase for a number of reasons including that his income increased, that her contribution to child support should decrease because other than her RRSP income, she has no other income for child support purposes, and she argues that the RRSP income should not be considered when calculating her contribution. It is also argued that if the RRSP income is to be considered then her contribution to the support of the children should be reduced as the amount that she would be required to pay under the Variation Order and the Child Support Guidelines, that is to say the amount set off against the Respondent's contribution, would cause her undue hardship. She has also asked the Court to review the amount of child support the Respondent should have paid going back to when the parties first separated.

[7] Subsections 17 (1) (a) and (4) of the *Divorce Act* read as follows:

> 17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[8] The Court is to determine if there have been changes in circumstances as provided for in the applicable guidelines since the making of the last variation order when considering a further variation order.

[9] Section 14 of the Child Support Guidelines says:

> For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
>
> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

[10] The last variation order was a consent order. Both parties agreed to its terms and both parties had legal advice prior to agreeing to its terms. The Order was approved by the Court and was not appealed. There is no evidence that the terms of that Order had been obtained by fraud or misrepresentation or for any other reason should be disregarded by this Court. There is no reason for the Court not to accept the terms of that Order or the Corollary Relief Judgment before it as being appropriate at the time. The Court is therefore not prepared to retroactively vary the terms of the Corollary Relief Judgment or vary the terms of the last variation order effective on any date before the date of the last Order.

[11] The Court is satisfied however, that there have been changes in the incomes of the parties since the last variation order which would permit the Court to consider a variation of the last variation order.

[12] The Consent Variation Order addressed the issue of child support up to and including August 2007. The amount of support would then be subject to change as

of September 1, 2007 based on the parties' income earned in 2006, and reviewed again on September 2008 based on their incomes earned in 2007.

[13] The Court has not been asked to change the method by which the child support is to be calculated each year other than the respondent has asked for some kind of certainty being put into the Court's order to minimize, if not eliminate, the possibility of ongoing disputes between the parties each summer, of the child support that is to be paid the following year. The methodology agreed to by the parties with the assistance of their lawyers is reasonable and sound and it conforms with the Child Support Guidelines.

[14] The Court cannot predetermine years in advance the income of either of the parties. The Court should not prevent either party from exercising their right to apply to the Court to vary child support in the appropriate circumstances. If either party abuses that right the Court can sanction their conduct, at the time, appropriately.

[15] The calculation of the Respondent's income for the support that is to commence in September of 2007 is relatively straight forward. In 2006, his line 150 total income was $126,874.00 including dividends that were grossed up for tax purposes from $2,000.00 to $2,500.00. That $500.00 gross up is to be adjusted pursuant to Schedule III of the Guidelines. He also had professional fees, which is another Schedule III adjustment, of $515.00. After adjusting his income for child support purposes, his income was $125,859.00 in the year 2006. The table amount for two children based on that amount of income is $1,643.00 per month. In 2007 his total income on line 150 of his tax return was $145,344.31. Again, that is to be adjusted by the $500.00 gross up of his dividends and $481.04 for professional fees, leaving him with a total income figure for child support purposes of $144,363.27 which would require child support payment for two children of $1,850.00. The Court is satisfied that the Respondent's tax returns accurately reflect his actual income. I should mention though that included in the Respondent's income in most years, including 2007, was his bonus income paid based on the performance and profitability of the engineering firm for which the Respondent works and in which he is a shareholder. Many years, including 2007, the Respondent, like other shareholder/employees in this firm, is required to spend all or part of his net or after tax bonus money on the purchase of shares in the firm, thus receiving no added funds in his hands in spite of his bonus. Sometimes he can even be required to spend more on the purchase of shares than he received in net

after tax bonus income. The firm requires that of all their employee/shareholders in order to buy out retiring members or to keep the business adequately funded. Therefore, there are years when the Respondent is paying child support based on a level of income a significant portion of which he does not actually have at his disposal. 2007 was one of those years.

[16] The Applicant's income for child support purposes is also fairly easy to calculate. In 2006 her line 150 total income was $25,793.00 including $6,000.00 in spousal support, $12,500.00 in RRSP income and $1,200.00 being her universal child care benefit. The spousal support and UCCB should be deducted as an adjustment pursuant to Schedule III. She asked the Court not to include her RRSP income as it is a non-recurring item. There are no reasons in the Court's view not to include her RRSP income for child support purposes. It is in fact a recurring income figure according to her tax returns. She deregistered between $10,000.00 and $14,000.00 in RRSP income in each of the last 4 years, including 2008. She relies on this income as part of her household revenue. It is income that forms part of line 150 and is not an adjustment contemplated by Schedule III. The Court is aware of the cases where RRSP funds were not included in income for the purposes of calculating child support but those cases can be distinguished from the Applicant's circumstances. So, after adjusting her line 150 by deducting spousal support and the University Child Care Benefit received in 2006, her income for child support purposes in that year was $18,593.00 which would require a child support payment pursuant to Section 3 of the Guidelines for two children of $277.00 per month. The applicant asked the Court to reduce that amount based on undue hardship. Section 10 of the Guidelines says :

> 10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

[17] Subsection 2 lists a number of circumstances which may cause a spouse or child to suffer undue hardship and that list is not exhaustive. I am not convinced that the Applicant would suffer undue hardship by having her share of the child support offset against the Respondent's payment. She has not provided a sworn statement of how she and her partner spend their income. She has not provided her statement of property and debts. She has not provided a current sworn statement of

her partner's income, although the Court does have a copy of his 2007 tax return. She and her partner only work part time.

[18] Based on the evidence, the Court cannot say that the Applicant or her family would suffer undue hardship as contemplated by the Guidelines. They live in a nice area. The children go to private school, paid for by the Respondent. The children take part in many activities. The Applicant's business paid for the Applicant and her partner to travel to the Carribean a number of times in the past year. The Court does not know of anything that they are doing without or may do without if the Applicant is required to pay her share of the child support.

[19] Using the formula in the Variation Order, the Applicant's contribution to the children's financial support is modest and there is no reason to decrease it.

[20] In 2007 her line 150 was $14,042.28 including UCCB of $700.00 and spousal support of $2,500.00. After adjustment of those two figures, her income for child support purposes is only $10,842.28 requiring a child support payment of only $97.00 per month. For all of the same reasons I am not prepared to reduce that amount.

[21] The Applicant has her own business. It is incorporated and over the past four years it has shown profit at times but overall has been losing money. The Respondent has asked the Court to impute income to the Applicant. He argues that many of the company's expenses benefit the Applicant-such as rent in her house and travel to the Carribean. He has also suggested that if the Company isn't profitable it is time for the Applicant to get a "real job" even it if it is a part-time position. He argues that throughout their marriage, the Applicant worked and earned an income in the $30,000 to $52,000 range.

[22] The Applicant says she is limited in what she can do because of an injury she suffered as a result of a motor vehicle accident in November 2004. She also says that if given another year, her Company can be profitable.

[23] I seriously considered imputing income to the Applicant. She claims she is limited in what she can do and yet she puts long hours into her business and apparently travels a great deal as a result of her business. She, in the Court's opinion, is capable of working at least part-time. Still, every business needs some time to be established.

[24] The Court is prepared to give the Applicant another year, that is to say until the end of her Company's fiscal year in the Spring of 2010 to show a meaningful profit, and by then, be in a position to provide the Applicant with an income by way of employment income or dividends. If the Company is not profitable by then and if the matter is brought back before the Court, the Court may seriously consider imputing income to her if she doesn't already by then seriously consider other options.

[25] In summary, beginning September 1, 2007 to and including August 1, 2008, the Respondent shall pay to the Applicant net child support of $1,366.00 per month, calculated by deducting $277.00 from $1,643.00. Assuming he has paid $1,506.00 each of those months, he has overpaid by a total of $1,680.00.

[26] Beginning September 1, 2008 to and including August 1, 2009, the Respondent shall pay the net sum of $1,753.00 per month, calculated by deducting from $1,850.00 the Respondent's contribution of $97.00 per month. Assuming in September and October of this year he paid $1,506.00 for each of those months, he has underpaid a total of $494.00 for those two months, leaving a net overpayment due back to him of $1,186.00 which overpayment can be deducted from the Respondent's November 1 child support payment.

[27] Regarding Section 7 expenses, I will not be varying paragraph 5 (a) of the Variation agreement that was incorporated into the Consent Variation Order, but for clarification purposes the orthodontic expenses that are being incurred for Dylan both past and future are to be shared by the parties proportionate to their incomes as and when those payments are due. The amount to be shared is the net amount after taking into account any insurance coverage or tax savings, if any.

[28] Costs are awarded to the Respondent in the amount of $1,000.00 to be paid by the Applicant within 60 days of October 15, 2008.

J.S.C. (F.D.)

Halifax, Nova Scotia