SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Roose v. Roose, 2010 NSSC 180

Date: 20100505
Docket: 1201-46516
Registry: Halifax

Between:

Kenneth William Charles Roose

Petitioner

v.

Gail Brenda Roose

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	April 29, 2010
Counsel:	Kenneth Roose, appearing on his own behalf William M. Leahey, appearing on behalf of Gail Roose

By the Court:

Introduction

[1] On October 22, 2009 Mr. Roose applied to terminate the child support he paid for his daughter. He asked that this happen on a retroactive basis, as of November 7, 2005. In response, on November 27, 2009 Ms. Roose applied to vary child support payments on a retroactive basis. She wants child support to be adjusted as far back as 2001.

Is Kara a child of the marriage?

[2] The critical issue in both applications is whether Kara was a child of the marriage, as defined by the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 2(1)(b), at the time of the applications. If she was not, that disposes of Ms. Roose's application to vary child support on a retroactive basis and offers some guidance in determining Mr. Roose's application to terminate child support.

[3] Jurisdiction to award child support retroactively is limited to cases where the person for whom support is sought was entitled to support at the time the application was filed. If the person was not a child at the time of the application's filing, there is no jurisdiction to make a retroactive order for support, according to Justice Bastarache at paragraphs 86 to 90 of *DBS v. SRG, LJW v. TAR, Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37.

[4] Kara turned nineteen in May 2007. She received her high school diploma in May 2008. Kara began a cosmetology course in January 2009. An earlier course was full. Between completing high school and starting her cosmetology course, Kara worked and earned $7,730.00. She also received CPP dependent benefits of $1,511.00 that year. In May 2009, Kara received a diploma in make up artistry from the Hair Design Centre and she earned her provincial make up certificate from the Cosmetology Association of Nova Scotia that same month. She found work as a cosmetologist starting around November 17, 2009. This job paid $9.50 per hour. Ms. Roose says that Kara held this job for "several weeks". According to her paystubs, Kara worked until at least the end of December 2009. She was laid off for approximately three weeks before she found another job, working as a clerk in a convenience store. She earns an hourly wage of $9.20 and works thirty-six to forty hours each week. She continues to look for work as a cosmetologist.

[5] Ms. Roose argues that Kara was a child of the marriage at the time the application was filed for four reasons: because Kara had "just recently" completed her education before Ms. Roose filed her application, because Kara earns a limited income, because Kara currently can't find a job in her chosen field, and because Kara is unable to afford to move from Ms. Roose's home.

[6] Kara completed her cosmetology program six months before Ms. Roose filed her application. She was 21 years old. At the time Ms. Roose filed her application, Kara was

working in the field for which she had trained. I've been provided with two December paystubs for Kara. Her pay cheque for December 31, 2009 showed earnings until December 27, 2009 of $2,195.76. Annualized, this calculates to earnings of over $18,000.00. Lastly, with regard to Ms. Roose's evidence that Kara doesn't have the means to move out, I have Mr. Roose's evidence that Kara, in fact, intends to move in with some other young women and share a place. Kara did not testify or offer an affidavit, so I have only the conflicting evidence of her parents.

[7] Ultimately, Ms. Roose's argument is that because Kara can't currently find a job in her chosen field and because Kara wants to further her education at some point in the future, I should find that Kara was a child of the marriage when Ms. Roose filed her application. Ms. Roose refers me to Justice Lynch's decision in *Lee*, 2009 NSSC 121. Mr. Lee applied to terminate child support after seeing his daughter's name on the list of graduates posted on a university website. In addressing the issue of whether Jacalynne was a child of the marriage at the time of the application, Justice Lynch identified Jacalynne's active pursuit of her education as the "other cause" in section 2(1)(b) of the *Divorce Act*.

[8] I was also referred to *Martell v. Height*, 1994 CanLII 4145 (N.S. CA) in which Justice Freeman, with whom Justices Jones and Hart concurred, said that parents "of a *bona fide* student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry level employment in an appropriate field." I accept this statement of the law. However, it does not apply to Kara. Kara was not a student of any sort when Ms. Roose filed her application. At that time, Kara was employed on a full-time basis in her chosen field earning the equivalent of an $18,000.00 annual income. Since then she has been laid off and found alternate employment. However, *DBS v. SRG, LJW v. TAR, Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37 does not direct me to look at circumstances after the application was filed, but at the time the application was filed.

[9] Ms. Roose encourages me to find that a young person who is planning on furthering her education remains a child of the marriage. I was not offered any judicial authority to support this proposition. In contrast, there is the decision of Justice Dellapinna in *Mason-Cramm v. Cramm*, 2008 NSSC 308 where Ms. Mason-Cramm argued that since her daughter planned to return to university in the next year, she should be found to be a child of the marriage. Justice Dellapinna held that the daughter might regain that status but that she did not, at the time of the application, have that status. Similar reasoning and results are found in *A.W.H. v. C.G.S.*, 2007 NSSC 181.

[10] With regard to Mr. Roose’s application, there is no evidence before me to suggest that Kara was independent in November 2005. At that time, she was both under the age of majority and attending high school. Her high school studies continued until June 2008 and entitled her to child support until that time. After her graduation, she lacked the educational basis to be self-sufficient and was actively pursuing further education, though she was prevented from returning to school in the fall of 2008 because the course she wanted to take was fully subscribed by other students. She attended school during through the first part of 2009, making her dependent on her parents' support. Upon graduation in May 2009, she remained dependent until she found work, sometime around November 17, 2009. This employment was entry level

employment in her preferred field with an annualized income in excess of $18,000.00. With regard to Mr. Roose's application, I find that Kara did not cease to be a child of the marriage until she began her job in November, 2009.

Conclusion

[11] I find that at the time Ms. Roose commenced her application for a retroactive award of child support, Kara was no longer a child of the marriage. As a result, I grant Mr. Roose's application as of that time and I dismiss Ms. Roose's application. Mr. Roose's child support obligation for Kara is terminated effective following his payment on November 1, 2009. I have drafted the appropriate order and it accompanies my decision. As required by the *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6, s. 9(2), a copy of the order will be filed with the Director of Maintenance Enforcement within five days of its being issued.

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

Halifax, Nova Scotia