IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Pottinger v. Hann, 2003 NSSC 310; formerly 2003 NSSF 22

Date: 20030613
Docket: SFHF-013252
Registry: Halifax

Between:

Lorne Gregory Pottinger

Applicant/Respondent

v.

Judy Roxanne Hann

Respondent/Applicant

Judge:	The Honourable Justice Walter R. E. Goodfellow
Heard:	June 3rd, 2003, in Halifax, Nova Scotia
Counsel:	Steven Zatzman and Louis Wolfson A/C, for the Respondent/Applicant Peter W. Kidston, for the Applicant/Respondent

By the Court:

BACKGROUND

[1] Lorne Gregory Pottinger and Judy Roxanne Hann commenced a common-law relationship November the 1st, 1991. They agree that the relationship ended June the 15th, 1997 but disagree as to whether or not they were living together throughout the entire period.

[2] Ms. Hann has a son, Nathon Rodney Hann, born April the 23rd, 1987, now 16, and this child resided with Ms. Hann and Mr. Pottinger throughout their cohabitation and was acknowledged by Mr. Pottinger as a "son" and the child acknowledged Mr. Pottinger as his "dad". The parties have a child, Lorne Brandon Pottinger, born May the 3rd, 1996.

[3] The parties consented to an order in Family Court November the 14th, 1997 whereby they shared joint custody of the boys, with the children's primary residence being with Ms. Hann and Mr. Pottinger having reasonable access to the children at reasonable times and upon reasonable notice to Ms. Hann. Mr.

Pottinger agreed to pay maintenance for the children at the rate of $500.00 per month, commencing October the 1st, 1997.

[4] The parties appeared to have varied the method of payment and arrangement whereby there was a level of contribution by Mr. Pottinger for daycare and nothing was pressed or pursued until December, 1999 at which time Mr. Pottinger began formal payment of the agreed order amount of $500.00 per month for the children.

APPLICATION

[5] Difficulties have occurred with respect to communication, et cetera, and much of the initial trust between the parents was diminished by Mr. Pottinger being convicted in 1998 of sexually assaulting Ms. Hann's niece for which he apparently received 18 months probation. Unfortunately, there were other circumstances that led to allegations of sexual assault by Mr. Pottinger against a young female friend of the child, Nathon, and, apparently, Mr. Pottinger last month was found not guilty of those charges. In addition, there were charges

outstanding at one point with respect to the death of the family pet but, again, those charges were not pursued.

[6] Other than the 1998 conviction, there remains only allegations. The weight to be attached to them is only a recognition that even allegations, particularly on top of a conviction, tend to recreate a climate of mistrust.

[7] I had the benefit of the evidence of a child protection worker who outlined the investigations that were conducted, the cessation temporarily of access, et cetera. It is clear that there is absolutely no independent evidence by way of a medical report, photographs, et cetera, that would even bring the allegations against Mr. Pottinger near the civil balance of probability threshold. The Department of Community Services Child Protection Services has in fact closed its file. Unfortunately, given the background of his one criminal conviction, additional allegations, quite understandably, raise concerns. In part, one of the by-products of what has transpired is that the child, Nathon, who previously had an excellent ongoing relationship with his "dad", now has no relationship whatsoever and goes out of his way to avoid Mr. Pottinger.

[8] The application is met, in effect, by a cross-application and the four issues before the Court are as follows:

CUSTODY

1. Ms. Hann seeks a designation of sole custody, as she does not oppose the child, Brandon's, right of access to his father, but wishes for a reasonable period of time that it be supervised. She is prepared to have it supervised by Mr. Pottinger's present common-law spouse. Ms. Hann shall have a designation of sole custody, however, she has failed to make out a case requiring that the child's right of access to his father be supervised. In addition, she seeks to have the access formalized and structured and Mr. Pottinger seeks to have it also formalized but to return to, at least if not greater, the extremely liberal access he once enjoyed to both sons. Mr. Pottinger takes the realistic point of view that what, if any, relationship is renewed with the child, Nathon, will have to wait the passage of time and circumstances of the future.

CHILD SUPPORT - ENTITLEMENT - QUANTUM - ARREARS - CHILDCARE

2. The issue of child maintenance is raised by both parties. Mr. Pottinger seeks the declaration that he is no longer under any obligation to support the child, Nathon, and asks that, with substantial access, he be permitted to pay child support for Brandon at something less than the child support guideline rate. Ms. Hann seeks arrears of child support that I calculated during the hearing as being $2,827.00, representing the guideline amount of $741.00 for two children from the date of the application, July, 2002, for a period of six months, and for a further application of the child support guideline from February, 2003 to and inclusive of May, 2003.

3. Additionally, it appears because of the mechanics of Mr. Pottinger's allotment to the bank, rather than pay child support as ordered on the first of the month, he is paying it in arrears, which means he is constantly in arrears the sum of $500.00 under the existing order. Ms. Hann seeks a contribution from Mr. Pottinger for childcare, which in the year 2002 has been established at a gross of $4,047.00. She seeks a contribution going back a period of five years, that is a contribution of at least $20,000.00, which she

has paid over this time span by herself for childcare. Mr. Pottinger takes the view that he was available to and did look after the children for periods of time and remains available to accommodate her to some extent, at least for her shift work as a licensed practical nurse, and he declines any offer to contribute to the childcare expenses retroactively or prospectively. The parties have agreed that they will each continue the children on their respective medical health plans through employment and one of the plans is being utilized to cover the orthodontic work required for Brandon. It is agreed that the uninsured portion will be shared between the parents on the ratio of Mr. Pottinger's $53,000.00 to Ms. Hann's $33,00.00 and the amount is $1,600.00. Mr. Pottinger should pay this amount without undue delay and, in any event, on or before the 31st of July, 2003.

PENSION ENTITLEMENT

4. There was an issue with respect to the time frame of entitlement by Ms. Hann to share in Mr. Pottinger's Canadian Armed Forces pension and I rendered an oral decision following counsel's submission on this point, setting her entitlement for what I found to be the entire period of their

cohabitation unbroken from the 1st of November, 1991 to and inclusive the 15th of June, 1997.

PERSONAL PROPERTY

5. Ms. Hann produced a list from Nathon of items he wished returned from Mr. Pottinger and those items included a 21" T.V. and stand which may or may not exist but, in any event, apparently went to Mr. Pottinger at the time of separation about six years ago, and there are other items in the same category. I rendered an oral decision after summation, concluding that it was too late and too uncertain as to what had transpired with all of these items, with the one exception of a play station game with memory cards and approximately 80 games. Mr. Pottinger acknowledged that this was a birthday gift to Nathon in 1999 and he has no right to retain it at his residence, and the fact that his present common-law spouse's teenage boy utilized it, et cetera, does not change the fact that it belongs to the boy, Nathon, and must be returned immediately.

OUTSTANDING ISSUES

1. Child Maintenance -

[9] The first determination is to address the argument advanced by Mr. Pottinger's counsel that as a step-father, Mr. Pottinger has no liability to support the child, Nathon Rodney Hann. It is clear that the mere fact Mr. Pottinger is a step-father does not give rise to a legal obligation of support. *Reed v. Smith* (1998), 86 N.S.R. (2d) 72 (N.S.C.A.). Our Court of Appeal dealt with a matter of first instance. The Family Court judge made a determination ordering the step-father to pay support for two children who had resided with their mother and step-father prior to and during a period of marriage. The County Court judge set aside the Family Court judge's order and the Court of Appeal agreed. Chipman, J.A. stated the issue at p. 74, para 9:

> **[9]** The issue before this court is whether in the circumstances of this case a step-parent can be compelled by law to pay maintenance for a step-child.

[10] Chipman, J.A. for the court also stated at p. 75, para 17:

> **[17]** There being no duty at law in this province, arising solely out of this relationship, upon a step-parent to provide necessaries for his or her step-child, the enforcement provision in the *Children's Services Act* has no relevance even though the custody provisions of s.67 are available for or against a step-parent by reason of the definition of parent in that *Act*.

[11] The issue of jurisdiction was raised at the very outset. The matter in *Reed v. Smith***,** above, came to the Court of Appeal for determination of an issue of first instance. There was no consent to jurisdiction, acknowledgement of dependancy and assumption of responsibility towards a child. The parent had been in a "father/son" relationship for several years. To contrast that, in the case before me, Mr. Pottinger acknowledged the child, Nathon, as his son for a period of several years and then in October, 1997 consented to a determination that Nathan Rodney Hann was his son and he agreed to pay support for the two children. There was no appeal as in *Reed v. Smith*, above, from the Consent Order.

[12] Counsel also advanced the decision of Justice Gass in *Baker v. Peterson,* 2001 NSSF 06. With great respect to Justice Gass, I believe she overlooked the fact that *Reed v. Smith* was a determination in the first instance and not, as is the case here and was the case before her, a non-appealed determination. There was a determination and order in 1989. It was varied in 1995 and varied by consent in

2000. On none of the orders and, most importantly, the initial order of determination did the “father” exercise his right of appeal.

[13] In my view, it is not open for a “parent” to accept, acknowledge or have determined to be in a dependancy relationship with a “child”, to permit that “parent” the option at will, at any time, during the period the “child” remains a child to simply say, “So what there's a court order or that I agreed that I had an obligation to support and I have done so. I now exercise my option to decline further.”

[14] The initial order granted by the court, particularly where it is a consent order, is not based upon a conditional or optional consent permitting a parent to decide at whim, at any time, to sever the obligation assumed.

[15] Mr. Pottinger’s obligation arises from the relationship that existed between he and the child, Nathon, not only during cohabitation, but post-separation, the consenting to an order from which no appeal has been taken giving rise to both estoppel and invoking the court's *parens patriae* jurisdiction.

[16] It is the relationship that existed between Mr. Pottinger and Nathon, his acknowledgement and consent to the existing order that, in totality, give rise to the dependency prerequisite, and I conclude that Nathon continues to be entitled to look to Mr. Pottinger for maintenance and the existing order in that regard remains in tact. To alter the order would have, in my view, required either a successful appeal, which is no longer open, or a factual situation that established the prerequisite dependency threshold no longer existed. I confirm, subject to counsel checking the mathematics, that the present arrears of child support for Nathon, to and inclusive the month of May, 2003, is in the amount of $2,827.00, which should be paid within 30 days of the order following this decision. In addition, within 60 days of signing of the order, Mr. Pottinger shall pay the additional arrears of $500.00 so that after payment, the order will be paid as directed and not constantly in arrears.

2. Childcare -

[17] Ms. Hann seeks a retroactive order calling for a contribution of at least $20,000.00, and the first difficulty with this claim is that I do not have the accurate figures as to the parties respective incomes and I do not have income tax returns

showing to what extent, if any, Ms. Hann in the previous years obtained a tax benefit. In short, I am not able to do a reasonably accurate calculation of the net cost for the past five years to Ms. Hann of the childcare expenses.

[18] Child support payments, in line with the guideline, are a clear obligation on a parent, without any requirement of request/demand or court application. See *Farnell v. Farnell*, [2002] N.S.J. No. 491.

[19] The issue of childcare, however, requires the person incurring such an expenditure to provide, in a timely fashion, financial particulars and confirmation of such expenditure, including the after tax cost of such, and Ms. Hann failed to do so. Finally, there must be a measure of reality in the court's determinations and, for the foregoing reasons, the claim for retroactive childcare is dismissed except to the extent of the year 2003. There should be a sharing of the childcare expenditure occurred to date in 2003 between the parties on the ratio of Mr. Pottinger's $53,000.00 to Ms. Hann's $33,000.00 and the shared amount should be estimated on the after tax cost to Ms. Hann. I leave counsel to work out the specifics and, if they have any difficulty, then I will be open to a telephone

conference to finalize this aspect, but I would not anticipate such would be required.

ORDER

[20] I await an Order from counsel incorporating the determinations.

J.