Date: 20031030
Docket: 1201-49371 (SFHD-015003)

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
(Citation: *Brown v. Campbell*, 2003 NSSF 45)

BETWEEN:

PATRICIA ALEXANDRIA BROWN

APPLICANT

- and -

KEVIN WAYNE CAMPBELL

RESPONDENT

DECISION

BEFORE: The Honourable Justice Mona M. Lynch DATES: April 29th and October 3rd, 2003
WRITTEN RELEASE OF DECISION: October 30, 2003

COUNSEL: Kenzie MacKinnon, counsel for the Applicant
Steven G. Zatzman, counsel for the Respondent

LYNCH, J.:

BACKGROUND

[1] The parties were married on October 10, 1981, separated in January 1988 and divorced by a divorce judgment dated the 23rd of June 1995. The Corollary Relief Judgment of June 23, 1995, provides that the parties would have joint custody of their two daughters, Katerina, born May 9, 1982 and Crystal, born September 18, 1985. Mr. Campbell was ordered to pay child support in the amount of $300.00 per month. Prior to the Corollary Relief Judgment, there had been three orders from the Family Court; one in 1988, which ordered Mr. Campbell to pay child support of $250.00 every two weeks; a further consent order in 1990, requiring Mr. Campbell to pay $450.00 per month in child

support; and, an order in 1994, requiring Mr. Campbell to pay $300.00 per month in child support.

[2] After the separation, the children lived with Ms. Brown and had limited contact with Mr. Campbell. Mr. Campbell has been in a common law relationship for the last ten years and from that relationship he has a six-year-old daughter. The child support paid by Mr. Campbell has been deductible by him and included in Ms. Brown's income. Mr. Campbell has paid less than the *Federal Child Support Guidelines* amount of child support over the years and has had the benefit both paying a lower amount of child support and having that amount tax deductible.

[3] Ms. Brown applied on May 1, 2002 to vary the Corollary Relief Judgment, with respect to child support to an amount in accordance with the *Federal Child Support Guidelines,* both the table amount and special expenses for the two children retroactive to January 1, 1999.

[4] On November 1, 2002, Mr. Campbell applied to vary the Corollary Relief Judgment to terminate child support for Katerina on the grounds that she was no longer a child of the marriage, retroactive to September 1999, to set a support amount for Crystal in accordance with the *Guidelines* and to order that any amount paid for Katerina since September 1999 be applied against future child support for Crystal. At the hearing of the matter, Mr. Campbell's position was that Crystal was also no longer a child of the marriage and no amount of child support should be paid.

[5] The matter came before the court for hearing on April 29, 2003 and October 3, 2003.

ISSUES

Is Katerina a "child of the marriage" as defined in the *Divorce Act*?

[6] The first issue to be decided is whether Katerina is still of a child of the marriage and if she is not, when she lost that status. The *Divorce Act,* RSC 1985, C.S (2nd Supp.) defines child of the marriage as:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> is under the age of majority and who has not withdrawn from their charge, or
>
> is the age of majority or over and under their charge but unable, by reason of illness, disability or

[7] Katerina graduated from high school in June 2000. During the school year 2000/200, she was in full-time attendance at the University of Western Ontario, in London, Ontario. She turned 19 years old, the age of majority in Nova Scotia, on May 9, 2001. During the school year 2001/2002 she lived at home with her mother and worked at two part-time jobs to save money to return to university. In mid-August 2002, Katerina moved in with a friend in an apartment and during the school year 2002/2003 she attended Saint Mary's University on full-time basis while working two part-time jobs. In July 2003, Katerina moved back with her mother, Ms. Brown and continued to work at her two part-time jobs. Katerina did not return to school in September 2003, but plans to do so in September 2004. She is currently 21 years of age.

[8] As stated in *Martell v. Height* (1994), 130 N.S.R. (2d) 318 (N.S.C.A.), there is no arbitrary cut off point based on age or scholastic attainment and as a general rule parents of a *bona fide* student will remain responsible for the child until the child has reached a level of education, commensurate with his or her abilities and which fit the child for entry-level employment in an appropriate field.

[9] Mr. Campbell's position was that he would not mind supporting Katerina if she was attending school full time, by which he meant taking five courses, but he objected to supporting Katerina if she only took three courses. He also testified that she should work while attending university and she needed to be more organized. Mr. Campbell's testimony showed that he had little understanding of the realities of life for a student in 2003. He did not understand that a student loan did not cover all of a student's expenses for the school year. He did not seem to appreciate that the $300.00 per month that he has been paying in child support for the two children since 1995, would have required Ms. Brown to contribute significantly more than her share to support the children. His overall view seemed to be that children of orderlies should not attend university. He also seemed to have little appreciation of the difference in the cost of university since he attended.

[10] It is a difficult situation for a university student in 2003. The tuition is very high, student loans do not cover the expenses associated with school, working part time is a necessity for most students, but this also hampers their ability to do well in their studies. In Katerina's situation, neither parent is in a position to pay her full expenses to attend university, she must finance that herself to a large extent.

[11] Ms. Brown has shouldered much more than her share of the costs associated with Katerina and Crystal since the separation and has encouraged Katerina's educational pursuits. Mr. Campbell, on the other hand, has made little contribution to Katerina's life

in either time or money.

[12] Mr. Campbell applied to vary the Corollary Relief Judgment to terminate child support for Katerina retroactive to September 1999. This appeared to result from a misunderstanding on Mr. Campbell's part as to when Katerina graduated from high school. In September 1999, Katerina was 17 years old and attending grade 12 at Charles P. Allen High School. She was a child of the marriage.

[13] Mr. Campbell's position is that Katerina stopped being a child of the marriage when she went away to attend university in September 2000. During that school year Katerina was supported by Ms. Brown, a student loan, a part-time job and the ability to live rent free with her boyfriend's family. Katerina was under the age of majority and while not living at home, the evidence was very clear that she had not withdrawn from her mother's charge and was being supported by her mother. Ms. Brown provided money for living, books and expenses. During the school year 2000/2001 Katerina was only successful in passing three courses. I find that during the year 2000/2001 Katerina continued to be a "child of the marriage" as defined by the *Divorce Act.*

[14] During the year 2001/2002 Katerina was over the age of majority and not attending university. She was on academic probation. She lived with her mother and worked at two part-time jobs. Based on the evidence presented at the hearing, during that year she did not earn enough money to obtain the necessaries in life and she continued to be dependent on her mother and she was trying to save money to return to university and was paying on her student loan. I find that during the school year 2001/2002 Katerina continued to be a "child of the marriage".

[15] In 2002/2003 Katerina moved in with a friend to an apartment and attended Saint Mary's University on a full-time basis. She took four courses in the first semester and three courses in the second semester. She was supported by a student loan, her mother and her two part-time jobs. As discussed in *MacLennan v. MacLennan* (2003), 201 N.S.R. (2d) 214 (N.S.C.A), the evidence from Katerina showed that post secondary education is expensive, well-paying part-time work is scarce and her work interfered with her ability to devote time to her course work. As Katerina stated in her affidavit "It is difficult to give my course work enough attention when I am working so much each week." There was no evidence before me to suggest anything other than Katerina used her best efforts while attending Saint Mary's. During this year Katerina was still supported by her mother, was unable to withdraw from her charge and continued to be a child of the marriage.

[16] In July 2003 Katerina moved back in with her mother and continued with

her part time jobs. During the summer Katerina was injured while working at one of her part-time jobs and was unable to work for a period of time. She had recently returned to work as of October 3, 2003, but was unable to continue as a waitress. She was to work at the less lucrative take-out window.

[17] She was able to continue with her part-time employment at the clothing store. It was difficult to determine Katerina's current income. A statement of financial information was submitted in April 2003, but that reflected her income and expenses while attending university and sharing an apartment.

[18] Since that time she had moved back in with her mother, had been off of work for a period of time due to an accident and was unable to return to her former job as a waitress. Katerina plans to take time off during the 2003/2004 academic year and return in 2004 to Community College or Mount Saint Vincent University. She was very clear in her testimony that she has a settled intention to return to college or university in 2004. She is preparing for independence but she is not currently independent. At the "material time" of this application, Katerina is still under Ms. Brown's charge and presently not in a position to withdraw from that charge. Katerina is still a child of the marriage.

Is Crystal a "child of the marriage"?

[19] Mr. Campbell's position is that when Crystal graduated from high school in June 2003 and had no intention of attending a college or university in the fall of 2003, she was no longer a child of the marriage. Crystal did not reach the age of majority until September 18, 2003 and was certainly a child of the marriage until that date. She was under the age of majority and had not withdrawn from her mother's charge. She worked part time in the summer at a restaurant and at the end of October she will take part in a program where she will be living in Europe. This program offers cultural awareness and the ability to work and travel. The program offers assistance in obtaining employment and lodging. Ms. Brown paid for Crystal's flight to London, England and she will be helping to support Crystal during her time in Europe. Crystal is expected to participate in this program for less than a year and return to Nova Scotia to attend university in September 2004.

[20] The evidence presented by Ms. Brown, which I accept, was that Crystal would still need financial assistance from her to participate in this program. I find that Crystal is still a child of marriage, she is still dependant on her mother while participating in a non-traditional type of educational program. I find this similar to Crystal living away from home attending university.

[21] Crystal is taking steps towards her independence but is not independent. 9

Has there been a change in circumstances since the making of the last order?

[22] Section 17(4) of the *Divorce Act* requires that there be a change in circumstances since the making of the order for which a variation is sought. The current order for child support was made in 1995. Section 14(c) of the *Federal Child Support Guidelines* provides that the date of the order alone would constitute a change in circumstances which would give rise to the making of a variation order.

RETROACTIVITY

[23] Ms. Brown has asked that the variation in the amount of child support paid by Mr. Campbell be retroactive to January 1, 1999. In *Conrad v. Rafuse* (2002), 205 N.S.R. (2d) 46, Roscoe, J.A. reviewed the law relating to a judge's discretion to retroactively vary child support. Some of the policy considerations adopted in *Conrad* would weigh in favour of a retroactive variation in this case. It is Katerina and Crystal who have the right to support and Ms. Brown not acting in a timely fashion to apply to vary the support should not affect their right. Mr. Campbell, paying less than what he should have for a number of years according to the *Federal Child Support Guidelines*, while also benefiting from a tax deduction, offends the principle that parents are jointly responsible for supporting their children. Respect for the court order, presumption against retroactivity and encouragement of negotiated settlements would weigh against retroactivity.

[24] I have also reviewed the factors that weigh for and against ordering retroactive child support. There was certainly a need on the part of Katerina and Crystal and an ability to pay on Mr. Campbell's part. There was no evidence before me that Mr. Campbell was blameworthy in not disclosing his financial situation or that he mislead Ms. Brown about his financial information prior to the Conciliation process. There was little evidence that Ms. Brown had to encroach on capital or incur debt to meet child care costs. There was no excuse provided for the lengthy delay in bringing the application to vary other than not wanting to deal with Mr. Campbell. There was no indication of notice to Mr. Campbell of an intention to pursue a change in child support and no indication of any negotiations to that end. The only indication of a request from Ms. Brown was for Crystal's orthodontics. Based on the financial position put forward by Mr. Campbell, I do find that a retroactive order would place a burden on him that would interfere with ongoing support obligations. The child expenses since 1999 have been paid. A lump sum payment at this time would be more akin to spousal support. There is a significant unexplained delay by Ms. Brown in making this application.

[25] After weighing the factors I find that a variation in the order beyond the date of the application is not appropriate in this case. I would therefore make the variation effective May 1, 2002

CRYSTAL'S ORTHODONTIC WORK

[26] Ms. Brown applied to have Mr. Campbell contribute to the cost of Crystal's orthodontic work pursuant to Section 7 of the *Guidelines.* The evidence from Ms. Brown was that these expenses were incurred in the year 1999/2000. She indicates that she contacted Mr. Campbell about sharing these costs and got a less than welcome response. She did not pursue the matter any further with him at that time. Mr. Campbell's position with regard to the orthodontic work, was it was cosmetic in nature and while it would have been recoverable by him through his medical insurance at the time, more than two years has passed since the cost was incurred, therefore it was no longer recoverable by him. I disagree with Mr. Campbell's characterization of the orthodontic work, there was nothing before me to indicate that the orthodontic work needed by Crystal was purely cosmetic. I do accept that if Ms. Brown had pursued this matter in a timely manner that Mr. Campbell could have claimed this work under his medical plan. Mr. Campbell should not have to pay out of his pocket because of Ms. Brown's delay.

QUANTUM OF CHILD SUPPORT

[27] Ms. Brown has requested that the *Guidelines* amount of child support be awarded as sharing of actual costs will lead to disagreement by Mr. Campbell, further costly court applications and unless a monthly amount was ordered, Mr. Campbell would not pay. Based on the attitude of Mr. Campbell, I am sympathetic to Ms. Brown's position. Mr. Campbell has asked me to consider the financial earnings of the Katerina and Crystal. It is appropriate in this case to make an order for Mr. Campbell to pay a monthly amount of child support.

[28] I find that on the date of the application, May 1, 2002, Katerina was living at home, paying on her student loan, saving for her education and not earning enough to support herself.

[29] From September 2002 until the end of April 2003, she was in attending Saint Mary's on a full-time basis and receiving contributions from her mother on a monthly basis. During this same period, Crystal was living at home and was supported by Ms. Brown. I do not find that the *Guidelines* amount would be inappropriate for this time period. His 2002 notice of assessment shows that Mr. Campbell's income was $33,662.

Therefore, Mr. Campbell shall pay the *Guidelines* amount for two children, $478.00, for the months of May 1, 2002 to and including April 1, 2003.

[30] From May 1, 2003, onward I find that the appropriate amount of child support for Crystal is the *Guidelines* amount of $285.00 per month. Taking into account that Katerina's ability to contribute to her own support, I find that the appropriate amount for Katerina from May 1, 2003 onward is 2 of the difference between the *Guidelines* amount for one child and the amount for two children or $97.00 per month. The total monthly amount of child support effective May 1, 2003 is $382.00 per month.

[31] If and when Katerina returns to school on a full-time basis, Mr. Campbell should pay the *Guidelines* amount for two children.

COSTS

[32] Counsel for Ms. Brown has requested that costs be awarded to his client in this matter. This matter was before the court for a pre-trial on February 18, 2003, a one hour hearing on April 29, 2003 and a further hour on October 3, 2003. Detailed briefs were filed. Ms. Brown was the successful party but she was not completely successful. I award costs in the amount of $500.00 payable by Mr. Campbell to Ms. Brown.

SUMMARY

a) Both Katerina and Crystal continue to be children of the marriage for whom child support is payable;
b) The variation in child support is retroactive to May 1, 2002, the date of the application;
c) Due to the delay in bringing the application, Mr. Campbell is not liable to contribute to the cost of Crystal's orthodontic work;
d) The amount payable in child support by Mr. Campbell to Ms. Brown is as follows:
    a. From May 1, 2002 to and including April 1, 2003 $478.00 per month;
    b. From May 1, 2003 and continuing each and every month thereafter $382.00 per month;
    c. If and when Katerina returns to college or university on a full-time basis $478.00 per month.
e) The payments shall be made to Ms. Brown through the Maintenance Enforcement Program.
f) On or before June 1 each year, Mr. Campbell shall provide to Ms. Brown, a

copy of his income tax return and notice of assessment.

g) Costs in the amount of $500.00 are payable by Mr. Campbell to Ms. Brown.

J.