

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: McCulloch v. Sullivan, 2010 NSSC 57

Date: 20100210

Docket: S.H. 1201-061923
(SFHD-054046)

Registry: Halifax

Between:

David John McCulloch

Applicant

v.

Traci Lyn Sullivan

Respondent

Judge: The Honourable Assoc. Chief Justice Robert F. Ferguson

Heard: December 10, 2009, in Halifax, Nova Scotia

Written Decision: February 10, 2010

Counsel: C. LouAnn Chiasson, for the Applicant
B. Lynn Reiersen, Q.C., for the Respondent

By the Court:

[1] Traci Sullivan and David McCulloch are the parents of Mairin, born August 6, 1998, and Ailie, born December 3, 2000.

[2] The parents are divorced. The children remain primarily with their mother. A Corollary Relief Judgment issued May 22, 2009, contains the following:

- Mr. McCulloch has an annual income of \$110,169.00 and Ms. Sullivan is without income.
- As to child support, the Judgment states:

Child Support

10. David McCulloch shall pay child support to Traci Sullivan pursuant to the Federal Child Support Guidelines and in accordance with the Nova Scotia Table, the amount of \$1,466.00 per month, commencing January 1, 2009 payable thereafter on the first (1st) day of each month.
11. Should David McCulloch receive a bonus from his employer, the information and documentation related to the bonus shall be provided immediately to Traci Sullivan and the child support shall be recalculated for the year in which the bonus was earned. The difference between what David McCulloch paid in child support that year, and what he should have paid with the bonus included in income, is to be provided in a lump sum payment to Traci Sullivan within one (1) month of his receipt of that bonus.
12. In addition to the table amount set out above, David McCulloch shall pay 100% of the orthodontic services required for the child, Mairin, to Traci Sullivan. Traci Sullivan shall provide David McCulloch with accounts for these services, as soon as those accounts are provided to her.
13. David McCulloch shall continue medical, dental and drug plan coverage for the children available through his present or subsequent employer and provide Traci Sullivan with all the necessary information to either provide her with direct access to that plan or for her reimbursement once claims are completed and sent to him.

14. Traci Sullivan and David McCulloch shall provide each other with a copy of his or her income tax return, completed and with all attachments, even if the return is not filed, along with all notices of assessment received from Canada Revenue Agency, on an annual basis on or before June 1st.

- As to spousal support, the Judgment states, in part:

Spousal Support

16. (a) David McCulloch shall pay spousal support to Traci Sullivan in the amount of \$2,000.00 per month commencing January 1, 2009 and payable on the first day of each month.
- (b) A review of spousal support shall occur on or before May 31, 2010 in order to determine whether Traci Sullivan has been accepted into any of the professional programs she had chosen and the likely date at which she might be expected to become employed. If she has not been accepted into one of the education programs she has chosen, Traci Sullivan is to explain what she intends to do to obtain employment. At the review, the court may establish a termination date, impute income to Traci Sullivan and adjust quantum. The parties shall schedule a pre-trial conference on or before March 31, 2010 to report whether a hearing on the review will be required and to discuss filing requirements.

[3] In early October of 2009 – some five months after the issuance of the Corollary Relief Judgment – the parties were seeking a variation of both the parenting provisions and support obligations (Ms. Sullivan as to parenting provisions and Mr. McCulloch as to support obligations). Court documentation indicates that the necessity of a hearing was termed “urgent” and a hearing date was scheduled for October 15, 2009, for one hour. On that date, court documentation indicates the applications were removed “without date” with a further indication that the matter(s) “had settled.” However, there was a request on November 12, 2009, to have the matter re-scheduled “to deal with the spousal and child support issues.” The issue as to the parenting provisions was not to be advanced at this stage.

[4] Counsel for the parties were contacted on the eve of this hearing. Concern was expressed, given the amount of documentation filed with the court, as to the ability to dispense with the issues in the time assigned. Counsel both stressed the

need to have the hearing completed and a belief it could be concluded in the one hour provided. The hearing was completed as scheduled.

ISSUES

Child Support

[5] In August of 2009, Mr. McCulloch began paying a monthly amount of child support of a lesser amount than required by the current court order. He requests the court agree with his actions and conclude that child support paid by him in 2009 was appropriate and to vary the order accordingly. Mr. McCulloch also seeks a variation lessening his child support obligations beginning in the year 2010 that would reflect his current income.

Spousal Support

[6] Mr. McCulloch seeks a variation of the current order terminating his obligation to provide spousal support as of August 1, 2009.

[7] Ms. Sullivan acknowledges Mr. McCulloch's income beginning in 2010 as less than attributed to him in the current court order. She does not dispute this change could create a decrease in ongoing child support. She disagrees with his request as to any further variation.

BACKGROUND

January 2009

[8] The hearing that resulted in the current court order ended.

February 19, 2009

[9] Mr. McCulloch's employment (with a corresponding income later found to be \$110,169.00 per annum) was terminated.

March 12, 2009

[10] The decision of the court was issued. The court found that Mr. McCulloch's income was \$110,169.00 per annum and that Ms. Sullivan was without income. Further, that Mr. McCulloch was to pay child support in accordance with the appropriate *Guidelines* in the amount of \$1,466.00 per month beginning January 1, 2009. Also, that Mr. McCulloch would pay spousal support in the amount of \$2,000.00 per month also beginning on January 1, 2009.

May 22, 2009

[11] A Corollary Relief Judgment setting out Mr. McCulloch's support obligations, in compliance with the court decision, was issued.

July of 2009

[12] Mr. McCulloch unilaterally adjusted, downward, his support obligations. He ceased paying spousal support and lessened his child support.

September of 2009

[13] Ms. Sullivan begins a part-time employment providing her with an income that, from the information provided by her, would amount approximately \$15,600.00 per year.

RELEVANT LEGISLATION

The Divorce Act

[14] Section 17 establishes the jurisdiction to vary or rescind orders. This section speaks to the factors for consideration as to a variation of a child or spousal support order. It also speaks to the objectives of such a variation order.

[15] Section 15(1) establishes the jurisdiction and the making of the initial child support order. In particular, it notes the application of the *Federal Child Support Guidelines*.

[16] Section 15(2) speaks to the jurisdiction as to the initial spousal support order and the objectives in the making of such an order.

Federal Child Support Guidelines

[17] Section 11 deals with the elements of a child support order.

[18] Section 14 deals with the circumstances as to a variation of a child support order.

[19] Section 15 speaks to the establishment of income for the purposes of determining the amount of a child support order.

CONCLUSION

Ongoing Child Support

[20] I indicated to the parties at the conclusion of the hearing that I had found Mr. McCulloch's current income, for the purposes of child support payments, to be \$65,500.00 which would attract a payment in Nova Scotia with regard to two children of \$923.00 per month which I order beginning January 1, 2010. Paragraph 10 of the Corollary Relief Judgment is to be so varied.

Child Support for 2009

[21] Mr. McCulloch reduced his required court-ordered payment (\$1,466.00 per month) in August of 2009. He seeks a variation to the amount that he actually paid in 2009. As previously noted, Mr. McCulloch lost his \$110,169.00 position in February of 2009 and he did not secure employment until mid October, 2009 – a position paying him \$65,500.00 which would be \$44,670.00 less than his former employment.

[22] However, Mr. McCulloch did receive a severance package from his former employer plus a small amount of employment insurance. Ms. Sullivan vigorously submits the financial information available to the court leads to a conclusion that Mr. McCulloch, in the year 2009, had income that exceeds the amount of \$110,169.00 used by the court in concluding his monthly child support payment.

[23] Mr. McCulloch, in accordance with the *Guidelines*, has been required to provide a monthly child support payment in accordance with his income – an

income that the court found to be \$110,169.00 when he last provided income information to the court. To reduce his current obligation he is required to provide information to lessen such obligation. There is no request or indication that the number of children he is obligated to provide support for has decreased. Therefore, he bears the burden of convincing the court that his income has lessened in the year 2009 from that used by the court in requiring his current payment. From the information provided, I am unable to conclude his income was less than stated in the court order. Accordingly, Mr. McCulloch's obligation to provide child support is not varied for the year 2009.

Spousal Support

[24] Mr. McCulloch stopped complying with his order to pay spousal support (\$2,000.00 per month) in August of 2009. He seeks a variance by terminating his obligation as of the date of his last payment.

[25] There are two main grounds for his request for variance. First, a recognition his yearly income has decreased by roughly \$44,600.00 per year. Second, Ms. Sullivan's income has increased by approximately \$15,600.00 per year.

[26] As previously noted, when dealing with child support, I found that, beginning in 2010, Mr. McCulloch's income, for the purpose of providing support payments, is \$65,600.00 annually. I did not conclude that, for the year 2009, or any portion thereof, his income for the purposes of providing support – in this instance, spousal support – is less than the amount indicated in the current order (\$110,169.00).

[27] I do, however, conclude that, beginning around September of 2009, Ms. Sullivan's income increased to an amount that would be characterized as \$15,500.00 annually.

[28] It is also noted that, beginning in 2010, by this decision, I have reduced the amount of child support that Ms. Sullivan will be receiving by approximately \$543.00 per month.

[29] Mr. McCulloch has requested I consider how he spent what would be considered income in 2009; in particular, how much of it, in compliance with the court order, found its way into the hands of Ms. Sullivan. I acknowledge such to be

the case but conclude that this payment of funds took place as a result of the court decision which, after ordering such payments, still considered it appropriate for Mr. McCulloch to provide spousal support in the amount of \$2,000.00 per month.

[30] Mr. McCulloch requests the court consider the financial strain he was forced to endure for the period of time he was unemployed and faced an uncertain financial future. I acknowledge his situation but do not see it as one that would decrease his spousal support obligation.

[31] Mr. McCulloch indicates that, given the date of the court-ordered requirement to pay spousal support, he was not able to acquire immediate tax relief "at source." While this may well have been the case I conclude it did not prevent Mr. McCulloch from, on an annual basis, being able to acquire the tax relief associated with such spousal support payments.

[32] Ms. Sullivan acknowledges she is currently receiving income that was unavailable to her when the spousal support amount was determined. However, she submits this course of action (return to employment) was thrust upon her by Mr. McCulloch arbitrarily lessening the income to which she was, by court order, entitled. She believes she can best serve the children's long-term financial needs if she returns to her previous pursuit which requires her to be a full-time student. Such return would make it practically impossible for her to continue to earn the income that is currently available to her.

[33] I conclude that, for the purpose of dealing with Mr. McCulloch's obligation to provide spousal support, that Ms. Sullivan has an income of \$15,500.00 per year and has had it available to her for at least the last two months of 2009.

[34] The total income available to Mr. McCulloch and Ms. Sullivan and their children has decreased by approximately \$30,000.00 since the making of the current order.

[35] I have made reference to the *Spousal Support Advisory Guidelines*. I conclude that Mr. McCulloch's responsibility to pay spousal support should be varied to \$290.00 per month beginning November 1, 2009, and payable on the first day of each month thereafter.

[36] This decision is not made on an interim basis but it is noted that the previous decision resulting in Mr. McCulloch's obligation to pay spousal support anticipated that such support would require a review early in the year 2010.

Paragraph 77 of that decision states:

[77] I am satisfied that the husband has ability to pay spousal support in the amount of \$2,000. per month commencing January 1, 2009. This payment will be subject to a review, which should be held before me, on or before May 31, 2010. The purpose of the review is to examine whether the wife has been accepted into any of the professional programs she has chosen and the likely date by which she might be expected to become employed. If she has not been accepted into one of the educational programs she has chosen, the wife is to explain what she intends to do to obtain employment. At the review the court may establish a termination date, impute income to the wife and adjust quantum. On or before March 31, 2010, the parties are to schedule a pre-trial conference to report whether a hearing on the review will be required and to discuss filing requirements.

[37] One final matter: Although not set out in her application, Ms. Sullivan submits, by virtue of paragraph 11 of the Corollary Relief Judgment and Mr. McCulloch's income for the year 2009, his child support payments, in fact, should not be lessened but increased. I conclude I was not provided with sufficient information to consider this request.

[38] I would ask counsel for Mr. McCulloch to prepare the order.

J.