<u>SUPREME COURT OF NOVA SCOTIA</u>
<u>(FAMILY DIVISION)</u>

Citation: Lyttle v. Bourget 2013 NSSC 346

Date: 20131023
Docket: 1201-050331 (SFHD-045078)
Registry: Halifax

Between:

Laura Lee Lyttle

Petitioner

v.

Louis Andre Bourget

Respondent

Judge: The Honourable Justice Beryl A. MacDonald

Written Submissions: August 21, 2013 from the counsel for Louis Bourget
September 9, 2013 from the counsel for Laura Lyttle
September 17, 2013 from the counsel for Louis Bourget

Counsel: Christine D. Black, counsel for Laura Lyttle
Judith A. Schoen, counsel for Louis Bourget

By the Court:

[1] On May 31, 2012 Dr. Louis Bourget filed a notice to vary a Corollary Relief Judgment issued upon his divorce from Laura Lyttle. That Judgment had been varied on previous occasions. Dr. Bourget wanted to change the amount and means by which he was paying child support. He wanted enforcement of a previous order and cost award and costs resulting from this new variation proceeding.

[2] Laura Lyttle filed a Response in which she requested a variation of child support including recalculation of that support and section 7 expenses.

[3] On July 30, 2012 the court heard Dr. Bourget's motion for directions and a one day trial was set for November 28, 2012. The trail had been double booked and as a result it was rescheduled twice. At a conference held February 27, 2013 a confirmed hearing date for May 10, 2013 was scheduled. Two additional days were required on July 22 and 23 and an oral decision given on July 29, 2013. Dr. Bourget is seeking costs. Both counsel have provided written submissions.

[4] To make this decision I have considered the principles I described in *Gagnon v Gagnon,* 2012 NSSC 137.

[5] The oral decision I gave on July 29th dealt only with items the parties had not been able to agree upon after they had engaged in extensive discussions following the hearing. They had engaged in those discussions because I made it clear much of what each wanted me to order may not have been within my jurisdiction. The child support guidelines give authority to order a parent to pay table or section 7 support amounts. They do not give authority to tell a parent to borrow money or to order a child to co-sign a debt instrument or accept money through a family trust. Nor do they require me to order a parent to go into debt to pay for a child's education.

[6] Since their separation Dr. Bourget and Ms. Lyttle have had three lengthy hearings in the Supreme Court of Nova Scotia because they have not been able to agree about the amount of money Dr. Bourget has available to support the children of their relationship. The very first time a judge reviewed Dr. Bourget's financial circumstances the judge observed that this family survived on debt. The family lived beyond its means and, sadly, when I reviewed the situation in 2007 I

made the same observation. In 2007 I also agreed with the previous judge that Dr. Bourget was not using his corporation to divert income that would otherwise be available to pay child and spousal support.

[7] Often an individual's financial status becomes suspect when he or she chooses to create corporate entities, including Family Trusts. There are legitimate reasons to do so; primary among those is the reduction of tax liability. This is not illegal and often produces more disposable income as a result. Unfortunately most people view these corporate entities as a mechanism to hide cash and assets in an effort to reduce income for support purposes. In the Family Law context, if this is proven, the court can add back before tax net corporate income to the sole director/shareholder of a corporation. In the case before me, as was the situation when I last examined Dr. Bourget's finances, the professional corporation cannot provide him more income than he is presently receiving. He is not attempting to hide cash or assets that should be available for child support. He has not hidden cash elsewhere. He and his corporations primarily survive on borrowed money - on debt. Ms. Lyttle has never been able to accept this conclusion and her failure to do so has prevented acceptance of numerous offers made by Dr. Bourget over the

course of this proceeding that would have resolved the child support issue without a hearing.

[8] Ms. Lyttle has given many reasons why the offers made were not accepted including the offer to arrange a joint meeting with Dr. Bourget's accountant. I accept the interpretation of those events as described in the submissions of Ms. Schoen in her letter dated September 17, 2013. I do so because I am satisfied Ms. Lyttle had one agenda and that was to force Dr. Bourget to pay for his daughter's very expensive education with as little contribution from his daughter as possible. She did not want her daughter to participate in any arrangement that would have permitted Dr. Bourget to access money on behalf of their daughter through corporate structures. Their daughter was not an independent actor in this proceeding. She was following the advice of her mother and so Dr. Bourget could not resolve these issues with her. Court proceedings were his last resort. The arrangement eventually proposed to the court was a variation of various previous proposals any of which would have ensured the daughter's financial completion of her education. None were accepted until the court ruled upon the issue. I place responsibility for this failure to resolve these issues upon Ms. Lyttle.

[9] Ms. Lyttle suggests there was a lack of financial disclosure. I reject that submission. Ms. Lyttle could have learned anything she wanted to know about Dr. Bourget's corporation and the Family Trust by sitting down with his accountant. She failed to avail herself of that opportunity. She had the financial statements but did not understand what they meant. That is not Dr. Bourget's fault.

[10] Interestingly in her submissions Ms. Lyttle requests costs be awarded to her as the successful party in this proceeding. I do not accept that she was the successful party. Her failure to agree to the means by which Dr. Bourget could finance their youngest daughter's education essentially forced him to make a Court application. What she did not realize was that a very limited amount would likely have been ordered to be paid by Dr. Bourget under a strict application of the child support guidelines. As I said earlier in this decision the child support guidelines do not contemplate a court ordering the parties to participate in debt instruments or accept money through a family trust. The only way Dr. Bourget could bring Ms. Lyttle to the table "so to speak" was by initiating court proceedings.

[11] Dr. Bourget also wanted the court to do something about the failure of his two older children to pay on debt he had co-signed. Their failure certainly

compounded his difficulty in obtaining financing to pay for the youngest daughter's education. No doubt he did attempt to have Ms. Lyttle put pressure on those children to live up to their obligations. This may have adversely affected settlement negotiations. It was a subject that was explored during the hearing because Dr. Bourget did not want to be in a similar situation with the youngest daughter. This was not a completely irrelevant issue to the resolution of satisfying the youngest daughter's financial needs.

[12] Finally Dr. Bourget did want the court to require Ms. Lyttle to comply with paragraphs 3 and 4 of the Varied Corollary Relief Order dated July 30, 2008 and to pay costs previously ordered. The order required her to pay $6,000.00 per year towards one daughter's university expenses and $3,000.00 per year towards their son's university expenses either by sending this money directly to the university or by applying that amount to any loan either child had incurred to attend university. She was to pay costs to Dr. Bourget. She did not pay any of the money as ordered. As a result of the discussions between the parties at the end of the hearing, she was relieved of those obligations.

[13] Ms. Lyttle requests no costs be ordered against her because she and her husband earn " a small fraction" of Dr. Bourget's income. I commented upon Ms. Lyttle's financial situation in 2007. It bears repeating :

> [25] Both the Mother and her present partner receive their income from real estate sales. They had worked for various companies as agents but essentially they are and have been self-employed. It is obvious from their incomes that they are not making a living wage. They have a young son and they live in a very expensive residence...They both either need to find a way to quickly become financially successful in the real estate business or look for alternate employment. They need to realistically evaluate what they have been doing and make change. The Father will not be injecting cash into their household forever.

[14] Because Ms. Lyttle was to contribute nothing directly to the youngest daughter's educational costs I have not evaluated her present financial situation other than to recognize she still claims that any cost award against her will cause "tremendous financial hardship". Given that she has not paid previous cost awards she may be judgment proof but that will be Dr. Bourget's problem to resolve. I am

not satisfied Ms. Lyttle's financial circumstances justify the rejection of Dr. Bourget's request for costs. He is seeking a $20,000.00 cost award. His legal and disbursement costs were approximately $30,000.00

[15] Using the "rule of thumb approach" the basic scale in Tariff A would provide $4,000.00. An additional $2,000.00 per day would be added for the 3 days of the hearing for a total of $10,000.00. After considering Ms. Lyttle's failure to accept any of the offers to settle or enter into meaningful negotiations until the second day of the hearing I have determined a cost award of $15,000.00 is appropriate.

Beryl MacDonald, J.S.C.