<u>IN THE SUPREME COURT OF NOVA SCOTIA</u>
Citation: Walsh v. Phelps, 2010 NSSC 158

Date: 20100426
Docket: SFHISOV 062619
Registry: Halifax

Between:

Dennis Michael Walsh

Applicant

and

LeeAnn Phelps

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: June 30, 2009, in Halifax, Nova Scotia

Counsel: Tammy Wohler, for the Applicant
LeeAnn Phelps, Self Represented (Absent)

By the Court:

Introduction

[1] The pleadings identify the proceeding as under the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c.30. However, the matter proceeded as a Provisional Hearing.

[2] It was before the court on June 30, 2009 for a Provisional Variation Hearing, as provided by ss.17, 18 and 19 of the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.). Mr. Walsh asked the court to vary the parties' Corollary Relief Judgment, issued by the Supreme Court of British Columbia on November 4, 2002.

[3] Following the hearing on June 30, 2009, conclusion of the matter languished because of concerns about the advisability of the court issuing two orders, one for arrears and one for ongoing support. In March 2010, the court was asked by counsel to proceed with one order.

Issues

[4] Mr. Walsh seeks to:

> (1) determine his child support obligation on a go forward basis for the parties' three children; and he seeks
>
> (2) to forgive arrears of child support.

Jurisdiction

[5] The court is satisfied that it has jurisdiction to consider Mr. Walsh's variation application, pursuant to s.18 of the *Divorce Act supra*.

Background

[6] The outstanding order dated November 4, 2002 requires Mr. Walsh to pay child support of $400 per month for three children: his stepson, Jesse, born March 14, 1986; Dean, born October 30, 1989 and Shannon, born April 28, 1992. The payment is ordered to continue "for so long as the children are eligible for maintenance under the *Divorce Act* or otherwise by law". The obligation was calculated on the basis of a guideline income of $23,900 in 2002.

Issue One: Prospective Child Support

[7] I am satisfied that the oldest child Jesse, D.O.B. March 14, 1986 is no longer a "child of the marriage" as defined by s.2(1) of the *Divorce Act supra*. He is no longer in the care of his mother. I refer to paragraphs five (5) and six (6) of the Applicant's affidavit, marked Exhibit 1.

[8] Similarly, I am satisfied that the parties second child Dean, D.O.B. October 30, 1989 is no longer a "child of the marriage". I refer to paragraph seven (7) of the Applicant's affidavit, marked Exhibit 1.

[9] Shannon, D.O.B. April 28, 1992, remains a child of the marriage and the Applicant agrees that he is subject to an ongoing obligation to pay child support for Shannon.

Issue Two: Arrears of Child Support: November 2002 - December 2008; December 2008 - Present

[10] Exhibit B to the Applicant's affidavit (Exhibit 1), sworn April 22, 2009, is a letter dated December 2, 2008, addressed to the Applicant by the British Columbia Family Maintenance Enforcement Program. The letter advises the Applicant that effective December 2, 2008, the November 4, 2002 order was enrolled with the Family Maintenance Enforcement office and that arrears of $29,600 "are now due". The letter attached a calculation sheet to support the conclusion. The calculation shows arrears accumulating at a rate of $400 each month, beginning November 1, 2002 to December 1, 2008 inclusive.

[11] Mr. Walsh agrees he has not made any support payments pursuant to the November 4, 2002 order.

[12] However, he believes the payments were not due for a number of reasons.

[13] Mr. Walsh points to an agreement (Exhibit C to Exhibit 1) he and Ms. Phelps signed July 8, 2002 pursuant to which she agreed to not seek child support from Mr. Walsh. Although this agreement may be unenforceable for policy reasons, its existence is a factor for the court to consider when assessing whether to forgive arrears. As between the parties, effective notice to Mr. Walsh of his obligation to pay child support can not be said to have arisen on November 4, 2002, when the order was taken out. At best, notice was communicated to Mr. Walsh when he received written communication from the Family Maintenance Enforcement Program in December 2008.

[14] I accept and find that Mr. Walsh did not contest the 2002 order because he believed the agreement he had with Ms. Phelps nullified any obligations to flow from the proceeding, at least on the issue of child support. The subject order, although dated November 4, 2002, flowed from court proceedings in July 2002 and the agreement between the parties was also concluded in July 2002.

[15] Such a conclusion on his part is not difficult to accept, given the parties' level of understanding of the court process, and the parties' desire to conclude their

divorce. His conclusion was not challenged for six (6) years. As stated, he received a demand for $29,600 from the British Columbia Family Maintenance Enforcement office in December 2008.

[16] In addition to being influenced by the existence of the parties' agreement, the court is influenced by Ms. Phelps' responses to questions posed in the British Columbia Request for Information of Children's Circumstances, signed by her on February 18, 2008 (Jesse) and October 18, 2008 (Dean). Two questionnaires relating to the children's circumstances, were completed and filed by Ms. Phelps with the Family Maintenance Enforcement Program of British Columbia. These are Exhibit B to the Affidavit of the Applicant (Exhibit 1).

[17] With respect to the child Dean, born October 30, 1989, Ms. Phelps declared on October 15, 2008 that she wanted enforcement of ongoing maintenance for Dean to end as of October 30, 2008, when he turned 19 years of age.

[18] With respect to the child Jesse, born March 14, 1986, Ms. Phelps declared on February 19, 2008 that she did not want maintenance enforced after September 2001, more than one (1) year before the date of the 2002 order. Ms. Phelps adds that Jesse was independent since he was 16 years old. Although this form pertains to Jesse, born March 14, 1986, she made a note on the form and was clear in maintaining her claim for support of the parties' third child Shannon, D.O.B. April 28, 1992.

[19] A separate questionnaire for Shannon was not filed with the Family Maintenance Enforcement office in British Columbia or at least the court was not provided with a copy of such a questionnaire.

[20] Mr. Walsh, as part of Exhibit 2, has filed evidence of his earnings in recent years. Those documents reveal the following:

2009	Projected Income - Social Assistance (see Statement of Income filed May 8, 2009, Exhibit 2)	$8,916.00
2008	E.I. Income of:	$4,981.00
	Social Assistance Income of:	$3,711.00
2007	Notice of Assessment: line 150 Income of:	$18,849.00
2006	Notice of Assessment: line 150 Income of:	$20,165.00
2005	Notice of Assessment: line 150 Income of:	$24,114.00
2004	Notice of Assessment: line 150 Income of:	$9,025.00
2003	Notice of Assessment: line 150 Income of:	$25,860.00
2002	Notice of Assessment: line 150 Income of:	$18,134.00

Legal Principles

[21] This is a situation similar to that before the court in *Penney v. Mifflen* [2009] N.S.J. No. 130 wherein, I concluded that a retroactive award should not be ordered because of the parties prior agreement and the hardship such an order would impose on the payor parent. The issues raised in that case are summarized in paragraphs 15, 17 and 18 of the report:

> 15 Mr. Mifflen takes the view that he and Ms. Penney had agreed that no child or spousal support would be payable and that after receiving the subject letter from Ms. Nicholson in April 2008, he had further discussions with Ms. Penney about the payment of child support. He testified that she assured him that the claim for child support was an error on the part of her lawyer and that she would not seek child support.
>
> . . . . .
>
> 17 Finally, he argues that his high level of current indebtedness will require him to declare bankruptcy and he is not in a position to pay retroactive child support.
>
> 18 Ms. Penney simply argues that Mr. Mifflen had an obligation to make payments and did not make them following Ms. Nicholson's letter. She does not respond directly to Mr. Mifflen's assertion that they had agreed to proceed in another fashion.

[22] The situation herein is analogous to one involving an agreement setting out child support obligations and the payor parent’s expectation is that his/her support obligations have been defined. Nevertheless, “a payor parent who adheres to a separation agreement that has not been endorsed by a court, should not have the same expectation that (s)he is fulfilling his/her legal obligations, as does a payor parent acting pursuant to a court order” (paragraph 77, *D.B.S. v. S.R.G.*, 2006 S.C.C. 37, hereinafter referred to as *D.B.S.*).

[23] The court in *D.B.S.* at paragraphs 75, 76 and 78 emphasized the important policy basis for deferring to agreements reached between parties:

> 75 A similar, but not identical, situation arises where child support obligations have previously been set out in an agreement between the parents. While many of the same considerations apply to this situation that applied to the situation of a previous court order -- e.g., the payor parent's expectation that his/her support obligations have been fully defined -- the difference between an agreement and a court order cannot be ignored.

> 76 In *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24, and *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 2004 SCC 22, I (along with Arbour J. in the former case) discussed the importance of encouraging spouses to resolve their own affairs, as well as the complementary importance of having courts defer to that resolution. These cases dealt with spousal support issues, but many of the same considerations apply in the child support context. Prolonged and adversarial litigation is just as troubling -- if not more so -- in the child support context as in the spousal support context.
>
> . . . . .
>
> 78 In most circumstances, however, agreements reached by the parents should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents. However, as is the case with court orders, where circumstances have changed (or were never as they first appeared) and the actual support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it: compare C. (S.E.) v. G. (D.C.) (2003), 43 R.F.L. (5th) 41, 2003 BCSC 896.

[24] Subject to the foregoing, an analysis of Mr. Walsh's obligations given the facts of this case, and in particular, the existence of the agreement between the parties, is similar to that applicable when a retroactive award of child support is sought.

[25] The Supreme Court in *D.B.S. v. S.R.G.* [2006] S.C.J. No. 37 addressed the issue of whether a court can make an order for retroactive child support and in what circumstances it is appropriate to do so. Three situations were described; awarding retroactive support where there has already been a court order for child support to be paid; awarding retroactive support where there has been a previous agreement between the parents and awarding retroactive support where there has not already been a court order for child support to be paid.

[26] Justice Bastarache then reviewed factors that could curtail the power of judges to make retroactive awards in specific circumstances. These are:

1. Status of the child. (para. 86)

2. Federal jurisdiction for original orders. (para. 91)

3. Reasonable excuse for why support was not sought earlier. (para. 100)

4. Conduct of the payor parent. (para. 105)

5. Circumstances of the child. (para. 110)

6. Hardship occasioned by a retroactive award. (para. 114)

[27] Justice Bastarache summarized the governing principles as follows:

> 133. In determining whether to make a retroactive award, a court will need to look at all the relevant [page 288] circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.
>
> 134. Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.
>
> 135. The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[28] The award of a retroactive maintenance award is a discretionary remedy. (Roscoe, J.A. in Conrad v. Rafuse (2002), 205 N.S.R. (2d) 46, para. 17-20). Judicial discretion was described by Justice Bateman in MacIsaac v. MacIsaac, [1996] N.S.J. No. 185 (N.S.C.A.) at para. 19 and 20. Discretionary decision making within the judicial context confers an authority to decide "according to the rules of reason and justice, not according to private opinion".

Conclusion

[29] Although I am not being asked to order retroactive child support, I am being asked to recalculate Mr. Walsh's child support obligation to reflect his actual earnings over the subject period and to reflect the actual number of children of the marriage. After having done this, I am being asked to forgive the amounts, if any found to be owing.

- ongoing child support for Shannon

[30] The court orders that (1) Mr. Walsh's ongoing child support obligation for the parties' youngest child Shannon (D.O.B. April 28, 1982) be based on his current income, reflecting the Nova Scotia tables. For 2009 it is set at NIL, effective June 1, 2009, based on his projected 2008 income of $8,692.00 for that year.

- arrears

[31] I cancel any child support arrears shown as accumulating to December 31, 2008. Mr. Walsh had notice that Ms. Phelps was not abiding by the terms of their written agreement by that date.

[32] Mr. Walsh is not guilty of blameworthy conduct. He followed the terms of the parties' agreement in good faith and returned to court when he learned Ms. Phelps was challenging the agreement. He has fallen on hard economic times and a decision to not forgive arrears would be a significant hardship. It is clear that the arrears claimed are not correct. For example, Jesse was not a child of the marriage when the November 2002 order was issued and declared him to be. The evidence also established that Mr. Walsh did have primary care of the children for a number of years and Ms. Phelps was not involved in financially supporting them. Mr. Walsh moved to British Columbia with the children to facilitate their having a relationship with their mother, who was residing there.

[33] His child support arrears accumulated after that date are not forgiven. However, they will be recalculated to reflect his earnings in 2008 and his obligation for one child in 2009 and 2010.

[34] The court therefore orders that (2) no arrears of child support be shown for the year ending December 31, 2008 and (3) that after December 31, 2008, only Shannon (D.O.B. April 28, 1982) be found to be “eligible for maintenance under the *Divorce Act* or otherwise at law” as that language is used in the Corollary Relief Judgment, issued by the Supreme Court of British Columbia on November 4, 2002. Given Mr. Walsh’s income level, the child support payment is set at zero for the period following December 31, 2008.

- disclosure

[35] Mr. Walsh is to (4) advise Ms. Phelps when his monthly income, viewed on an annualized basis exceeds $9,000.00 per year, and (5) he is to provide her with a copy of his tax return and notice of assessment by June 1 of each year, for the preceding year.

[36] Mr. Walsh is to begin paying child support based on the Nova Scotia tables, the month following an increase in his monthly income. No further court order is required.

J.