

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Lynds v. Terfry, 2009 NSSC 246

Date: (20090817)

Docket: 1207-000281

Registry: Truro

Between:

Wendy Lynds

Applicant

v.

Randy Terfry

Respondent

Judge:

The Honourable Justice Cindy A. Bourgeois

Heard:

July 21, 2009, in Truro, Nova Scotia

Counsel:

Wendy Lynds, self-represented

Randy Terfry, self-represented

By the Court:

[1] This application was heard on July 21, 2009 in Truro. Both the Applicant, Wendy Lynds, and the Respondent, Randy Terfry, appeared. Both provided evidence to the Court and were each self-represented.

[2] Ms. Lynds is seeking to vary an Order of the Supreme Court dated May 30, 1994, as it relates to child support payable in relation to the couple's daughter Garrett Dawn Lynds ("Garrett"). Mr. Terfry has been paying child support in the amount of \$200.00 a month since 1994.

[3] Garrett, born August 28, 1988, is nearly 21 years of age. Ms. Lynds submits that given her enrollment in a post-secondary educational programme, Garrett remains a "child of the marriage" as defined by the *Divorce Act* 1985, c. 3 (2nd Supp.).

[4] *Is Garrett a "child of the marriage"?*

[5] Section 2(b) of the *Divorce Act* defines "child of the marriage" as follows:

"Child of the marriage" means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

[6] The evidence establishes that Garrett is attending University, pursuing a Bachelor of Arts degree in Psychology. In past years, Garrett, due to health concerns, was unable to undertake a full course load. She did however, successfully complete credits equivalent to approximately a 60% course load. Garrett is registered to undertake a full course load for the Fall Semester of 2009.

[7] Mr. Terfry is aware of Garrett's health difficulties and did not suggest that her scaled back course load was unwarranted. I find in the circumstances that Garrett is a "child of the marriage" and will continue as such, provided that she continues to attend post-secondary courses at a minimum of 60% of full time attendance, until she completes her Bachelor of Arts degree.

[8] *What is an appropriate amount of child support to be paid?*

[9] Given that Garrett is a child of the marriage, it is appropriate that periodic support for her maintenance and benefit should continue.

[10] It is worthy of note that although Mr. Terfry has consistently paid support, the quantum has not been revisited since 1994. The evidence establishes that Mr. Terfry has subsequently spent considerable time in the Western provinces, where his employment income greatly increased. His financial information filed with the Court disclosed line 150 earnings of \$66,481.44 and \$78,530.51 respectively for 2007 and 2008. Had the Court been asked to revisit child support earlier, it is quite likely it would have substantially increased.

[11] Mr. Terfry testified that he is a licensed automotive technician. He returned to Nova Scotia in June 2009 and is presently seeking employment in his field. He is awaiting receipt of his first Employment Insurance cheque. He is uncertain of the amount. Although he expressed a willingness to provide financial support for Garrett's benefit, he would like it to reflect his current unemployed status.

[12] Given that Mr. Terfry submitted evidence establishing that he has earned already in 2009 \$21,000.00 to April 29, 2009, and he obviously left that position to return to Nova Scotia, I believe this is an appropriate case to impute a level of income to him.

[13] The Federal Child Support Guidelines allow a Court to subscribe a level of income to a payor, notwithstanding a lack of documented earnings. It reads:

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

(b) the spouse is exempt from paying federal or provincial income tax;

(c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[14] I find that for the purpose of setting his income for child support purposes, Mr. Terfry's imputed income is \$48,000.00. Based on this, Mr. Terfry should, effective September 1, 2009, make child support payments to Ms. Lynds of \$418.00 monthly, continuing on the 1st day of each month thereafter. I further direct that Mr. Terfry should immediately notify Ms. Lynds of any change in his employment circumstances, and provide to her, so long as Garrett is a "child of the marriage", a copy of his Income Tax Return and Notice of Assessment by May 15 of each year.

[15] *Should Mr. Terfry contribute to Garrett's educational expenses?*

[16] Garrett did not testify. Ms. Lynds did provide evidence however, that in previous years, Garrett's educational expenses were completely covered by an educational fund. This has now been exhausted. Garrett has applied for a student loan, the results of which were unknown at the time of the hearing. Garrett apparently worked full time during the summer months, but the extent of her personal savings was not reported to the Court.

[17] It has been recognized by the Courts that an adult child, although still a "child of the marriage", has a personal responsibility to contribute financially to educational expenses. Garrett is doing so by virtue of seeking student loans and through maintaining summer employment. It is not however, clear at this point in time, what her actual deficit, if any, will be in terms of her expenses.

[18] I am not prepared at this time to order Mr. Terfry to contribute to Garrett's educational expenses. The exact amount of her expenses was not provided to the Court, nor was the deficit, after application of loan proceeds and Garrett's own savings are taken into consideration. I am hopeful however, that if there is a shortfall, that the parties can co-operatively address the issue. Failing resolution

between the parties informally, either Ms. Lynds or Garrett herself can make application to the Court to have the matter addressed.

J.