SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Hamilton v. Samland, 2013 NSSC 282

Date: 2013-09-18
Docket: SFHMCA 030902
Registry: Halifax

Between:

Lindsey Marie Hamilton

Applicant

v.

Markus Erin Helmut Samland

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: September 12, 2013

Counsel: Lindsey Hamilton, on her own
Markus Samland, on his own

Introduction

[1] Lindsey Hamilton asks that I vary child maintenance payments for eleven year old Madison. She wants the variation to be both prospective and retroactive in effect. Madison's father, Markus Samland, says that he cannot afford to do what Ms. Hamilton asks. The application is pursuant to section 37 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160.

[2] Initially, Ms. Hamilton also asked that access be varied. The parties have agreed to a variation of access and an order addressing this has been finalized.

Prevailing order

[3] Section 37 of the *Maintenance and Custody Act* says that I may prospectively or retroactively vary a maintenance order where there's been a change in circumstances since the order was made. A change in circumstance is more particularly described in section 14 of the *Child Maintenance Guidelines*, N.S. Reg. 53/98, which says that where child maintenance includes an amount dictated by the tables, a change which would result in a different amount is a change sufficient to warrant a variation order.

[4] The prevailing order is a consent variation order from December 17, 2004. It states that Mr. Samland's annual income was $18,720.00. He was ordered to pay monthly child maintenance of $147.00. That order also required Mr. Samland to provide Ms. Hamilton with a copy of his tax return, completed and with all attachments, even if he didn't file the return, and all Notices of Assessment before June 1 of each year.

[5] This consent variation order modifies the terms of a consent order which, confusingly, is also dated December 17, 2004. Based on the dates when the orders were signed by the parties, it seems that the initial consent order was signed by Ms. Hamilton in August 2004 but Mr. Samland didn't sign it until November 2004. On the day he signed the consent order, he and Ms. Hamilton also signed the consent variation order. Both orders were issued the same day.

[6] The consent variation order explicitly states that the terms of the consent order continue in force and effect except where specifically varied. The consent variation order increased the amount of Mr. Samland's monthly child maintenance pursuant to the *Child Maintenance Guidelines* tables. It did not change other amounts he was ordered to pay: he was to pay $100.00 bi-weekly to Madison's

babysitter; to pay fifty percent of the cost of Madison's extra-curricular activities and to obtain medical, dental and drug insurance coverage for her.

[7] So, together the two orders combine to dictate the amount of Mr. Samland's basic child maintenance payment along with his contribution to expenses for child care and activities, his maintenance of insurance and his ongoing financial disclosure.

[8] Mr. Samland's income has changed since 2004. Accordingly, the threshold requirement of section 37 of the *Maintenance and Custody Act* is satisfied, and I may make a variation order.

Analysis

[9] Ms. Hamilton claims both a prospective and a retroactive variation of child maintenance. Because I must consider the potential financial hardship that might accompany a retroactive award, I must deal first with prospective child maintenance to understand Mr. Samland's financial circumstances.

Prospective child maintenance

[10] Ms. Hamilton filed her variation application in October 2012.

[11] In at paragraph 43 in *Staples v. Callender*, 2010 NSCA 49, Justice Bateman said that where a parent's resources allow, and particularly if there's no existing order for maintenance, a "judge should consider backdating the order to the date of the application for support." She said there is no fixed rule for this and that I am to use my discretion in determining if it's appropriate "considering, in particular, the payor's ability to respond to the order."

2012

[12] Mr. Samland's financial disclosure included income information slips from five employers in 2012. Additionally, he drew from RRSPs funds last year.

[13] In 2012, Mr. Samland's income was $23,730.16. A very small portion of this ($125.07) was comprised of funds withdrawn from his RRSP. In determining Mr. Samland's 2012 income, I do not consider the amount he withdrew from his RRSP. While this is not the only year in which he made an RRSP withdrawal, I conclude that his reliance on his RRSP to finance shortfalls in his income is not the fairest way to determine his income, having regard to subsection 17(1) of the *Child*

Maintenance Guidelines. Withdrawals from his RRSP are not typically recurring events. Mr. Samland thought he had exhausted his RRSP when he withdrew money from it in 2011. The money withdrawn in 2012 was that which had been contributed in early 2012.

[14] Based on the *Guidelines* and an annual income of $23,605.09, his monthly child maintenance obligation was $181.00. I order that for October, November and December 2012, Mr. Samland pay monthly child maintenance pursuant to section 3 of the *Guidelines* of $181.00.

2013

[15] During the early part of 2013, Mr. Samland worked at a car dealership. I don't know when Mr. Samland left this job. He began work at Admiral Insurance early in July. It isn't clear whether Mr. Samland has had any other employment this year.

[16] I don't have complete details of Mr. Samland's income from his employment at Steele Mazda. I know that he was guaranteed a bi-weekly training allowance of $1,153.00 until February 26, 2013 at which point he was to begin working on a "100% commission" basis, according to information provided by the sales manager at Steele Mazda. If he remained at the dealership until the end of the training period, Mr. Samlan would have earned $5,188.50.

[17] Mr. Samland says that he earns minimum wage working for Admiral Insurance's call centre. In fact, he earns more than minimum wage. According to his paystub, Mr. Samland is paid $11.6669 per hour. He works seventy-seven hours every two weeks. From the beginning of July to the end of this year he will earn approximately $11,678.56. This presumes that he will not work on any of the remaining statutory holidays this year.

[18] At this point, the best estimate I can make of Mr. Samland's 2013 income is that it will be $16,867.06: the total he would have earned if he stayed at Steele Mazda until the end of the training period and the amount he can earn until the end of this year at Admiral Insurance. I order that from January 1, 2013 to December 31, 2013, Mr. Samland pay monthly child maintenance of $95.00. Payments are due on the first of each month.

2014

[19] Mr. Samland has worked at Admiral Insurance for approximately two and one-half months and, when he completes his probationary period by the end of this month, he will be eligible to earn commissions.

[20] Based on an hourly pay rate of $11.6669 and a schedule of seventy-seven hours bi-weekly, and considering that Mr. Samland will likely work forty-eight weeks each year, Mr. Samland's annual income will be $21,560.43. I am allowing two weeks for a vacation period and ten further days for statutory holidays. I am not including any amount for commissions in this calculation. At this level of income, I order Mr. Samland to pay monthly child maintenance of $156.00 to Ms. Hamilton for Madison. Payments will begin on January 1, 2014 and will be payable on the first day of each month.

[21] Ms. Hamilton has made no claim to vary the amount payable for Madison's special or extraordinary expenses.

[22] With regard to the revised amounts of child maintenance Mr. Samland owes for the past twelve months (since Ms. Hamilton filed her variation application), I order that sums be collected on account of this amount at a rate of no more than $100.00 each month.

Retroactive child maintenance

[23] According to her affidavit of May 21, 2013 Ms. Hamilton seeks a retroactive award reaching back to 2010. Such an award would cover the entirety of 2010 and 2011 and the first nine months of 2012.

[24] Retroactive child maintenance claims are governed by the Supreme Court of Canada's decision in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37.

[25] Retroactive awards are not made automatically. At the same time, they are not exceptional. They are discretionary awards. In exercising my discretion to make a retroactive award, I am to balance the competing principles of certainty and flexibility, while respecting the core principles of child maintenance. Certainty protects Mr. Samland's interest in respecting the prevailing order, rather than re-writing the rules for child maintenance years later. Flexibility honours Madison's interest in receiving the appropriate amount of child maintenance. The core principles of child maintenance are that: child maintenance is the child's right; the

child's right to maintenance survives the breakdown of the parents' relationship; child maintenance should, as much as possible, perpetuate the standard of living the child had before the parents' relationship ended; and the amount of child maintenance varies, based upon the parent's income.

[26] In determining whether a retroactive award is appropriate, I'm to consider: the reason for Ms. Hamilton's delay in claiming maintenance; Mr. Samland's conduct; Madison's past and present circumstances; and whether a retroactive award would result in hardship. All of these factors must be considered and none on its own dictates my decision, according to Justice Bastarache in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 99.

Ms. Hamilton's delay

[27] My first consideration is the reason for Ms. Hamilton's delay in claiming support: why am I dealing with a request to vary child maintenance for 2010 in 2013? According to Justice Bastarache at paragraph 103 of *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37: "Recipient parents must act promptly and responsibly in monitoring the amount of child support paid". Ms. Hamilton has a positive duty to seek a variation in child maintenance as Mr. Samland's ability to pay improves. An unreasonable delay in seeking a variation militates against a retroactive award. Acceptable reasons for delay include: if Ms. Hamilton had reasonable fears that Mr. Samland would react vindictively to a claim for increased maintenance; whether she had deficient legal advice or insufficient financial or emotional resources to pursue the claim.

[28] According to Ms. Hamilton she made repeated requests to Mr. Samland that he pay the child maintenance he was ordered to pay. He was deficient in meeting his regularly ordered payments. She says she also made special requests when specific expenses arose and that Mr. Samland would sometimes say that he couldn't afford to pay her and sometimes he would say "yes" to her requests, but not follow through. She relied on Mr. Samland's statements that he would pay on those occasions when he said he would and she explained that this was why it had "drawn out so long". Ms. Hamilton was clearly reluctant to come to court. She wanted to resolve matters directly with Mr. Samland.

[29] Ms. Hamilton filed her application in October 2012. She's aware that Mr. Samland lost his job in 2011 but says that he didn't increase his payments while he had this job. The job was one at Research in Motion where

Mr. Samland's annual income was in the range of $45,000.00 to $50,000.00. When Mr. Samland refused to respond to her requests for financial assistance despite his improved circumstances, Ms. Hamilton should have overcome her reluctance to pursue Madison's entitlement to maintenance.

Mr. Samland's conduct

[30] My second consideration is Mr. Samland's conduct and whether it is blameworthy. Blameworthy conduct promotes a retroactive award and the absence of blameworthy conduct militates against one. Blameworthy conduct is an act or omission that puts the payor's interests before the child's right to an appropriate amount of maintenance. On its face, it isn't blameworthy for a payor to adhere to the terms of the prevailing order. However, if a payor receives a significant increase in income and doesn't disclose it, this is blameworthy conduct. Justice Bastarache wrote, at paragraph 106 of *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37, that "a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments".

[31] Mr. Samland did not meet his court-ordered obligation to disclose information about his income each year. According to Ms. Hamilton's testimony, he failed to pay child maintenance though he was ordered to do so. The 2004 consent variation order was based on the parties' agreement that Mr. Samland had an annual income of $18,270.00.

[32] I don't know when Mr. Samland's income first increased. By the end of the decade, his income had more than doubled from the amount stated in the 2004 orders. Mr. Samland's 2008 income tax summary showed his income was $47,651.00 that year. He contributed almost $3,000.00 to his RRSP in 2008. His 2009 income tax summary showed an annual income of $45,568.00 and noted a $2,711.00 RRSP contribution. According to his 2010 Notice of Reassessment, his income was $50,924.00. That year, he deposited almost $1,900.00 into his RRSP. Instead of meeting his then-current obligation to increase his maintenance for Madison, Mr. Samland saved for his retirement.

[33] In some cases, a presumption that adhering to the prevailing order is not blameworthy "may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay" according to the Supreme

Court at paragraph 108 of *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37.

[34] The increase in Mr. Samland's income by 2008 was significant. Seeing his income more than double (in 2008 to 2010 it was, on average, almost $30,000.00 more than it was in 2004) should have prompted Mr. Samland to adjust his maintenance to Madison. During these years he didn't increase his child maintenance, but he did contribute to RRSPs. This conduct is blameworthy.

Madison's past and present circumstances

[35] My third consideration is the child's past and present circumstances. Madison's circumstances include her needs at the time maintenance should have been paid and at the present. If her needs were met and her lifestyle was comfortable (even without the money which Mr. Samland ought to have provided), then it may not be appropriate to make a retroactive support award.

[36] According to Ms. Hamilton's affidavit of October 17, 2012, she sought retroactive maintenance "as my own bills are getting behind due to lack of support." She testified that she had to rely on her mother to meet Madison's needs. She agreed, when asked, that she has not been afraid of losing her house or not feeding her children over the last year. Ms. Hamilton has a new partner. He is employed. Together they have a child and her new partner pays child maintenance for another child. Ms. Hamilton says that she earns minimum wage.

[37] Ms. Hamilton says that for the past three years her mother has had to "step up" to pay for expenses that Ms. Hamilton was unable to afford, such as dental plates for Madison's teeth.

[38] Madison remains a dependent child so a retroactive award would benefit her. That Ms. Hamilton has been able to house and nourish Madison is not the measure of appropriate maintenance. The *Guidelines* require that maintenance is the child's right and it is to reflect the income of the payor parent: it is not payable only where the child's subsistence needs are unmet.

Hardship created by a retroactive award

[39] My final consideration is whether a retroactive award would result in hardship. I am to consider whether Mr. Samland is able to satisfy a retroactive award. "Hardship" is to be considered broadly, not within the confines of section

10 of the *Guidelines*. The breadth of this consideration encompasses others Mr. Samland may support.

[40] Mr. Samland moved in with his partner, Jennifer Perkins, and her two children, now aged four and nine, approximately three months after losing his job in 2011. Occasionally, they are joined by Ms. Perkins' brother when he is not working. Additionally, a babysitter lives with the family. I was told that the babysitter is not paid, but that her meals are provided.

[41] Mr. Samland is unsure of Ms. Perkins' earnings as a self-employed esthetician. He believes she may gross a minimum of $800.00 monthly. Child maintenance for Ms. Perkins' children is negligible. One boy's father pays a few hundred dollars each year and the other, Mr. Samland says, works under the table, suggesting that he pays no maintenance.

[42] Ms. Hamilton challenges Mr. Samland's support for this household while he doesn't meet his obligation to Madison. Mr. Samland says that Ms. Perkins supported him for one year when he wasn't working. Ms. Samland's monthly expenses total $1,972.00 (including an average monthly expense of $110.00 for NSF banking charges), without considering his statutory deductions. Even without these deductions and his expense for income tax, these expenses exceed his gross monthly income by approximately $175.00. Additionally, he has two debts totalling $26,700.00, owed to the Bank of Nova Scotia and to Nova Scotia Power. His only asset is a 2002 Chevy Tracker.

[43] I am ordering Mr. Samland to pay monthly child maintenance of $95.00 until January 2014 when his payments will increase to $156.00. I have fixed the amount of his payments from October 2012 to the present. I am aware that the Maintenance Enforcement Program has placed garnishees against any money owed to Mr. Samland by the federal government and his employer. I do not know the extent of arrears which are under collection, but my decision will certainly create a debt from 2011 to date. It does not change any amount he may owe from earlier accumulated arrears. He has made no application to address those.

[44] In *Staples v. Callender*, 2010 NSCA 49, Justice Bateman reviewed *S. (L.) v. P. (E.)*, 1999 BCCA 393 and *T.(E.) v. T.(K.H.)* 1996 CanLII 2625 (BC CA). She quoted with approval from the latter decision where Justice Esson said, "In deciding whether to exercise the discretion to order payment of maintenance for a period prior to the hearing, a judge should consider whether such an order will

have an impact on the defendant which will make it less likely that the order for future payments can or will be complied with."

[45] Ms. Hamilton's delay militates against a retroactive child maintenance award. Madison's needs favour such an award. Mr. Samland's conduct does not excuse him from a retroactive award. However, even without the demands of his current household, a retroactive award varying child maintenance prior to October 2012 will jeopardize the payment of ongoing maintenance.

[46] Based on all the considerations outlined *in D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37, I hold that it is not appropriate to award child maintenance on a retroactive basis, and I dismiss this claim.

_____

Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia