IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Maintenance Enforcement) v. Stuckless, 2003 NSSC 321; formerly 2003 NSSF 33

Date: 20030813
Docket: S.F.H.MEA 013903/000333
Registry: Halifax

Between:

Director of Maintenance Enforcement
for the Province of Nova Scotia

Applicant

v.

Everett Roger Stuckless

Respondent

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: August 11th, 2003 in Halifax, Nova Scotia

Counsel: Megan E. Farquhar, for the Applicant
Everett Roger Stuckless, Personally

By the Court:

BACKGROUND

[1] This matter relates to arrears of child support and it has a lengthy and checkered career. Initially, it was set down for hearing before me on June the 12th, 2003; however, I could not proceed as there was no affidavit of personal service upon Mr. Stuckless and, therefore, I set the matter down before myself on the August the 11th, 2003.

[2] The first order appears to be an interim order of the Manitoba Queen's Bench of September the 6th, 1994 which required child support of $1,000.00 per month commencing the 15th of September, 1994 for Everett Isaac James Stuckless, born July the 5th, 1983; Melanie Mary Stuckless, born March the 11th, 1986; and Darren Joseph Stuckless, born July the 6th, 1987. The order also directed full disclosure by Mr. Stuckless of his financial affairs. The next order appears to be a garnishee order by then Judge R. James Williams of the Nova Scotia Family Court in relation to arrears of $8,000.00 fixed May the 11th, 1995.

[3] Judge Williams issued a further order on March the 22nd, 1996 fixing the arrears and this order was amended to correct the amount. The amount of the arrears fixed at that time were $16,000.00 to be paid in increments of $250.00 per month. It also continued the $1,000.00 interim order. The divorce judgment was issued September the 3rd, 1997 in Manitoba which was registered with the Supreme Court of Nova Scotia October the 1st, 1997 and this set the child support payments to $638.00 per month, payable on the 15th day of each and every month commencing September the 15th, 1997. This is the existing order. While this order was made after May the 1st, 1997, it appears to have been treated by the parties as a variation of the tax deductible interim order and this should be clarified. I do note that the order specifically referred to Mr. Stuckless's then income and I strongly suspect that the child support was set in accordance with the federal child support guideline and that the existing order does not carry a tax deductibility. Mr. Stuckless has been able to obtain tax relief to the extent of any payments he has made over the years, including in 2002.

APPLICATION

[4] This is an application by the Director of Maintenance Enforcement for the Province of Nova Scotia to fix the arrears of child support. The application is pursuant to s. 37 of the *Maintenance Enforcement Act* and the relief sought is to have the arrears paid in full by a specific date, for Mr. Stuckless to pay the outstanding fees and costs and an order for incarceration of Mr. Stuckless in the event of any failure to pay the arrears as the court determines and orders.

LEGISLATION

Subsection 37(2) of the *Act* sets out two presumptions at a hearing held pursuant to Section 37:

> **37(2)** At a hearing pursuant to this Section, unless the contrary is shown,
>
> **(a)** the Payor is presumed to have the ability to pay the arrears owing and to make subsequent payments under the maintenance order; and
>
> **(b)** a statement of arrears prepared by the Director is presumed to be correct as to the arrears owing.

Subsection 37(3) of the *Act* states:

> **37(3)** At a hearing pursuant to this Section, the court, unless it is satisfied that the payor is unable for valid reasons to pay the arrears or to make subsequent payments under the maintenance order, may order that

(a) the payor pay all or part of the arrears in such manner as the court considers just;

(b) the payor pay the arrears in full by a specified date;

(h) the payor report periodically to the court, the Director or a person specified in the order;

(j) the payor be imprisoned continuously or intermittently for not more than six months unless the arrears are sooner paid;

(k) the payor be imprisoned continuously or intermittently for not more than ninety days on default in any payment ordered pursuant to this subsection;

(n) a judgment be entered pursuant to Section 38;

(p) the payor pay any costs that the court considers just including fees of the Director;

(r) an execution order be issued.

37(6) Imprisonment of a payor pursuant to clauses (3)(j) or (k) does not discharge arrears under a maintenance order and does not preclude a subsequent imprisonment pursuant to subsection (3) for the same arrears.

APPLICATION FOR ADJOURNMENT

[5] Mr. Stuckless wrote to the court on August the 4th, 2003 requesting an adjournment and the court immediately responded indicating that his application for adjournment would be heard on the date set for the hearing, August the 11th, 2003 and, if not granted, the application of the Director would proceed.

[6] Mr. Stuckless made representations and was cross-examined on the question of whether or not an adjournment should be granted.

[7] Mr. Stuckless indicated that on August the 7th, 2003 he had contacted a Mr. MacDonald, a lawyer in Manitoba, and that there had been discussions with respect to retainer, etc. Mr. Stuckless indicated that Mr. MacDonald's paralegal was going to deal with the file initially but, subsequently, indicated that it involved too much for her to handle as directed. Mr. Stuckless indicated that Mr. MacDonald would be making an application to vary the order with respect to the arrears of maintenance and the continuing level of child support. This was to take place within 30 days.

[8] Mr. Stuckless made an application to vary in 2002 and he is aware that his application to vary the child support was dismissed. The dismissal order was apparently granted in January 2003.

[9] In addition, Mr. Stuckless acknowledged that he has resided at his present place of residence for the past several years and that he had received written material dated May the 12th, 2003 from the Maintenance Enforcement's solicitor, Megan Farquhar, indicating that the Director's application was being heard in Supreme Court on June the 12th, 2003. Mr. Stuckless ignored the reference to a hearing June the 12th received by him in the mail and his explanation is he misunderstood the date and he claims he contacted another solicitor but could not come up with the name of this solicitor.

[10] I make the following findings:

1. Mr. Stuckless knew, by virtue of the material mailed to his present address, May 12th, 2003, that this application was coming forward June the 12th, 2003.

2. Mr. Stuckless received communications with respect to June the 12th, 2003 at his present place of residence where he has resided for several years.

3. Although Mr. Stuckless claims that he engaged a lawyer in May 2003, he is unable to provide the name of such solicitor and at no time did he communicate to

Maintenance Enforcement or its solicitor that he had engaged a lawyer, let alone who he had engaged.

4. Mr. Stuckless recognized that, as he had not received personal service, he could get away with not attending on June the 12th and I do not accept his explanation that he simply got the date mixed up to a different date in June.

5. Mr. Stuckless was served personally with notice of this application for August the 11th, 2003 on July the 7th, 2003.

6. If Mr. Stuckless did in fact communicate with a lawyer, Mr. MacDonald in Manitoba, he did not at any time convey this to Maintenance Enforcement or its solicitor.

7. At no time in relation to this application has the Director of Maintenance Enforcement or its solicitor received any communication from any solicitor on behalf of Mr. Stuckless.

[11] I had an opportunity to observe Mr. Stuckless on the stand and it is clear that he has embarked upon a deliberate course of conduct to delay and avoid payment and this application to determine and set the arrears with whatever consequences may follow from such determination. It is of interest, but not a factor for determination of the motion for adjournment, that Mr. Stuckless has failed to provide adequate financial disclosure virtually from the outset and he acknowledged that there was a memorandum directing disclosure from Justice Deborah Gass February the 3rd, 2003 and that he did not comply. Additionally, there were numerous requests by Ronald Borne, Regional Co-Ordinator with the Maintenance Enforcement Program for the Province of Nova Scotia, for

information and documentation and at no time was there ever a satisfactory level of response from Mr. Stuckless.

[12] Given the history of this matter and the conclusion beyond a reasonable doubt that Mr. Stuckless has conducted himself for years by deliberate courses of action to foster delay and that his present representations are simply more of the same, his application for adjournment is dismissed and the application will proceed forthwith.

FINDINGS - APPLICATION

[13] The first determination is whether or not the Director of Maintenance Enforcement has established the arrears outstanding. There is no need in this factual situation to rely upon the presumption in the *Statute* as I find the evidence of Ronald Borne, through his affidavits and documentation as well as his evidence in direct and upon cross-examination by Mr. Stuckless, clearly and unequivocally establishes the arrears outstanding. I find the arrears outstanding and established to August the 8th, 2003 to be in the amount of $51,978.04 and in addition, on one occasion a cheque from Mr. Stuckless in the amount of $700.00 was subsequently N.S.F. and the Director paid out of its own trust funds this

amount and it is recoverable. I also find that it is reasonable and appropriate for Mr. Stuckless to pay the outstanding administration fees of $450.00, bringing the total outstanding arrears as of August the 8th, 2003 to the amount of $53,128.04.

[14] In so finding, I particularly find also that Mr. Stuckless is totally lacking in credibility. He is prepared to raise any and all arguments and suggestions that place blame and fault upon everyone else in the world but himself. He has conducted himself for years with a policy of avoidance and while intellectually he clearly understands the priority to be given for child support, his priorities throughout have been to attend to his own needs and comfort.

[15] Amongst the relief sought by the Director is entitlement to enter a judgment for the arrears and where there is going to be an order in any event, I am quite prepared to have specific provision contained in the order authorizing the entry of judgment. Normally, an application is not necessary. See *Clancey v. Clancey* (1991), 99 N.S.R. (2d) 147. S.38 of the *Maintenance Enforcement Act* does allow for an *ex-parte* application for judgment. The entry of judgment carries with it an entitlement to issue execution and such leave to do so is granted. No limitation is placed upon the Director of Maintenance Enforcement with respect to pursuing

any and all avenues for the collection of the arrears crystalized in a judgment. In addition, Mr. Stuckless is reminded of his obligation that continues under the divorce judgment for the payment of periodic child support as ordered.

[16] Having concluded and set the arrears as of August the 8th, 2003, the next determination is whether or not Mr. Stuckless has or has had the ability to pay.

[17] I previously referenced the directions to Mr. Stuckless for full and complete financial disclosure and the determination that he has failed to adequately provide the same. The Director issued a demand for information July the 18th, 2003 to the Bedford Branch of the T.D. Canada Trust and this brought forth some very revealing financial information with respect to Mr. Stuckless.

[18] This material included income tax information and, in particular, a copy of Mr. Stuckless's computer printout showing his line 150 income in 2000 at $43,139.00; 2001 - $42,966.00; and 2002 - $80,375.03. Mr. Stuckless says he disputes his 2002 income tax return, but it is interesting to note that, in order to reach his net income of $33,332.20, he has written off "operating expenses" of $39,832.83 and he has also entered a deduction for $6,000.00 child support.

[19] Included in the order will be a direction that Mr. Stuckless is to provide a copy of all his income tax returns in the future, whether filed or not, and they shall be provided on or before the 15th of May in each and every year commencing the 15th of May, 2004. In addition, he is to provide a copy of any and all notices of assessment in relation to his income tax returns starting with the year 2002 and they shall be provided immediately upon receipt by Mr. Stuckless. It will be interesting to see the position of Canada Customs and Revenue with respect to such a large deduction as "operating expenses" in his 2002 return. It is also interesting to make note that Mr. Stuckless still enjoys the benefit of a pre-1997 order which provides a tax deductibility for child support and the amount he is ordered to pay presently of $638.00 provides him with a net cost substantially less than the child support guideline for $33,300.00 of income; namely, $627.00 after tax dollars. If you utilize the federal guideline for his previous years' income, his child support in 2000 ought to have been $780.00 after tax per month and, in 2001, $778.00 after tax per month. In other words, Mr. Stuckless, on the surface, is paying an amount less than another parent who has a responsibility for three children.

[20] The T.D. Canada Trust not only confirms his income tax return information but also discloses that he and his second wife recently made a mortgage application which appears to have been approved as of July the 29th, 2003. This is for the then intended acquisition of a new home in Glen Arbour at a purchase price of $293,000.00 with a down payment/equity of $73,250.00. It also indicates a line of credit available to facilitate the acquisition. It is correct, as Mr. Stuckless points out, that he is only a guarantor on the mortgage and that the application makes reference to his present wife's parents; however, the gross income represented to the T.D. Canada Trust is the representation of he and his wife and it lists it at $5,140.00 monthly. Mr. Stuckless, in response to the question from the court as to the present income of his second wife, indicated she was on maternity leave and was presently being paid at the rate of $18,000.00 per annum.

[21] The financial information also indicates and Mr. Stuckless confirmed that he has RRSP's with Clarica of a value of approximately $20,000.00. He indicates that these are tied in to a pension arrangement and are not accessible. I have indicated to the solicitor for the Director of Maintenance Enforcement that she should check out the situation and, if it requires a consent to access or authority to transfer or whatever, that I would have no hesitation in making such an order. The

financial information indicates that both Mr. Stuckless and his new wife lease motor vehicles and he has resided for several years in a property owned by his second wife. It is interesting that the documentation from T.D. Canada Trust considers Mr. Stuckless as a joint borrower and that it considers amongst the assets - "joint interest in 43 St. George Boulevard, Hammonds Plains, N. S., estimated value $200M". It is not the purpose of this application to determine ownership or otherwise. Any interest he has in the existing matrimonial home would have to be subject to a separate hearing and on notice to the present Mrs. Stuckless. It is sufficient for the determination as to whether he has and has had the ability to pay is the recognition of the standard of living Mr. Stuckless has enjoyed with his present wife and the ability he has to join in the financing of a home costing almost $300,000.00 in a well known area that provides a number of benefits, including a lifetime entitlement to utilize the local golf club although probably with some additional fees.

[22] Very clearly, Mr. Stuckless has never accepted his responsibility for child support as being a priority and it is most unfortunate that somehow over the years he has not even been forced to pay the appropriate level of child support. He continues to delay and conduct his finances geared to his own priorities.

[23] Without reservation, I conclude he has now and has had the capacity to pay the child support ordered and the court must now directs its attention as to the consequences of his failure.

[24] The court indicated to Mr. Stuckless that it had to seriously consider a term of imprisonment and that he ought to come up with some program to address the arrears. Any such program would have to be significant and immediate. Mr. Stuckless's immediate response was that he had a contract with a particular company whereby he felt he could give a cheque today for $10,000.00, dated August the 31st and then an additional payment of like amount in January coupled with some continuous monthly payments. Obviously, there is no way of assessing, without reflection, the adequacy of such a proposal. Very clearly, in the past, he has made undertakings, including a written undertaking, to make payments and has defaulted. In other words, he has very little credibility when it comes to the responsibility for his children.

[25] What has been made clear to Mr. Stuckless is that, unless he comes up with something of considerable magnitude in a timely fashion to address the arrears that

meets the satisfaction of the Director of Maintenance Enforcement, then he will be required to satisfy the court as to why it should not issue a warrant for his immediate imprisonment, probably for the maximum term of six months.

[26] The final determination with respect to whether or not a warrant should be issued for his imprisonment is reserved, as is the issue of costs of this application. These outstanding issues will be addressed further by the court on Thursday, October the 2nd, 2003 at 9:30 a.m. Mr. Stuckless is well advised to obtain the assistance of counsel and he should be under no illusions that his days of delay and addressing his own needs and comforts in priority to child support have come to an end.

J.