

SUPREME COURT OF NOVA SCOTIA
Citation: Martell v. MacPhee, 2011 NSSC 69

Date: 20110216
Docket: SFHD 061315
Registry: Halifax

Between:

Peter Martell

Applicant

and

Heather MacPhee

Respondent

Decision (Provisional)

HEARD BEFORE: The Honourable Justice Lawrence I. O’Neil

PLACE HEARD: Halifax, Nova Scotia

DATES HEARD: November 1 and 16, 2010

COUNSEL: Angelina Cunningham, counsel for the Applicant
Heather MacPhee, Self Represented (ABSENT)

By the Court:

Background

[1] The Applicant is subject to an order of the Family Court of the Superior Court of Justice, Ottawa, Ontario effective December 2, 2005, duly registered in the Supreme Court Family Division at Halifax, Nova Scotia on the 10th day of October, A.D. 2008.

[2] By Application filed October 28, 2008 in the Supreme Court of Nova Scotia (Family Division), the Applicant sought a recalculation of his child support obligation and forgiveness of arrears of child support, if any were found to be owing.

[3] A Provisional Order of this Court was forwarded to Ottawa following a Provisional Hearing before me on December 11, 2008, granting the relief requested.

[4] By Order dated March 30, 2010, following a Confirmation Hearing in Ottawa before the Honourable Justice Blishen, further evidence of the Applicant's income in 2007, 2008 and 2009 was requested. The order of Justice Blishen dated December 14, 2009 provided as follows:

1. The provisional order of Justice O'Neil is not confirmed. This matter is remitted back to the Nova Scotia jurisdiction in which Mr. Martell resides for further evidence of his income in 2007, 2008 and 2009 including tax returns and notices of assessment and for evidence as to why the imputation of at least \$30,000, as found in the December, 2005 order, should not continue.
2. This court finds that Colin Martell, born May 6, 1990, continued and continues to be a child of the marriage. Therefore, paragraph 4 of the Nova Scotia order is not confirmed.
3. A provisional order is made, terminating the access order of December, 2005, to be confirmed in Nova Scotia. Given the children's ages of 21, 19 and 16, they can work out access arrangements with their father on their own.

[5] Additional evidence was received by the Nova Scotia Court on November 1 and November 16, 2010.

[6] After reading the Application and all other documents on file herein, and upon hearing Angelina Cunningham, on behalf of the Applicant, and upon hearing from the Applicant, Peter Martell, the following decision is rendered.

Current Proceeding

[7] It appears that the provisional order I forwarded to Ottawa some time ago, flowing from the court appearance on December 11th, 2008, did not have the supporting documents enclosed, including the tax returns and financial information of Mr. Martell. These documents were not in the file forwarded to Ottawa with the Provisional Order. Consequently, the Ottawa Justice returned the matter to me. The date of the Ottawa order returning the matter to me is March 30, 2010. Clause 1 of the order directed the matter back to me and requests evidence of Mr. Martell's income in 2007, 2008 and 2009, including tax returns and notices of assessment, and asks for evidence as to why an imputation of at least \$30,000 as income, as reflected in the December 2005 order should not continue.

[8] The evidence presented November 1 and 16, 2010 establishes Mr. Martell's line 150 income over the relevant period was as follows:

1. The Applicant's 2007 line 150 income was \$15,347. Reference is made to paragraph 5, tab 9 of the Applicant's affidavit appearing at Exhibit 1, which exhibit was filed November 16, 2010.
2. The Applicant's 2008 line 150 income was \$33,060. Reference is made to paragraph 8, tab 9 of the Applicant's affidavit appearing at Exhibit 1, which exhibit was filed November 16, 2010.
3. The Applicant's 2009 line 150 income was \$18,932. Reference is made to paragraph 11, tab 9 of the Applicant's affidavit appearing at Exhibit 1, which exhibit was filed November 16, 2010;

2007

[9] Given Mr. Martell's 2007 line 150 income of \$15,347, comprised of \$12,455.00 from employment income and \$2,892.00 from social assistance, his child support obligation for 2007 is recalculated to reflect this lower income. That monthly obligation is therefore determined to have been \$291.00 per month, using the Nova Scotia tables and an obligation for three children.

[10] Mr. Martell's obligation to contribute to special expenses for the children in 2007 is set at zero given his low income in 2007.

2008

[11] In 2008, Mr. Martell's line 150 income of \$33,060.00 included RRSP income of \$5,989.97. I am satisfied that the RRSP income is non recurring and should not be considered for purposes of determining Mr. Martell's child support obligation (s.17(1) Federal Child Support Guidelines). Mr. Martell's 2008 remaining income for 2008 comprised of employment income and employment insurance income totalling approximately \$27,000. His child support obligation for 2008 should therefore be recalculated to reflect an income of \$27,000 based on an obligation for three children.

[12] Mr. Martell's 2008 child support obligation is therefore set at \$537 per month, based on the Nova Scotia tables and an obligation for three children.

[13] Given his low income in 2008, Mr. Martell's obligation to contribute to special expenses for the children is set at zero for 2008.

2009

[14] In 2009, Mr. Martell's line 150 income was \$18,932. This consisted of employment income (\$6,541.00); employment insurance income (\$5,566.00) and social assistance income (\$6,825.00). For the period January - April 2009, his child support obligation is set at \$384.00 per month.

[15] He has been on social assistance since May 2009. His income has been \$849 per month, which on an annualized basis is \$10,188.00. This gives rise to a child support obligation of \$75.00 per month for three children. It is worth noting that the figure of \$849 includes a specific amount for medical transportation each month (\$70.00) and for a monthly telephone service (\$30.00)(see Exhibit D to Tab 9 of Exhibit 1). As a result, I propose to set his monthly income at \$749, which is \$8,988.00 per year. This gives rise to a child support obligation for three children in the amount of \$19 per month commencing May 1, 2009.

[16] Given his low income in 2009, Mr. Martell's obligation to contribute to special expenses for the children is set at zero for 2009.

2010 - 2011

[17] Mr. Martell's ongoing income consists solely of his social assistance income of $\$749 + \$70 + \$30 = \849 per month (see Mr. Martell's affidavit at Tab 10 of Exhibit 1). His ongoing child support obligation is based on an annual income of \$8,988.00. His child support obligation is set at \$19.00 per month, being the amount payable for three children. The obligation to contribute to special expenses for the children is terminated effective January 1, 2010.

Arrears

[18] In his affidavit filed November 1, 2010 at paragraph 16, Mr. Martell states that arrears of child support, as calculated by the Maintenance Enforcement Program office in Nova Scotia, are in excess of \$37,000.

[19] The recalculation of Mr. Martell's obligation in 2007, 2008, 2009 and 2010 will result in a significant reduction of the amount shown as arrears.

Conclusion

[20] The parties' three children remain children of the marriage and they shall arrange their access time directly with Mr. Martell. Clause 2 and 3 of Justice Blishen's March 30, 2010 order are confirmed.

[21] Mr. Martell is very ill and his health will continue to deteriorate. He suffers from Huntington's disease. He is without material assets and without earned income. He will continue to subsist on social assistance income. Given that \$100 of his total monthly income of \$849 is targeted for transportation and telephone service made necessary by his health condition, I find his income since May 1, 2009 to be \$749 per month. This represents an income of \$8,988 per year and gives rise to a child support obligation for three children in the amount of \$19.00 per month.

[22] Mr. Martell is permanently disabled. He has suffered from a physical disability for a number of years and this has impacted on his employability. I am satisfied that he has diligently pursued work. I am satisfied that he is not and never

will be in a position to pay any child support arrears that may currently exist or that may exist following a recalculation of his income at the now known lower level.

[23] The Court has also been asked to forgive any arrears of child support that remain outstanding after the past child support obligation is recalculated. I apply the principles enunciated by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 when considering whether any accumulated arrears should be forgiven. In *D.B.S. supra*, when discussing the relevance of hardship experienced by a payor parent made subject to a retroactive award, the Court at para. 114 stated:

While the Guidelines already detail the role of undue hardship in determining the quantum of a child support award, a broad consideration of hardship is also appropriate in determining whether a retroactive award is justified.

[24] I apply this authority when determining whether any arrears of child support owed by Mr. Martell should be forgiven.

[25] Since February 1, 2007, Mr. Martell's actual income has been less than the \$30,000 imputed by the earlier order. Given the personal hardship, any arrears shown would represent to him and the fact there is absolutely no prospect of his being able to pay arrears, any such arrears should be forgiven. Arrears are therefore forgiven.

[26] In addition, Mr. Martell's opportunity to enjoy his relationship with his children will be adversely affected by any assessment of arrears. He has limited means to maintain communication with his children. His condition is progressive. He has testified today that dementia is a symptom of this disease.

[27] It is the court's observation, supported by the testimony of Mr. Martell, that his ability to enjoy life is diminishing rapidly. Over the course of my carriage of this file, I can say that there has been a dramatic decline in Mr. Martell's physical presentation and also in his cognitive presentation.

[28] It is this court's hope that given this drastic change in circumstances, Heather Martell will join with Mr. Martell in having any arrears re-assessed, forgiven, or at least not oppose his application, that this occur.

J.