IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Rhynold v. Van der Linden, 2006 NSSC 260

Date: 20060830
Docket: 1201-000496
Registry: Antigonish

Between:

Carol Christina Rhynold (formerly Van der Linden)

Applicant

and

Andreas Julianus Van der Linden

Respondent

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: January 10, 2006, in Antigonish, Nova Scotia followed by Case Management with Conference Hearing August 17, 2006 for final determination.

Counsel: M. Louise Campbell, for the applicant
Donald L. Macdonald, for the respondent

By the Court:

BACKGROUND

[1] Carol Christina Rhynold born September 16, 1965 and Andreas Julian us Van der Linden born December 14, 1962 were married July 11, 1987 and ceased cohabitation September 30, 1996.

[2] Their marriage was blessed with their daughter, Ria Johanna Van der Linden, born November 25, 1991 now fourteen years old.

[3] The parties entered into a separation agreement September 9, 1996 dealing with custody, access and maintenance for the child whereby the father paid child support of $200 per month. A subsequent second agreement was entered into January 30, 1997 dealing with the division of property which dealt with a number of matters including a cash payment to Ms. Rhynold of $20,000.00 and retention by Mr. Van der Linden of their farm and the farm assets, etc.

[4] The parties were divorced June 18, 1998 and the corollary relief judgment incorporated the terms of their separation agreements. The corollary relief judgment specifically continued the child support of $200.00 per month payable on the 15th day of each and every month and these payments were to continue starting July 15, 1998. The corollary relief judgment provided for joint custody with their daughter Ria to be in the day to day care and control of her mother and that remains the situation.

APPLICATION

[5] Ms. Rhynold filed an application May 31, 2005 to have the corollary relief judgment provision with respect to child support reviewed. This application was set for January 10, 2006 in Antigonish. Both parties were in attendance, gave evidence and were represented by counsel. Mr. Van der Linden also called evidence with respect to the problems dealing with the farming industry and the dairy industry in particular. It was clear that additional information was necessary to determine the appropriate level of child support however, an interim order was granted increasing the child support to $281.00 non-taxable per month effective June 15, 2005 based upon an estimate of Mr. Van der Linden's annual income at the rate of $33,000.00. The order specifically required a review in April 2006 in part because it was

anticipated that there would likely be a change in the Child Support Guidelines, which did take place May 1, 2006.

[6] I agreed to retain the file in order to see that the necessary financial disclosure would be forthcoming without undue delay and to try and provide assistance to the parties by dealing with the matter rather than putting it back in the system.

[7] Subsequently, both parties requested that I make a determination and file a decision without the necessity of any further attendance in court or any cross-examination of the respective affidavits and material filed by both parties.

[8] The application is supported by the following documentation:

(1.) Order dated 25 May, 2006 dealing with disclosure, the deadline of the 30th of May, 2006 and the freezing of funds received as a result of the sale of cattle, milk quota and associated equipment related to Mr. Van der Linden's dairy business with the funds to be held in Mr. Van der Linden's solicitor's trust account pending resolution of the child support issue. The Order permitted disbursements that were necessary to pay secured creditors who held liens on the cattle, milk quota or farm equipment;

(2.) Affidavit of Carol Christina Rhynold sworn 28th June, 2006;

(3.) Affidavit of Andreas Van der Linden sworn 10th July, 2006 with "statement of changes in cash position" for the years 2000 - 2005 prepared by Mr. Van der Linden's accountant;

(4.) Affidavit of Andreas Van der Linden sworn 18th July, 2006;

(5.) Volume of correspondence including advancing proposals;

(6.) Telephone conference with counsel Thursday, the 17th August, 2006 and subsequent final written representations dated August 23, 2006.

CHANGE IN CIRCUMSTANCES

(1.) Tax consequences of child support

[9] This issue was raised by Ms. Rhynold from the very outset and has been addressed by the interim order of the 7th of February, 2006 so that, since June 15, 2005, the child support payments are non-taxable to Ms. Rhynold and not tax deductable to Mr. Van der Linden.

(2.) Change in Federal Child Support Guidelines

[10] The change, effective May 1, 2006 will be addressed in the order varying the corollary relief judgment.

(3.) Mr. Van der Linden's Disposal of Assets

[11] Mr. Van der Linden was a self-employed dairy farmer who, on or about April 1, 2006, sold 32 of his Holstein cattle retaining 6, plus 20 heifers. Two of the Holstein he exchanged for 11 heifers, with the exchange calling for a payment by him of $4,000.00 The result is that he now owns 31 heifers and 4 Holsteins. His intention is to raise the heifers and eventually sell them. The entire proceeds of the sale of his Holstein cattle went to reduce his overdraft at CIBC. Mr. Van der Linden sold his entire milk quota, consisting of 33.8 units, for $1,069,770.00 and, after payments of three loans to the Nova Scotia Farm Loan Board, netted $531,913.87. From these proceeds he paid off the balance of his leased tractor, purchased a new hay-bailer and paid off a loan he said was outstanding to his parents and other farm expenses, resulting in this solicitor now holding $324,000.00 in trust. He plans to use $24,000.00 of that sum in relation to purchasing a mini-home in lieu of his child support obligation to his son from another relationship thus off-setting the child support otherwise payable for his son. He retained $31,000.00 for his farm and his own expenses. This means that he has disbursed for his own obligations and benefit something in the nature of $207,000.00. He anticipates his income in the future being from: (1) employment by other farmers - seasonal $12.00 per hour; (2) custom work - sale of bails of hay grown on his farm; (3) raising heifers - some he will own and he will also raise heifers for other farmers.

[12] He anticipates investing the remainder of the proceeds from his quota sale at $200,000.00 at 8% and $100,000.00 at 3.85% which will provide him with an

additional income above employment, custom work and raising heifers of $20,000.00 per annum. It is Mr. Van der Linden's position that his income, other than from investment, is uncertain. It is noted that he is free from the level of debts that he carried during his dairy business and overall there has been a substantial improvement in Mr. Van der Linden's position and it is somewhat more capable of quantification with a degree of accuracy than previously prevailed.

(4.) Child Support

[13] The child Ria was five years old at the time of the separation and is now a 14-year old with a tremendous record of achievement. The parents are justifiably very proud of their daughter's 2005 - 2006 report card from Chedabucto Education Centre that augurs well for the child proceeding in due course to higher education. In addition, she was the junior athlete for 2005 - 2006 and represented Nova Scotia at a Science Fair in Quebec receiving an honourable mention. She also represented Nova Scotia in Toronto with the 4-H Club. She attended the Toronto Winter Fair accompanied by her father. Previously, their daughter had represented Nova Scotia at a Science Fair in Vancouver in 2004 - 2005 and received third place nationally.

[14] The affidavit of Ms. Rhynold and responses from Mr. Van der Linden raise some concerns with respect to the approach of Mr. Van der Linden in relation to the application and financial aspects of it. It is clear that there has been some concern for the relationship of the child with her father and, unfortunately, he cancelled what would have been a tremendous trip for the child to go to Holland on the occasion of this parents' anniversary. There is always a measure of uncertainty and concern when litigation is taking place and I am satisfied that there is a sufficient track record of love and responsibility by both parents that no useful purpose can be served by dwelling further on the tensions that have arisen which should now subside, other than to say that it is indeed regretful and unfortunate that Mr. Van der Linden, without justification, cancelled their daughter's trip to Holland.

ISSUES

(1.) Ongoing Quantum of Child Support

[15] The position advanced by Ms. Rhynold is that the court already had to deem Mr. Van der Linden's income at the time of the initial interim hearing and that there was no indication given or disclosure at that hearing of the possible impending sale

of the quota and cattle. It is the position of Ms. Rhynold that the court should not accept his representation, advancing that having done so he has a more easily calculable income projection and that the court should deem his income to now be in the range of $50,000.00 - $60,000.00.

[16] Mr. Van der Linden's position is that there is simply no historical basis for warranting a level of $50,000.00 - $60,000.00 per annum. He stated previously that his income never exceeded $30,000 and some years it was substantially less. He denies that the disposition of his dairy business is in any way related to the issue of child support but relates it to the increasing difficulty of operating a dairy farm. He suggests a continuation of the existing level of child support based on $33,000.00 per annum.

Conclusion

[17] Mr. Van der Linden anticipates his income for 2006 would be from several sources. In 2005, the first five months will be from his occupation as a dairy farmer and that carries with it the same difficulty the court was confronted with on the interim hearing, mainly that the tax statements do not accurately reflect his capacity. He anticipates with the sale of his dairy quota and farm labour employment to date he has apparently earned $465.00. In addition, he will have custom work and he has submitted three invoices for work to date in the gross amount of $4,901.25. With respect to his raising and selling of heifers, he provides some mathematics and expects to earn $12,500.00 - $13,000.00 for the balance of the year. With respect to the interest income, the court is not entirely satisfied with the financial accounting and Mr. Van der Linden ought to have strictly abided by the freezing order and, not without the court's permission and full clear accounting disclosure, paid off all his debts, purchased new farm equipment and paid off what he says is a debt to his parents. The court is curious as to what he also paid in the way of personal expenses such as legal fees, but leaving such aside, it is just another example of the failure to provide **total** disclosure and accounting. It is clear that he will not likely receive much in the way of interest income actually paid for the balance of 2006, but it certainly will be earned and, presumably, it will be taxable in the year 2006.

[18] Mr. Van der Linden has a shareholder's equity with Scotsburn shares and he can cash them out apparently over five years. He suggests that these shares are property and do not have an impact on his income. With respect, the cashing in of the

shares over the next five years, which appear to have considerable value, will provide the opportunity for investment income of an uncertain nature.

[19] I agree with Mr. Van der Linden's solicitor that the Scotsburn equity and sale of the dairy quota, etc., result in capital and not income directly. There is, however, a limit to how much one can use capital to further their own financial well being through removal of debt and asset acquisition, effectively pre-paying child support for his son through the purchase of a mobile home for the boy and his mother, etc. The $300,000.00 remaining provides more than sufficient latitude and, henceforth, Mr. Van der Linden should be aware that the court will likely continue to deem him having at least this level of capital for income production with respect to any further asset acquisition, etc.

[20] It will be difficult to calculate the annual rate of income that is a real annual rate of income, even with full and complete disclosure. To accept Mr. Van der Linden's representation that it is to remain at $33,000.00 as an annualized income would mean that he would make no more than $13,000.00 from his various activities and the limited track record in that regard to date indicates the high probability of considerably more income being earned. On a conservative basis, I am satisfied that, for the existing year 2006, a reasonable estimate of his real income is $38,000.00. Therefore, the child support payment effective the 15th of September 2006 shall be increased to the Guideline amount for $38,000.00 and the order shall so reflect.

[21] With respect to 2007, his financial position overall is clearly improved from the operation of the dairy farm and I would therefore deem his income starting January 2007 at $42,000.00 per annum and the child support payments shall be in accordance with the Federal Child Support Guidelines for that annual amount effective the month of January 2007. The order will require full disclosure on an annual basis by Mr. Van der Linden. He must clearly provide documentation to Ms. Rhynold with respect to the investment income, his income in the heifer raising business, his income and disposal of shares in the Scotsburn equity program, his custom work and his farm employment. In the event he does not provide full and complete disclosure on or before June 30, 2007, Ms. Rhynold has leave to file an application for such and I would urge the justice then presiding to seriously consider if the application is necessary that Ms. Rhynold be provided costs on a solicitor and client basis.

(2.) Lump Sum Child Support

[22] The position of Ms. Rhynold is that she seeks an order for child support by way of a lump sum to be paid, in effect, as an advance payment of child support to and inclusive of June 2011. She points to the issue of a garnishee order in the past. Mr. Van der Linden's position is that he has not been in default and that he has in the past provided post-dated cheques to Maintenance Enforcement. On July 24, 2006 Ms. Rhynold's solicitor advised that, effective July 24, 2006, Maintenance Enforcement had not received the post-dated cheques from Mr. Van der Linden which position was confirmed to be in error.

Conclusion

[23] Mr. Van der Linden's solicitor responds to the concerns with respect to post-dated cheques and irregular payments and the court accepts that such difficulties were not entirely of Mr. Van der Linden's own making. The court has jurisdiction to call for pre-payment of child support in unusual circumstances and, most frequently, it has been done where there is a sale of an asset, a history of non-payment and arrears, and the limited resources provide an opportunity for some stability at least for a reasonably short period of time.

[24] The other alternative is to require the payor to post security as was done in *Snyder v. Snyder* (1995), 146 N.S.R. 249. The circumstances warranting the posting of security in *Snyder, supra,* were that Mr. Snyder owned a home in Nova Scotia which he listed for sale and he told his former wife that if he got an offer of $35,000.00 that he would be gone. The evidence established that Mr. Snyder had made inquiries to obtain a Visa to the United States and he had also indicated to his children that he was going to leave Nova Scotia. Initially the court froze the proceeds of the sale of the property should it be sold and the court in that circumstance concluded it was appropriate to issue an order to secure the existing child support out of the proceeds of the sale of the payor's major asset.

[25] In the case before me, where there has been some confusion, there are no arrears of child support and certainly there is no indication that Mr. Van der Linden intends to leave the jurisdiction. In fact, although he has disposed of his major asset, the milk quota, he continues to own and operate his farm property and the

circumstances here are not of such a nature that warrants the court ordering a lump sum of his funds to be posted by way of security.

(3.) Lump Sum - Education Fund

[26] Ms. Rhynold has had very limited resources over the years however she has, to her credit, established an educational fund under the Canadian Scholarship Trust Plan which has a balance as of December 31, 2005 of $20,181.41. The plan calls for a contribution monthly of $74.00 and matures January 22, 2009. This is a registered plan and to date the Grant is in the amount of $832.99. There are in effect two plans, the second one shows a Canada Education Savings Grant of $1,994.81. Ms. Rhynold presently pays $113.20 per month and it is estimated that she will have paid in $23,000.00 by the time their daughter completes Grade XII.

[27] Mr. Van der Linden acknowledges that their daughter should not be prejudiced by his business decision and, as previously indicated, indicates when the financial information is available, the level of ongoing child support can be adjusted accordingly. Mr. Van der Linden strongly opposes any lump-sum advance payment idea. With respect to the education fund request of Ms. Rhynold, his suggestion is that he deposit $5,000.00 into a fund exclusively for his daughter's benefit. He notes that he would be doing the same thing for his son; which is an issue outside this application. The encouraging position is that stated in the penultimate paragraph of his solicitor's letter to the court on July 19, 2006 "his intention would ultimately be to deposit an amount in the fund equivalent to that made by the applicant, as circumstances permit."

<u>Conclusion</u>

[28] The court secured written confirmation from the Canadian Scholarship Trust Plan that a child / beneficiary is able to have more than one agreement. The contributors are only able to submit a total of $4,000.00 per calendar year with the first $2,000.00 being eligible to receive the Canada Education Savings grant. Ms. Rhynold, in a very responsible fashion, took out a registered educational savings plan with Canadian Scholarship Trust and has made substantial contributions, she presently pays at the rate of $113.20 per month, and by the end of their daughter's Grade XII year she will have paid in a sum of $23,000.00. A statement indicates the balance of the two plans that she has for their daughter which includes Canada

Education Savings Grants received. I am unable to tell with any certainty whether there is any room for additional government grants with respect to a plan to be entered into by the father. Nevertheless, the opportunity exists to secure their daughter's education. I had the opportunity to observe Mr. Van der Linden in open court and he is a strong independent-minded individual, gifted with a work ethic. However, as admirable as that is in most circumstances, it seems to the court fit and proper, given the disposal of his major asset, to secure the minimum educational requirements of their daughter. The order will direct the establishment of a fund payable out of the cash held by his solicitor. If there are advantages to paying it on an installment basis, beyond at least a minimum of $12,000.00 forthwith, then such will be permitted provided the funds are invested on a short term basis in the name of the daughter with the father as trustee for payment as and when is most advantageous. The intent is that Mr. Van der Linden match the mother's existing payments within three years and thereafter match the payments of the mother. The order will provide a provision that the parties exchange full disclosure of their respective investments in the educational funds.

[29] In the event of a disaster relating to the child or the child failing to pursue a higher education, each of the parents would presumably receive at least the capital being set aside.

LIFE INSURANCE

[30] At the telephone conference before finalizing the decision, the court inquired as to life insurance and Ms. Rhynold has confirmed that she does have life insurance. The court will not make any formal order requiring Mr. Van der Linden to match such. In our telephone conference, the court sensed that Mr. Van der Linden's solicitor saw the merit of some life insurance being acquired by the father and certainly he is at an age where it would not be very expensive to maintain such over the next 10 years or so by way of term insurance. I will leave the issue of life insurance to the determination of the father.

COSTS

[31] It is clear from the record and my observation of the parties in court, etc., that there has been, in part, due to the independent spirit of Mr. Van der Linden, some reluctance to and actual failure to provide the kind of full and detailed disclosure that

ought to have been provided. This has resulted in some unnecessary legal effort on the part of Ms. Rhynold's solicitor and there should be some relief by way of party and party costs. I tax and award Ms. Rhynold party and party costs in the amount of $1,400.00 plus her disbursements. If counsel are unable to agree upon the disbursements, I will be prepared to tax them.

[32] Corollary relief judgment to be amended accordingly.

J.