

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Sampson v. Sampson, 2013 NSSC 276

Date: 20130909
Docket: 64556
Registry: Sydney

Between:

Beverly Joan Sampson

Applicant

v.

Jeffery Sampson

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: July 22, 2013, in Sydney, Nova Scotia

Written Decision: September 9, 2013

Counsel: Peter Forgeron, for Beverly Sampson
Duncan MacEachern, for Jeffery Sampson

By the Court:

[1] **Introduction**

[2] Beverly Sampson and Jeffery Sampson are former spouses who were divorced in March, 2011. At the time of the divorce, the parties contemplated a shared parenting arrangement of their daughter, Katelin. As a result, the parties agreed that no child support would be payable between them.

[3] The shared parenting arrangement never materialized. Ms. Sampson therefore filed an application to vary on June 15, 2012. Further, Ms. Sampson sought judgement for certain debt payments which she made and which were the obligation of Mr. Sampson according to the provisions of the corollary relief order.

[4] The parties were unable to reach agreement on the outstanding issues. The evidence of both parties was heard on July 22, 2013. Following oral submissions, the court adjourned for decision.

[5] **Issues**

[6] The following issues will be determined in this decision:

- Has a material change in circumstances been proven?
- What is the appropriate quantum of ongoing child support?
- Should a retroactive child support order issue?
- What amount is owing to Ms. Sampson from Mr. Sampson by virtue of the debt provisions of the corollary relief order?

[7] **Analysis**

[8] *Has a material change in circumstances been proven?*

[9] Section 17 of the *Divorce Act* requires proof of a material change in circumstances before the court can vary child support provisions of a corollary relief order. An application to vary is not an appeal of an originating order, nor is it an opportunity to retry a prior proceeding. The existing order must be treated as correct as of the date the order issued. A material change is one which has not been foreseen, or could not have been reasonably contemplated by the judge who made the original order: **Gordon v. Goertz** [1996] 2 SCR 27. A material change must be more than a temporary or minor change; the change must be a substantial, continuing one.

[10] Ms. Sampson has proven a material change in circumstance since the issuance of the 2011 corollary relief order by the following:

- The shared parenting arrangement contemplated in the corollary relief order never materialized. The parties' daughter has continuously lived in the primary care of her mother and has spent very little time in the care of her father.
- Mr. Sampson's income has increased substantially. In 2010, Mr. Sampson earned \$34,424.92. After the issuance of the corollary relief order, Mr. Sampson became employed out west. In 2011, Mr. Sampson's income increased to \$94,314.80; in 2012, his income increased to \$106,764.42. Mr. Sampson's year-to-date income for the pay cheque dated June 21, 2013, approximately six months, shows a gross income of \$58,502.18.

The variation application is therefore properly before the court.

[11] *What is the appropriate quantum of ongoing child support?*

[12] Although employed out west, Mr. Sampson resides in Nova Scotia. Child support is based on the *Nova Scotia tables* and a gross income of approximately \$117,000 less union dues of about \$1,000, for a total income of \$116,000. This projection is based upon Mr. Sampson's year-to-date income and is consistent with the pay increase earned between 2011 and 2012. Child support for one child is therefore payable at a rate of \$963 per month effective September 15, 2013 and

continuing on the 15 day of every month thereafter until further order of a court of competent jurisdiction.

[13] Mr. Sampson's suggestion that other reasonable arrangements have been made to substitute for the table amount of child support is not supported by the evidence. Mr. Sampson did not transfer title of the former matrimonial home to Ms. Sampson or the child. Mr. Sampson's comment that he was inclined to do so was nothing more than speculation. Further, the former matrimonial home is encumbered by a mortgage and is occupied by Mr. Sampson's son. The table amount of support must be paid.

[14] *Should a retroactive child support order issue?*

[15] Mr. Sampson contested Ms. Sampson's request for a retroactive child support payment. I, therefore, will examine the principles enunciated by the Supreme Court of Canada in **S.(D.B.) v. G.(S.R.)**, 2006 SCC 37, wherein Bastarache, J. outlined the four factors that a court must balance when determining the issue of retroactivity. These factors are as follows:

- The reasonableness of the custodial parent's excuse for failing to make a timely application in the face of an insufficient payment for child support.
- The conduct of the noncustodial parent. If the noncustodial parent engaged in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. Bastarache J. confirmed that the determination of blameworthy conduct is a subjective one based upon objective factors. The court should not encourage blameworthy behaviour. The court must also determine if the noncustodial parent has contributed to the child in any way that satisfied his or her obligation, or a portion of that obligation.
- The circumstances, past and present, of the child, and not of the parent. This includes an examination of the child's standard of living.

- The hardship which may accrue to the noncustodial parent as a result of the noncustodial parent's current financial circumstances and financial obligations, although hardship factors are less significant if the noncustodial parent engaged in blameworthy conduct.

[16] In determining that a retroactive award is appropriate I make the following findings of fact:

- Ms. Sampson did not delay, to any significant degree, in the filing of a variation application. Ms. Sampson would not have received a copy of Mr. Sampson's 2011 income tax return until late spring, 2012. According to exhibit #4, Mr. Sampson's 2011 tax return was not submitted until March 7, 2012. There was no evidence to suggest that Ms. Sampson was aware of the substantial increase in Mr. Sampson's income before the spring of 2012.
- Mr. Sampson engaged in blameworthy conduct. Mr. Sampson was aware that the shared parenting arrangement had not been implemented. Ms. Sampson was therefore assuming the vast majority of Katelin's direct and indirect expenses. They were not being shared. Further, Mr. Sampson was fully aware that his income had increased substantially from that which existed at the time of the issuance of the corollary relief order. Despite this knowledge, Mr. Sampson did not pay appropriate child support. The court does recognize, however, that Mr. Sampson did pay for some expenses, from time to time, such as the purchase of an Ipad, laptop, cellphone, clothing and other miscellaneous expenses.
- The child, Katelin, requires an appropriate level of support. Katelin is now 15 years old. Ms. Sampson requires the retroactive support for Katelin's benefit and will use the retroactive support for Katelin.
- Mr. Sampson has the ability to pay retroactive support. His annual income is healthy. He owns two homes, a vehicle and has other assets. Further, he shares living expenses with his partner, who is

employed on a full-time basis. His other adult child works with him out west.

[17] I, therefore, grant the application for retroactive child support. The retroactive child support award is based upon the following:

- In 2011, Mr. Sampson should have paid \$790 per month in child support. He paid no support. The corollary relief order did not issue until March, 2011. The order must be given some measure of life and thus child support will not be retroactive until July, 2011. The total amount owing for 2011 is **\$4,740**, (six months x \$790), subject to credits to be discussed.
- In 2012, child support is based upon an income of \$105,787, given the union dues payable. Monthly child support of \$882 should have been paid. The amount outstanding for the year 2012 equals **\$10,584**, (12 months x \$882), less credits to be discussed.
- In 2013, child support is based on an income of \$116,000. Monthly child support of \$963 should have been paid. The total amount owing to August, 2013 equals **\$7,704** (eight months x \$963) less credits to be discussed.

[18] The amount owing for retroactive support is thus **\$23,028**. Credit, however, must be given because Mr. Sampson did pay for some expenses for his daughter during this period of time. Mr. Sampson did not supply receipts to confirm the amounts that he paid. Based upon the evidence before me, I provide Mr. Sampson with a credit of **\$8,000**. The total amount of retroactive child support outstanding is **\$15,028**. Mr. Sampson will pay this amount in monthly installments of \$400 on the last day of every month, commencing September 30, 2013, and continuing until the retroactive award is paid in full. All maintenance will be payable through the maintenance enforcement program.

[19] In addition, the parties are to supply written submissions, in the absence of agreement, as to the appropriate interest rate to be applied to the retroactive award.

[20] *What amount is owing to Ms. Sampson from Mr. Sampson by virtue of the debt provisions of the corollary relief order?*

[21] Third party creditors took action against Ms. Sampson. As a result, Ms. Sampson paid two accounts which were Mr. Sampson's obligation pursuant to the provisions of the corollary relief order. In particular, Ms. Sampson paid Citifinancial \$4,607 and Nova Scotia Power \$455.79 for a total payment of \$5,062.79. The minutes of settlement were incorporated into the corollary relief order. According to the minutes, Mr. Sampson must indemnify Ms. Sampson in respect of this debt. Mr. Sampson did not contest this aspect of the application. Judgement is entered against Mr. Sampson in the amount of \$5,062.79. This sum must be paid forthwith.

[22] **Conclusion**

[23] Ms. Sampson was successful in her application. Mr. Sampson is required to pay Ms. Sampson the following:

- Ongoing monthly child support in the amount of \$963 payable effective September 15, 2013 and continuing on the 15 of every month thereafter;
- Retroactive child support in the amount of \$15,028 payable at a rate of \$400 per month effective September 30 and continuing on the last day of every month thereafter until the retroactive order is paid in full. The applicable interest rate will be set after further submissions from counsel.
- Judgment in the amount of \$5,062.79, payable forthwith.

[24] If either party wishes to be heard on the issue of costs, written submissions are to be supplied no later September 27, 2013.

Forgeron, J.