SUPREME COURT OF NOVA SCOTIA
Citation: ***Stewart v. Stewart***, 2010 NSSC 100

Date: 20100318
Docket: 1208-001921 (SYD 018840)
Registry: Yarmouth

Between:

Heather Marie Stewart

Applicant

v.

Arthur Wallace Stewart

Respondent

Judge: The Honourable Justice Peter Bryson

Heard: Friday, February 5, 2010, in Shelburne, Nova Scotia

Counsel: Donald R. Miller, for the Plaintiff
Alexander L. Pink, for the Defendant

By the Court:

[1] Arthur Wallace Stewart and Heather Marie Stewart were married at Shelburne, on October 21, 1986. There are two children of the marriage: Robert Dylan Stewart, born October 19, 1989 and Brandon Arthur Stewart, born March 23, 1992.

[2] The parties separated on July 22, 1999 and entered into a separation agreement on September 28, 1999, which is registered in the Family Court, File No. 99SB0041. The separation agreement provided that the parties would have joint care and custody of the children, with the children to reside with and be in the primary care of Mrs. Stewart. Mr. Stewart was to have liberal access. The separation agreement provided for child support and special expenses.

[3] The parties were divorced on April 3, 2003. The corollary relief judgment issued on the same day provided for, amongst other things, child support to Mrs. Stewart. On June 11, 2004, the corollary relief judgment was varied ("V.C.R.J.") so that Mr. Stewart was to pay Mrs. Stewart child support in accordance with the federal guidelines of $843.00 per month commencing June 15, 2004. It also required that Mr. Stewart pay 75% of all special or extraordinary expenses set out in the corollary relief judgment.

[4] Robert and Brandon Stewart reside with their mother on Cape Sable Island. In the fall of 2008 Robert Stewart began studies at St. Francis Xavier University but had to withdraw in January 2009 for health and financial reasons. Robert presently works at a call centre in Yarmouth, to which he commutes daily. He maintains contact with his father and has stayed with him.

[5] Brandon Stewart is attending high school and does not have any contact with his father. Both boys are academically talented. They have done well in high school and Robert was given a scholarship to attend St. Francis Xavier University.

[6] Both Mr. Stewart and Ms. Stewart are now involved in new domestic relationships.

[7] As of January 5, 2010, total child support arrears owed by Mr. Stewart under the V.C.R.J. were $13,922.09 together with $573.58 outstanding fees for the Maintenance Enforcement Programme.

[8] On June 20, 2008, Mrs. Stewart filed an interlocutory notice (application inter partes), seeking to vary the V.C.R.J. by requiring Mr. Stewart to contribute special expenses for post-secondary education for Robert. On April 3, 2009, Mr. Stewart filed an interlocutory notice (application inter partes) seeking an order to vary the V.C.R.J. by reducing his child support payments. He also asks that Robert be declared no longer a child of the marriage pursuant to the **Divorce Act**, 1985, c. 3 (2nd Supp.). This was conceded at the hearing, but Mrs. Stewart says that income should be imputed to Mr. Stewart. Accordingly, the issues before the court now are:

(1) What is Mr. Stewart's income for child support purposes and should the court impute income to him?

(2) Is Mrs. Stewart entitled to special expenses for post-secondary education for Robert?

(3) Should (1) and/or (2) be retroactive?

(4) If so, what effect would a retroactive award have on Mr. Stewart's arrears of child support?

[9] In order to entertain either of the applications, this court must find that there has been a material change in circumstances pursuant to s. 17(4) of the **Divorce Act**. In respect of Mr. Stewart's application, the material change is the significant decline in his income since the V.C.R.J. was granted. For Mrs. Stewart, the material change is Robert's attendance at university.

Mr. Stewart's Income

[10] When the V.C.R.J. was granted, Mr. Stewart's reported income was much higher than it is currently. During the period 1999 to 2001 his income averaged approximately $60,000.00 annually, primarily from lobster fishing. Mr. Stewart has fished all his life and has extensive experience in the ground fish and lobster fisheries as well as rockweeding. He says that he is not presently employed although he did some rockweeding last month. The income reported on line 150 of Mr. Stewart's last tax return (2008), was $17,231.81. He estimates that his 2009

income will be $15,000.00. The figures for 2005, 2006 and 2007 respectively were $61,306.00, $28,597.00, and $31,345.00.

[11] Section 16 of the *Federal Child Support Guidelines ("Guidelines")* provides that spousal income is normally determined by the "total income" figure on a tax payer's tax return. That section says:

> Calculation of annual income
>
> 16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.
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> SOR/00-337, s. 3

[12] Section 19 of the *Guidelines* allows the court to impute income in certain circumstances. The list of circumstances provided for in s. 19 is not exclusive, but there are at least three which may have application in this case. They are:

> 19(1)(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;
>
> (d) It appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> (g) The spouse unreasonably deducts expenses from income.

[13] With respect to (g), ss. 2 of s. 19 provides that reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the **Income Tax Act**.

[14] Mr. Stewart admits that he quit lobster fishing in May of 2008. He was asked why he was not still lobstering and claimed that it was not lucrative. Mr. Stewart was extensively cross-examined on both his ability to work and how he is being paid. He specifically denied being paid cash for rockweeding, although Mrs.

Stewart testified that he was paid cash for rockweeding when they were together in the late 1990's.

[15] Mr. Stewart said that Acadian Sea Plants Ltd. ("Acadian") paid him for rockweeding, although "in a sense" he worked for Johnny Brannon who owns the boats used for rockweeding. From the evidence it appeared that Mr. Brannon received a certain payment per ton for rockweed harvest and Mr. Stewart was paid another figure per ton – the differential presumably being the "rent" for the use of Mr. Brannon's boats.

[16] Mr. Stewart said that he was paid $30.00 a ton and that each boat could carry between two and four tons. Usually, there would be one rockweeding trip a day - occasionally two, depending on the tide. Mr. Stewart was not able to say how much rockweeding he had done in 2008. He claimed that his step son, Chad, came with him from time to time, although he was vague on the details. He admitted that he received a disability payment of $11,116.00 "through the government" because Chad suffers from diabetes. This appears on his 2008 tax return. He also admitted that in 2008 Chad went to school full time. Yet, when one looks at his 2008 tax return, half of his fishing income ($7,082.25) was attributed to Chad. Mr. Stewart testified that "Chad deserved a half share."

[17] When asked exactly how often Chad went out with him, Mr. Stewart was initially vague but became more specific when confronted with his 2008 tax return which reveals that Chad received $7,052.25 in 2008 for rockweeding or fishing. The tax return indicates that this was half of the total. Therefore they had a gross income of $14,064.50. Excluding social assistance and employment insurance, Mr. Stewart's only other 2008 income was $3,857.00. Mr. Stewart would have the court believe that a 15 year old boy with a serious health issue who was attending school full time would earn virtually the same amount of money as his stepfather who had nothing else to do but work. I do not accept this evidence of Mr. Stewart's income. Mr. Stewart is in his 40's and looks healthy and says that he has no serious health problems. Either Mr. Stewart was diverting income to Chad, or alternatively he was under employed; probably both. Mr. Stewart is either earning or is capable of earning at least another $7,000.00 over and above what he reported on his 2008 tax return. This conclusion was reinforced when Mr. Stewart admitted in cross-examination that he could make more money lobster fishing than rockweeding in "some places." Obviously he could earn more money as a lobster fisherman.

[18] Mr. Stewart was also asked about his expenses. On his "Statement of Fishing Activities" for 2008 Mr. Stewart deducted motor vehicle expenses of $4,375.72 and yet he admitted he did not use his motor vehicle for fishing. He did use it for driving back and forth to work. This evidence established that the amounts Mr. Stewart was claiming for vehicle expenses were really for his family's personal use of the vehicle.

[19] The motor vehicle expenses claimed by Mr. Stewart can be looked at in two ways in light of ss. 16 and 19 of the *Guidelines*. These expenses should not be deducted from "total income" because they were not related to the earning of income. This means that the T1 "Total Income" on Mr. Stewart's 2008 Income Tax Return was understated by $4,375.72. Alternatively, one could treat this sum as an unreasonable deduction from income pursuant to s. 19(1)(g) of the *Guidelines*. Regardless of how one looks at it, Mr. Stewart's 2008 income was understated by that amount.

[20] Since Mr. Stewart could have earned at least another $7,000.00 in 2008 and understated his expenses by $4,375.72, I would impute additional income to Mr. Stewart of $12,000.00 a year for 2008 and 2009. This would give Mr. Stewart a 2008 income of $29,231.81 and an estimated 2009 income of $27,000.00.

Mr. Stewart's Application

[21] Mr. Stewart asks that the court recalculate his support obligations as of June 2008, based on a 2008 income of $17,892.00 and a 2009 income of $15,000.00. He requests that this recalculation be for two children until December of 2008 and for one child for all of 2009.

[22] After imputing income to him, I have already found that Mr. Stewart's 2008 income was $29,231.81 and his 2009 income was $27,000.00. He did not apply to adjust support payments until April of 2009. He therefore seeks retroactive adjustment of his support payments.

[23] Section 17 of the **Divorce Act** which authorizes the variation, rescission or suspension of orders provides amongst other things as follows:

> 17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
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> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

[24] Accordingly, the court does have jurisdiction to make a retroactive award with respect to the V.C.R.J.

[25] It is clear from the evidence that Mr. Stewart's child support obligations should be reduced, based on a reduction in his level of income. In my view it is equally clear that Mr. Stewart should have contributed to the cost of Robert's university education. Robert attained the age of majority in October of 2008, while attending university. He was not then financially independent.

[26] In *D.B.S. v. S.R.G.* 2006 SCC 37, the Supreme Court set out a number of factors be considered when deciding whether to make a retroactive award:

- delay
- blameworthy conduct
- situation of child
- hardship.

In this case, Mr. Stewart delayed making his application until April 2009. Prior to that he had filed an affidavit in response to Mrs. Stewart's application. He and his then counsel had ample opportunity to file an application, but did not. He blames mix-ups with counsel. But if he were seriously concerned about varying his obligations, he would have moved more quickly. Moreover, his conduct in misreporting income and being underemployed is blameworthy. Evidence of the children's situation is incomplete. But we know that it was a financial challenge for Robert to attempt university in 2008–2009. With respect to hardship – I am

confident that Mr. Stewart could meet his existing V.C.R.J. obligations up to April of 2009. Accordingly, I would only vary the V.C.R.J. as of that month.

Special Expenses

[27] Mrs. Stewart and Robert Stewart testified that Robert attended St. Francis Xavier University in the fall of 2008. Mrs. Stewart's June 2008 Affidavit estimates Robert's university expenses for 2008-09 at $16,277.62. It appears from those estimates that a total of $8,100.00 was due by September 28th, 2008. From the same Affidavit, Robert was expected to earn about $2,500.00 which presumably would have been put towards his education. In addition, he apparently was awarded a scholarship from St. Francis Xavier University, but the amount of that scholarship is not stated. He did have to take out a student loan to go to St. Francis Xavier University, but again evidence on the amount of that loan is not before the Court. Nevertheless, taking into account the income levels of his parents, including the income imputed to Mr. Stewart, Robert's ability to contribute to his educational costs and his academic abilities, I consider it reasonable that Mr. Stewart should have contributed to Robert's education in 2008-2009. On the other hand, since Robert lived at the university, it would be reasonable that the child support payments for Robert would decline during that period.

[28] Section 7(1) of the *Guidelines*, "special or extraordinary expenses," includes expenses post-secondary education. The relevant portion of s. 7(1) says:

> Special or extraordinary expenses
>
> 7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
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> . . .
>
> (e) expenses for post-secondary education; and
>
> . . .

[28] Subsection (2) of s. 7 mandates that the expense should be shared by the spouses in proportion to their respective incomes after deducting from the expense any contribution from the child. Subsection (3) requires the court to take into account any subsidies, benefits or income tax deductions or credits relating to the expense and any eligibility to claim a substitute benefit or tax deduction or credit relating to the expense. The parties did not provide the court with evidence relating to the financial impact of the tuition fees tax credit, the education tax credit or the textbook tax credit on Robert's university expenses.

[29] Mrs. Stewart provided evidence that she works part-time. According to the tax return appended to her June 2008 affidavit, her 2007 income was $19,367.00. She also deposed that she had provided financial assistance to Robert during his first term at university.

[30] Factors relevant to the consideration of whether or not Mr. Stewart should contribute to Robert's university expenses as follows:

- Robert is clearly academically inclined and gifted.
- Robert is able to make some contribution to his own education.
- Mr. and Mrs. Stewart's incomes are modest.
- Mr. Stewart's income is – or should be – at least 50% higher than Mrs. Stewart's.
- Robert is able to obtain student loan assistance.
- Mrs. Stewart has made some contributions to Robert's education, although the precise amount is undisclosed.

[31] Taking all of the foregoing into account, I consider it reasonable that Mr. Stewart should have provided $250.00 a month towards Robert's university education, for a period of 8 months; 4 months in 2008, beginning in September and 4 months in 2009, beginning in January. On the other hand, Robert was no longer living at home while he attended university. That means Mr. Stewart's payments

for Robert would be reduced during that time. I consider $250.00 a month reasonable in all the circumstances. Accordingly, I would offset the two figures, and make no change to V.C.R.J. until April 2009, when Robert's university year was scheduled to end.

[32] Courts have been reminded that retroactive orders are not truly retroactive, but simply enforce the pre-existing legal obligation of the parents to pay an amount of child support commensurate with their income. Ms. Stewart brought her application prior to the 2008 academic year. She struggled to assist her son at university, while Mr. Stewart was shirking his obligations. She had changes in counsel. I ascribe no impropriety of conduct to her in the time it took her to bring this matter before the court.

Disposition

[33] Commencing with the April 15, 2009 payment, Mr. Stewart's child support payments will be reduced from two children to one. In other words, as of that date child support will continue in favour of Brandon. The amount of income on which that support is to be calculated will be $29,192.00. According to the Nova Scotia Table, that results in child support of $253.00 a month. This will have the effect of reducing the arrears payable by Mr. Stewart to $8,022.09 as of January 5, 2010. That is calculated by adjusting child support from April 2009 to $253.00 a month from $843.00 a month, i.e., a net decrease of $590.00 a month thereafter. [$843.00 a month minus $253.00 a month = $590.00 a month X 10 months = $5,900.00]. That total figure is then deducted from arrears of $13,922.09, to arrive at $8,022.09. These arrears are to be paid at the rate of $233.00 a month, commencing May 15, 2010, until paid.

[34] As success has been divided, there will be no costs. Counsel are to prepare an order amending the V.C.R.J. accordingly.

Bryson, J.