

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Douglas v. Campbell, 2006 NSSC 266

Date: 20060907
Docket: SFHMCA15703
Registry: Halifax

Between:

Robert Chisholm Douglas

Applicant

v.

Shirley Marjorie Campbell

Respondent

Judge: The Honourable Justice Mona M. Lynch

Heard: July 31, 2006, in Halifax, Nova Scotia

Counsel: Yvonne LaHaye, for the Applicant
G. Douglas Sealy and Robin Joudrey, for the Respondent

By the Court:

BACKGROUND:

[1] The Applicant, Robert Chisholm Douglas, applies to vary the current order which requires him to pay child maintenance to the Respondent, Shirley Marjorie Campbell, for his daughter, Amanda Carol Campbell. Amanda is almost 22 years of age. Amanda and Robert Douglas do not have a relationship and they have never met. The relationship between Robert Douglas and Shirley Campbell ended prior to Amanda's birth.

[2] Robert Douglas has been ordered to pay child maintenance for Amanda by court order since 1992 when Amanda was approximately eight years old. The current consent order, dated September 3, 2004, requires that Robert Douglas pay child maintenance in the table amount of \$387.00 a month and \$44.00 a month for medical/dental premiums and transportation costs to university. Shirley Campbell is required to notify Robert Douglas should Amanda withdraw from full-time attendance at university and transcripts are to be provided to Robert Douglas. Beginning September 1, 2002 and on each September 1 and January 1 that Amanda is in full-time attendance at university Robert Douglas is ordered to pay, in addition to the above amounts, \$1,122.00 for his share of Amanda's annual tuition, fees and

books. He is also required to pay 47.8% of any increase in Amanda's tuition fees. Shirley Campbell is to advise Robert Douglas of monies earned by Amanda in a taxation year which exceed \$1,700.00. The first \$1,700.00 of Amanda's earnings was to cover the costs of Amanda's voice and piano lessons.

[3] Amanda has attended university for four years and obtained a BA in Theatre Studies from Dalhousie University in the Spring of 2006. Amanda applied to the University of British Columbia but was not accepted to the undergraduate program in creative writing. She was not accepted into the Masters program in creative writing at UBC. In 2006/2007 she will be attending UBC taking courses and hopes to be accepted into the undergraduate or Masters program in creative writing in 2007/2008.

[4] Robert Douglas seeks to terminate all child maintenance for Amanda effective April 30, 2006. Shirley Campbell opposes the termination and requests that Robert Douglas be ordered to pay 46.6% of Amanda's education expenses of \$17,600.00 for the 2006/2007 school year. In the alternative she is requesting that he continue to pay the table amount of child support and 46.6% of expenses for Amanda's tuition, student fees, books and U-pass.

ISSUES:

- [5] (a) Has there been a material change in circumstances since the order of September 3, 2004?
- (b) Was there an agreement between the parties that child support would continue while Amanda was in full-time attendance at university until Amanda reached the age of 24?
- (c) Is Amanda still a dependent child? If so, what amount of child maintenance should be paid by Robert Douglas?

ANALYSIS:

(a) Has there been a material change in circumstances since the order of September 3, 2004?

[6] Under s. 37 of the **Maintenance and Custody Act**, S.N.S. 1989 c. 160 as amended, a court may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order where there has been a change in circumstances since the making of the order or last variation order. I must consider s. 10 of the **Maintenance and Custody Act**, supra, as well as the **Child**

Maintenance Guidelines made under section 55 of that **Act**. Section 14 of the **Guidelines** allows a variation order where there is: (a) any change that would result in a different child maintenance order or provision under the applicable table; or (b) any change in the condition, means, needs or other circumstances of a parent or of any child who is entitled to maintenance. An increase in income that would alter the amount payable by a payor parent is a material change in circumstances (**D.B.S. v. S.R.G.** 2006 SCC 37 at paragraph 66).

[7] Robert Douglas makes approximately \$5,000.00 more per year than at the time of the current order and Ms. Campbell makes approximately \$7,000.00 more per year. The change in income for Robert Douglas would require a different amount of child support to be paid according to the Table. The difference in incomes of the parties would also require a different proportionate share of extraordinary expenses and post-secondary education expenses to be paid by Robert Douglas. When the order was made, Amanda was pursuing her degree in Theatre Studies from Dalhousie University. Amanda has completed that degree and will be attending a different university taking a different degree in 2006/2007. Amanda's circumstances have changed. I find that both under s. 14(a) and (b) of the **Guidelines**, supra, that there has been a material change in circumstances which would give rise to a variation order.

(b) Was there an agreement between the parties that child support would continue while Amanda was in full-time attendance at university until Amanda reached the age of 24?

[8] When the order of September 3, 2004 was agreed upon Shirley Campbell was unrepresented. Robert Douglas was represented by Pamela J. MacKeigan. Shirley Campbell testified there were negotiations around the wording of the order. Shirley Campbell testified she would not agree to limiting child maintenance to Amanda's undergraduate degree. It was her understanding after the negotiations and draft orders that the child maintenance from Robert Douglas would continue while Amanda was in full-time attendance at university and under the age of 24.

[9] Pamela J. MacKeigan testified that there were negotiations over the wording of the child maintenance provisions in the order of September 3, 2004. She agreed that the clause limiting maintenance to an undergraduate degree was removed. However, she testified that the clause was inserted in an effort to avoid an application to terminate at the end of the undergraduate degree. She testified that there was no agreement that Robert Douglas would continue to pay child

maintenance as long as Amanda was under the age of 24 and attending university on a full-time basis. The wording around full-time attendance in university was designed, according to Pamela J. MacKeigan, to indicate why Amanda was still dependent although over the age of majority and to distinguish full-time attendance from part-time attendance by Amanda. Pamela J. MacKeigan testified that she did not discuss the limit of the age of 24 with Shirley Campbell and that negotiations were difficult because Shirley Campbell was unrepresented.

[10] Counsel for Shirley Campbell urges me to find that Shirley Campbell is more credible than Pamela J. MacKeigan. He says the consent order was drafted by Pamela J. MacKeigan and should be interpreted in favour of Shirley Campbell. Shirley Campbell drafted the initial version of the order and then changes were made. The reference to undergraduate degree was taken out and full-time attendance was discussed. The final order was drafted by Pamela J. MacKeigan. Counsel for Shirley Campbell also urged that I decide the credibility issue in favour of Shirley Campbell as she had only one case to deal with while Pamela J. MacKeigan had and continues to have a busy law practice and could not be expected to remember the discussions with Shirley Campbell as well as Ms. Campbell.

[11] It is clear from the evidence there was no meeting of the minds and therefore no agreement that child maintenance would continue while Amanda was under the age of 24 and attending university full-time. The e-mail of April 20, 2004 from Pamela J. MacKeigan to Shirley Campbell makes it clear that the reference to full-time attendance in university was referring to Amanda's dependent status and part-time attendance would allow for greater contribution by Amanda to her education costs. This supports Pamela J. MacKeigan's recollection of those negotiations. The use of the term "full-time attendance in university" was not a clause placed in the order to require payment by Robert Douglas for as long as Amanda was in full-time attendance. It was a clause placed in the order, as Pamela J. MacKeigan testified, to indicate why Amanda was dependent and to distinguish full-time and part-time attendance at university.

[12] The removal of the "while pursuing an undergraduate degree" does not indicate that the parties agreed that Robert Douglas would continue to pay support for Amanda for as long as she attended university on a full-time basis. Shirley Campbell's interpretation would foreclose a variation even if Amanda failed all the courses she took at university. If variation was to be foreclosed, clear language could have been inserted in the order stating that there could be no variation of the child maintenance while Amanda was in full-time attendance at university and

under the age of 24. Shirley Campbell had the understanding that the effect of the order would be that child maintenance would continue while Amanda was under the age of 24 and in full-time attendance at university but there was no agreement on behalf of Robert Douglas and the order is not clear that was the intent. I accept that Robert Douglas agreed to the removal of reference to the undergraduate degree because a variation application could be made after Amanda obtained her undergraduate degree. I accept that Pamela J. MacKeigan did not indicate that Robert Douglas was waiving his right to apply to vary based on a change in circumstances. While nothing in the order limits payment of child maintenance to an undergraduate degree, foreclosure of a variation application based on a change in circumstances would require much clearer language than that contained in the current order.

[13] Shirley Campbell testified that she had discussions with Pamela J. MacKeigan about the age of 24. On page three of the brief submitted on behalf of Shirley Campbell it indicates that Shirley Campbell would "confirm in evidence that she and Ms. MacKeigan talked about the **Maintenance and Custody Act**, and she will indicate Ms. MacKeigan read her the section of the **Act** which confirmed that educational support ends at age 24". However, Shirley Campbell did not testify that Pamela J. MacKeigan read her the section from the **Maintenance and**

Custody Act, supra. Pamela J. MacKeigan testified that she did not discuss the limitation of the age of 24 with Shirley Campbell as she was dealing with a self-represented person and would not have read her sections of legislation or provided legal advice. I accept that Pamela J. MacKeigan did not indicate to Shirley Campbell that Robert Douglas would pay until Amanda reached the age of 24.

[14] I do not find that there was an agreement between the parties that child maintenance would be paid for Amanda while she was in full-time attendance in university and under the age of 24.

(c) Is Amanda still dependent? If so, what amount of child maintenance should be paid by Robert Douglas?

[15] Whether a child over the age of majority is still dependent is to be decided on a case by case basis. There is no arbitrary cut off point based on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier. 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. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency (**Martell v. Height** (1994), 130 N.S.R. (2d) 318 at paragraph 8). Most students attending a full time undergraduate program will remain dependent and the party claiming support has the burden of establishing entitlement (**MacLennan v. MacLennan**, [2003] NSCA 9 at paragraph 40).

[16] Many factors are to be considered in determining whether the child is still dependent including:

- (a) the age of the child,
- (b) his or her academic achievements,
- (c) the ability to profit from further education,
- (d) the possibility of securing employment having regard to the standard of education already achieved and the state of the labour market,
- (e) the capacity of the parents to bear the costs of a college education for a child who evinces an aptitude therefor,
- (f) whether the child is a full-time or part-time student, and
- (g) the ability of the child to contribute to his or her own support through part-time employment, student loans and summer employment

(**Bradley v. Zaba** (1996), 137 Sask. R. 682 (C.A.); **Farden v. Farden** (1993), 48 R.F.L. (3d) 60 (S.C. Master); Payne, Julien D. and Payne Marilyn A. *Canadian Family Law*, second edition. Toronto: Irwin Law, 2006 at pp.298-299).

[17] Amanda is almost 22 years old and has been attending university since 2002. She has obtained her BA in Theatre Studies. The course she seeks to explore at UBC is creative writing. This is not a continuation of her BA in Theatre Studies. It is a different field of study. She is currently enrolled at UBC for the Fall of 2006 to take third year courses toward obtaining another Bachelor of Arts. It is uncertain whether she will be accepted into a creative writing program after the 2006/2007 year. There was not enough evidence provided to determine whether Amanda could be employed at an entry-level position in theatre and I am not aware of the labour market in that field.

[18] Shirley Campbell is employed and has made great sacrifices to ensure Amanda has received a good education. Robert Douglas is a retired teacher and his income consists of pension and other income consistent with his age. Amanda's education to date has been totally financed by the parties. Robert Douglas paid according to the court order and has contributed more than \$7,000.00 per year for

four years. Shirley Campbell contributed by contribution to an RESP, the funds of which are now exhausted. Amanda was and continues to be a full-time student.

[19] As stated recently in **Lewi v. Lewi** [2006] CanLII 15446 (ON C.A.), a child with means should be expected to contribute to their own education. Amanda did not contribute to her own educational costs for her first degree. During the first two summers it appears that she chose to work on her children's novel. She is still editing that novel, circulating it for review and sending it out to publishers. It has not been published but Amanda is still hopeful. The next two summers she did not seek other employment when she was unsuccessful in obtaining the positions she wanted. Up to the Summer of 2006 Amanda has not applied for a student loan, she has not worked during the summer and she has not obtained part-time employment during the school year to help contribute to her education.

[20] Amanda's first full-time employment started in July 2006 and she hoped to earn approximately \$3,000.00 during the Summer of 2006. Amanda applied for a student loan in the Summer of 2006 and was approved. The maximum amount available to Amanda from a Canada Student Loan is \$7,140.00 and from a Nova Scotia Student Loan is \$5,100.00 for a total of \$12,240.00.

[21] Shirley Campbell hoped that for an undergraduate and Masters degree Amanda would not have to take out a student loan. Robert Douglas does not agree with that plan.

[22] Despite requests from Pamela J. MacKeigan on behalf of Robert Douglas and despite the provisions in the court order of September 3, 2004 there were no transcripts provided to Robert Douglas.

[23] Various arrangements are made in intact families to finance a child's education. Some parents agree to wholly finance their child's education. Some parents require the children finance their own education by obtaining employment in the summer and in the school year as well as obtaining student loans. Robert Douglas testified that he only provided room and board for two of his other daughters, one of whom is a doctor and the other a dietician.

[24] During the 2006/2007 school year Amanda had hoped to attend UBC in a Masters Program in Creative Writing. She was not accepted to this program. Nor was she accepted in the undergraduate program in creative writing. Amanda plans to attend UBC for the 2006/2007 in a third year of a Bachelor of Arts degree where she will take courses which would count as electives should she be accepted

into either the undergraduate or Masters program in creative writing. She may or may not be accepted into one of those programs. The cost of the 2006/2007 year is approximately \$17,600.00, not including personal expenses. I do not find that it is reasonable that I order Robert Douglas to continue to pay maintenance for Amanda. She is no longer a dependent child.

[25] Amanda has had the benefit of a fully funded Bachelor of Arts degree. If she wants to attend UBC to take courses to see if she can be accepted into a creative writing program she will have to do so without court-ordered support from Robert Douglas.

CONCLUSION:

[26] I find that there has been a material change in circumstances since the order of September 3, 2004. There was no agreement between the parties that child

maintenance would continue for Amanda while she was under the age of 24 and attending university full-time. The child maintenance for Amanda Campbell by Robert Douglas shall be terminated effective May 31, 2006, the month Amanda graduated from Dalhousie. Shirley Campbell shall repay Robert Douglas for any child maintenance paid after May 31, 2006 on or before October 31, 2006.

[27] Robert Douglas is entitled to costs in this matter in the amount of \$1,000.00.

J.