

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: Tanner v. Tanner, 2013 NSSC 159

Date: 20130607

Docket: 1201-56110

Registry: Halifax

Between:

Jeffrey Eugene Tanner

Applicant

v.

Wendy Christine Tanner

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

March 25, 2013 in Halifax, Nova Scotia

Counsel:

Sandra McCulloch for the applicant, Jeffrey Tanner
Wendy Tanner, Self-Represented, Not Present

By the Court:

[1] This is an application by Jeffrey Tanner to terminate his obligation to pay child support to his child, Nicole, born August 30, 1991, currently 21 years of age.

[2] The Corollary Relief Judgment issued January 22, 2002 placed this child in the primary care of the mother. The father was directed to pay child support.

[3] Mr. Tanner advises he voluntarily increased the child support amount commensurate with his income until March 2011.

[4] Nicole graduated from high school in June of 2009 at 17 years of age.

[5] She then applied to complete a practical nursing program ("PNP") but was missing a required course.

[6] In September 2009 she took an additional year long program to obtain her missing course. During this period of time she worked part time in a pizza restaurant earning a small income in 2009 and 2010. The father continued to pay monthly child support during this time.

[7] In September of 2010 she began a one-year personal support worker ("PSW") program at a college in Guelph, Ontario. She moved out of her mother's home to live closer to the university.

[8] The father continued to pay monthly base child support payments to the mother plus additional expenses.

[9] He advises he paid her tuition; however, the evidence is not clear to me whether this June 29, 2011 payment was for the 2010-2011 year or for the following year.

[10] The father continued to support his daughter paying base amount of child support to the mother until March of 2011 at which point the child had completed her PSW training.

[11] On completion of this year Nicole became employed in her field at a health care centre from May of 2011 to August of 2011.

[12] By August of 2011 at 20 years of age Nicole had worked for approximately three months in her second choice of career, her first being unavailable to her with her then current credits.

[13] Deciding to complete the practical nursing program she returned to school. She had some choices on how to accomplish this.

[14] She could come to Nova Scotia and take this course at the community college. This would result in significant reduction of living expenses if she lived with her father and a 50% discount on tuition which she would receive as a result of her father being a faculty member.

[15] It is not unusual in this day and age to see students struggle through a first university degree, having changed programs once or twice in the course of completion of this degree in order to stabilize in a field of study that is suitable to their abilities and interests.

[16] The father argues that he could reduce Nicole's expenses by her living in Halifax with him. The relationship between the parties would not make that a viable proposition.

[17] While there is merit to his argument that Nicole could reduce her tuition costs by half, if one looks at her tuition for the 2012 - 2013 year, it is \$3,120, half of which she may save by coming to Nova Scotia but there would be expenses related to getting her back and forth to Nova Scotia by at least an equal amount.

[18] Were this to be financially much more advantageous, certainly I would give that argument far more weight.

[19] Nicole chose instead to go back to Conestoga College and begin a two-year practical nursing program in September of 2011.

[20] When Nicole moved out and attended the first year of her practical nursing program, the father paid her directly \$350 on October 21, 2011; \$300 on

November 28, 2011; \$300 on December 20, 2011; \$400 on January 26, 2012; \$400 on February 23, 2012; and \$400 on March 22, 2012.

[21] She withdrew from this program after the first year, when she was approximately 21 years of age.

[22] During 2012 she worked as a personal support worker. In September 2012 returned to live with her mother.

[23] The evidence I have, which lacks certainty, is that she worked for a period of time during the summer as a PSW. The father was unaware as to whether or not she worked between September 2012 and November 2012 and if not, why not.

[24] Nicole then decided to enrol in a three-year child and youth worker program commencing January 2013. She had the option of coming to Nova Scotia for a comparable program during which period of time she could save on tuition and living expenses.

[25] She decided instead to attend Mohawk College in Ontario.

[26] She commenced this program in January 2013. It does not appear she was employed thereafter.

[27] The father has no information about any efforts she may have made to obtain bursaries, scholarships or student loans.

[28] The father paid base child support until March of 2011 at which point she had completed her PSW training.

[29] When she returned to school for her practical nurses program in 2011, he assisted her directly: he paid her tuition and he provided her with monthly rent.

Summer Earnings

[30] I am unclear as to whether and if not why Nicole was unemployed in or about September 2012 forward.

[31] She worked part time in 2009 in the summer earning \$3,514.08 and in 2010 at the same food establishment earning \$4,861.27.

[32] I have no information about her earnings preceding her return to live with her mother in September of 2012 and why there is no employment income until November of 2012.

[33] I have no information to determine what, if any, contribution she made to the next choice of pursuit in January of 2013 when she was looking to continue to acquire a child and youth worker program.

[34] Nor do I have information about the mother's contribution.

[35] The information provided by the father indicates that his daughter moved out of her mother's home when she began the PSW program in September 2010 and did not return there until September of 2012.

[36] The father has not had the benefit of any tax credits or tuition credits.

[37] The father indicates that he has continually supported his daughter and will continue to support her. He wishes this to be a voluntary arrangement between he and his child and no longer determined by the court.

Separation Agreement: April 27, 1995

[38] Page 5, para. 12 of the Separation Agreement entered into between the mother and the father contains certain relevant clauses.

[39] The parties had joint custody. The child was to reside with the mother. At para. 12 (ii) the following is set out:

- (ii) the husband and wife shall share one with the other any information they receive concerning the child's health, education, recreational activities, and the like and shall make reasonable efforts to keep the other informed of matters pertaining to the child;

- (iii) neither party is to make any major developmental decisions regarding the child without the consent or acquiescence of the other parent except on an emergency basis;
- (iv) the husband and wife will cooperate with each other as much as is reasonably possible to ensure the most appropriate care, upbringing and education of the child of the marriage;

[40] There does not appear to have been compliance with these provisions.

[41] At para. 19, "Insurance", the father was to keep two insurance policies operating, change the beneficiary to be the child of the marriage and to maintain these policies while they are available to him naming the child as beneficiary. The wife was to do the same with respect to a Penncorp Canada life insurance policy.

[42] While there does not appear to be a condition requiring a child to be in school for the purposes of maintaining this insurance, for the time being while he continues to be obligated to support this child, this policy should continue.

[43] This Separation Agreement was incorporated into the Corollary Relief Judgment dated January 22, 2002.

[44] Also attached to the father's affidavit is Exhibit "G", a true copy of a spreadsheet provided by the mother around May of 2012 setting out what she believes to be the total expenses the child incurred. She asks that the father pay (reimburse her) half.

[45] This spreadsheet itemizes approximately \$74,471 in expenses between 2009 to 2013.

[46] The father takes issue with motor vehicle expenses and the level of expenses in other categories.

[47] The father argues that the mother unilaterally made decisions, took on certain expenditures and later presented him with a spreadsheet demanding he pay \$40,000.

[48] The spreadsheet does not account for any expenses or base amount paid for by the father nor does it make any adjustment for Nicole's income and contribution or advise of the mother's income.

Car Expenses

[49] In this Exhibit "G", 60% of the total living expenses claimed in 2009-2010 (\$12,052.41) relate to motor vehicle expenses in the amount of \$4,234.67.

[50] The car expense is not a necessary or reasonable expense for the purposes of a young person attending university. It is up to the recipient to prove the necessity of this expense.

[51] One ought not to purchase a vehicle for a young person who is unable to support themselves and expect contribution from another parent unless it can be shown that the expense mitigates against the ordinary public transit expense which would be available to a student.

[52] A bus pass or subway pass appears to be a more reasonable alternative for that period of time. For the purposes of what is reasonable, I consider an amount of \$130 a month as reasonable.

[53] For the 2009 year, when the child remained a dependent, I would reduce the s. 7 expenditures from \$12,052 to \$4,817.74.

[54] For the 2009 and 2010 year, the child worked, earning \$3,514.08 for 2009 and \$4,861.27 for 2010. I have no knowledge of any bursaries, scholarships, etc. She was living home during that period of time.

[55] I also cannot determine what the mother should have contributed, if anything.

[56] As noted at para. 17 of his affidavit, the father continued to pay the base amount and assisted with other expenses including text books. He made a contribution of \$600 for her textbooks in late August of 2009.

[57] The expenses associated with tuition, books and applications amount to \$4,609.53. There was \$360 for necessities which would have been covered by his base amount of child support.

[58] The evidence before me, although limited, allows me to draw certain conclusions.

[59] In the year 2009 to 2010, the expenses claimed by the mother equal \$7,234.67, showing living and home expenses of \$12,052.41, less car expenses of \$7,234.67, reducing reasonable expenses to \$4,817.74.

[60] During this year, child support was paid directly to the mother's home to cover expenses associated with the ordinary food, clothing and shelter expenses. I reduce her expense claim by \$360 to \$4,609.52 as expenses associated with education.

[61] In February 25, 2010, the father paid \$600 toward books.

[62] In the 2010 to 2011 year, the father continued to pay child support into the household, covering the base amount of child support during this period of time.

[63] On February 25, 2010 he paid tuition of \$2,000.

[64] The mother claims there was \$13,678.02 in expenses. While Nicole was living outside the household, the father continued up until March of 2011 to pay child support directly into the household in addition to the other costs he covered.

[65] The car expenses, which I have disallowed, are \$4,122 for a balance of \$9,556.02.

[66] Nicole's living expenses were covered by the base amount.

[67] By the father's calculations, he would have paid 59% of the cost of education plus the base amount into the household.

[68] Without knowing the mother's income or having an understanding of the daughter's contribution, it would be difficult to determine whether it was a fair

apportionment of 60% for him and the remaining 40% split between the mother and child.

[69] Although the father claims in March his child was independent, he continued to contribute toward her tuition of \$3,120 plus additional expenses of \$2,150 for a total payment of \$5,270.

[70] Subsequent to March 2011, he would not have been paying child support directly into the household.

[71] The mother notes her expenses for the child in 2011-12 academic year were \$26,914. The car expenses, which I have disallowed, are \$11,222 for a balance of \$15,692, of which he paid \$5,270.

[72] It appears he paid approximately 33% to 34% for the commencement of this additional pursuit.

Conclusion on Retroactive Award

[73] The evidence before me would not support a retroactive award. The evidence before me is far too incomplete to make a just award that would consider the obligations of the mother and child and to account for what the father already paid.

[74] There was a period starting in the summer of 2012 up to the commencement of her three year program in January 2013 when the daughter was not in school. It is unclear to me whether she was working.

The Law

[75] As **Beninger v. Beninger, 92 R.F.L. (6th) 350 B.C.S.C.** states, there is no automatic rule that a child is no longer a child of the marriage once the first university degree is complete (see also **N. (W.P.) v. N. (B.J.), 10 R.F.L. (6th) 440 B.C.C.A.**

[76] All relevant factors must be considered. There is no arbitrary cut off point based on the number of degrees or the eligibility of the student for financial assistance.

[77] In **Naylor v. Naylor, 2012 CarswellBC 2979 (B.C.S.C.)** Justice Jenkins decided that the child of the marriage, who was still in full-time schooling pursuing "a reasonable course of study" continued to be a dependent child, notwithstanding she had one undergraduate degree and no relationship with her father.

[78] A BC Master in British Columbia itemized factors that ought to be considered: **Fardon v. Fardon, 48 R.F.L. (3d) 60:**

1. Whether the child is in fact enrolled in a course of studies and whether it is a full time or part time course of studies.
2. Whether or not the child has applied for or is eligible for student loans or other financial assistance.
3. The career plans of the child, ie whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do.
4. The ability of the child to contribute to his/her own support through part time employment.
5. The age of the child.
6. The child's past academic performance, whether the child is demonstrating success in the chosen course of study.
7. What plans the parents made for the education of their children, particularly where those plans were made during cohabitation.
8. At least in the case of a child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from a parent from whom support is sought.
9. The additional criteria the court needs to consider is whether a parent has an ability to support a child beyond first degree.

[79] Nova Scotia Court of Appeal in **Smith v. Selig, 56 R.F.L. (6th) 8 (N.S.C.A.)** noted that "the higher the parent's income, the less the student should be required to contribute."

[80] **Martell v. Height 1994 CarswellNS 45, 3 R.F.L. (4th) 104** heard in 1994, dealt with the education of adult children. In that case, the 21-year old was completing her Bachelors Degree in political science and studying cartography. The father was ordered at the trial level to continue to support the child.

[81] The father appealed this order. His appeal was dismissed.

[82] The Court concluded that support was not to terminate automatically once children reach a particular age or completed a first degree; it was to continue until the child achieved some economic independence. The Court of Appeal, in dismissing the appeal, held as follows:

As a general rule, where a child is over the age of 16, the parents remain responsible for his or her support if the child is a bona fide student. The period of dependency will continue until the child reaches a level of education, commensurate with his or her abilities, that will enable him or her to join the workforce at least at an entry level position in an appropriate field. **Whether that period has ended is a question of fact in each case, but judges should make their decisions in light of the prevailing social and economic conditions. A bachelor's degree no longer ensures that the holder will become self-sufficient.** Although no automatic age or scholastic cut-off point exists, as the child ages or augments his or her education, the onus on the claimant to prove dependency becomes greater.

[83] If that was true in 1994, it certainly remains true today.

[84] Justice Cromwell in the **MacLennan v. MacLennan, 2003 212 N.S.R. (2d) 116 (N.S.C.A.)** referred to the words of Justice Freeman in **Martell v. Height, supra**, concluded:

As a general rule 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...**

[85] Justice Cromwell, in **MacLennan**, *supra*, said as follows:

Judges are entitled to draw reasonable, common sense inferences from the proven facts and to take into account notorious facts such as that post secondary education is expensive, well paid part time employment for full time students is scarce and that the demands of full time course work limit the time available for part time work.

[86] Justice Cromwell recognized the need, however, to put some time limit and a requirement that attendance be full time on a conditional order as was before him on appeal.

[87] In that case, the facts proposed the child would return to school.

[88] This matter proceeds as a reciprocal application to vary.

[89] The information before me is limited. There is, as noted in the case law, a heavier burden on the person purporting to be a child to provide information to show that the course of studies is a reasonable course of studies given the historical performance.

[90] There is also the fact that the student did in fact achieve in March of 2011 a level of self-sufficiency that may or may not be considered an end to her entitlement.

[91] There are gaps in her employment history and there are unexplained reasons why she has started to pursue one course of action, failed to complete it and commenced an entirely different field of endeavour after having attained her diploma.

[92] There are questions relating to why she did not take her father up on the possibility of significantly reducing her tuition and make reasonable efforts to mitigate the costs of university, particularly as she grew older.

[93] Most importantly, it is unclear as to whether this is a field of endeavour that is reasonable and that will put her in any better position to be self-sufficient than the first PSW course. It does appear to be a more substantial course.

[94] As she approaches 22 years old, the burden is heavier on her to trigger the father's responsibility to continue to support her.

[95] If there is a responsibility to support an adult child engaged in education there ought to be a corresponding obligation and responsibility for her as recipient to keep her father notified as to her course results, her long-term intentions, to give him sufficient information to weigh the reasonableness of the program and to keep him appraised as to her status in the college or university setting.

[96] As an adult and mature student, surely she should be required to provide information and disclosure as to any bursaries, scholarships or other awards she may have received which would decrease her dependency on his parents, in addition to which any efforts she has made to obtain and maintain supplementary income by way of part time employment.

[97] Further missing, is the disclosure required by the mother to determine what if any contribution she can make toward the ongoing support of the child.

[98] If this was a reasonable program, certainly there was a break between the March 11th success she achieved and her decision to enter into a further three-year course.

[99] In conclusion, this young person graduates from high school at age 17 with insufficient credits to take the course that she originally intended to take. She spent an additional make up year (not an unusual circumstance) to get herself up to speed for college or university.

[100] She intended to take a PNP course but instead qualified for a one-year PSW course making her employable by March of 2011.

[101] That, however, is a one-year course and likely not going to put her in a long-term position that would be any better than if she had completed the PNP course.

[102] She took a second year to complete the first year of a PNP course, dropped out and is now pursuing child and youth worker course.

[103] In total, her post-secondary education will amount, if she is successful, to six years, not an unusual length of time to complete a first degree.

[104] In light of these circumstances, I would consider her a dependent **if she is enrolled full time, attending full time, completing her courses by at least no less than a passing grade** to put herself in a better employable and independent position.

[105] She must continue to attend full time without any breaks or further changes in direction.

[106] Car expenses are not reasonable for a student in these circumstances.

[107] In my consideration of retroactive, the father has already contributed up until March of 2011 not only with a contribution toward s. 7 expenses but with a monthly payment to the mother.

[108] Therefore, I deal here only with prospective support starting in January 2103.

[109] On condition that Nicole provides to her father immediately full particulars of the three-year course, confirmation of her enrolment and attendance, copy of her marks for each year of attendance and confirmation that she continues to be registered, she will continue to be a child for the purposes of completing this three-year course which she commenced in 2012.

[110] At the end of each year she shall provide her father with confirmation of her marks and by September of each year until this three-year course is concluded, she shall provide him with confirmation as to her status in the program, her enrolment and her continuation participation in the program.

[111] She shall respond to all reasonable inquiries by the father as to her current status.

[112] She will also provide each year on or before May 1st a full and complete copy of her Income Tax Return and confirm in writing to her father the source of

any bursaries, scholarships, loans and assistance that she has with respect to continuation in this course.

[113] The mother shall also provide her full and complete Income Tax Returns from 2011, 2012 and for 2013 on or before May 1st each year as long as the child remains a dependent child.

[114] There is ample case authority to suggest that the application of the Guidelines and the base amount is not necessarily appropriate in these circumstances, particularly where the child moves in and out of the mother's home since the commencement of her course in 2010.

[115] The mother will provide to the father full and complete particulars of any rent and s. 7 expenses associated with the daughter's course and s. 7 expenses.

[116] The father's financial circumstances are as set out. He is currently remarried and he has children of this marriage. On his Statement of Expenses dated February 7, 2013 he shows an item indicating he has three children with braces and thus a dental expense. It is unclear to me whether Nicole is included with those three children. He certainly has two children on his expense list on a monthly basis for extra curricular activities.

[117] He shows an annual table income in his Statement of Expenses for 2013 of \$107,870.52 comprised of his salary plus pension income.

[118] In reviewing the Exhibit "G" I note that for the 2012-2013 estimate year, it appears that Nicole is living in Guelph during the second year, which would cause one to conclude that for the 2013-2014 she will be finished by April 2014.

[119] I rely on the rental and food and necessities for the 2011 year on the assumption that the child lived outside of the mother's residence and I have estimated prospectively that she continues to live outside the mother's residence.

[120] I have calculated that the father has paid 37% of her expenses inclusive of rent and food for the 2011-2012 year.

[121] For the current year 2012-2013 the mother has provided expenses of \$21,826.57. I have disallowed the car expenses and added \$1,300 for a transit pass for a balance of \$14,899.30.

[122] The father, however, advises the year starts in January 2013. I will assume these are year long expenses.

[123] The father shall be responsible prospectively for 1/3 of these expenses pending an order from the confirming court. That is, he shall pay monthly payments directly to his daughter in the amount of \$493 per month.

[124] In the event the father does not receive information confirming his daughter's attendance full time, her marks and her course details the daughter's income and the mother's income disclosure within 90 days of this provisional order and in any case by no later than September 1, 2013 the father's obligation shall cease pending completion of the disclosure requirements.

[125] The mother and adult child shall provide disclosure of the child's actual residence and confirm and verify the expenditures set out in the mother's expense chart.

[126] The mother shall also provide her last three years' Income Tax Returns together with Notices of Assessment and Reassessments.

[127] The child shall also disclose her last three years' Income Tax Returns together with her Notices of Assessment and Reassessment.

[128] Each of them shall confirm for the court their 2013 income from all sources.

[129] The adult child should provide confirmation of her attendance.

Legere Sers, J.