DOCKET: FKMCA-050004

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
[Cite as: S.G.H. v. K.E.B., 2007 NSFC 4]

BETWEEN:

S. G. H.
-APPLICANT

AND

K. E. B.

-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATE HEARD: JANUARY 15, 2007

DECISION DATE: February 13, 2007

APPEARANCES: -JENNIFER YOUNG, ARTICLED CLERK, ACCOMPANIED BY ERIC STURK FOR THE APPLICANT
-THE RESPONDENT FORWARDED AFFIDAVITS BUT DID NOT APPEAR CITING HEALTH REASONS, NOR WAS SHE REPRESENTED BY COUNSEL

DECISION

By the Court:

1. The Applicant, S.G.H. seeks a recission in his child maintenance obligation for his daughter, retroactive to June 17, 2002, the date of her 18th birthday. The Respondent is the child's maternal grandmother who, since 1985, by consent order of the Family Court at Halifax, has had legal custody and has been the person to whom the maintenance was payable. The Applicant and the child's mother were subsequently divorced but, as by then custody was with the grandmother, there was no further custody or maintenance order by the Divorce court. There is no indication of any further orders or previous variation applications by any party to have the order varied.

2. This matter proceeded unusually. Prior to court the Respondent and the child's mother each submitted to the court, by Fax, copies of affidavits setting forth the facts from their perspective and asking that the maintenance be held to have been payable at least until June, 2005 when the child graduated from full-time attendance at Nova Scotia Community College. These documents were made available to counsel for the Applicant who expressly consented to their admissibility and agreed that those documents and the Respondent's own affidavit with attachments would be the record on which a decision could be made. Ms. Young, for the Respondent made representations which included some "evidence" not in any of the documents.

3. The Applicant and the child's mother separated shortly after the birth of the child in 1984. They signed a Separation Agreement whereby the child's mother would have sole custody of the child and he would pay $125 per month in child support, according to the Agreement, until:

> "a. The child attains the age of eighteen (18) years and ceases to be in full-time attendance at school, college or university and is not physically or mentally infirm;
> b. the child ceases to reside with the wife;
> c. the child marries;
> d. the child dies, or
> e. the child ceases for any reason to be a child of the marriage within the meaning of the Divorce Act."

4. In 1985 the child's parents consented to the Respondent having custody of the child shortly after the child's mother moved to Ontario. A Family Court order recognized Respondent's custody, (and was silent as to access), and provided that the child maintenance would henceforth be payable to the Respondent, "*...as per the Separation Agreement...*".

5. It would be very difficult for a person to have done any less for his child or contributed less financially than the Applicant has done. He says that he couldn't find the child or where she was living and that he hasn't seen her since 1998. He cited various efforts he has made. The grandmother says, however, that she has always lived in the same place since before the parents separated and indeed that the Applicant had shared this residence until the separation. The grandmother asserts, and this is not denied, that until 1998 that it is doubtful that the Applicant had given her as much as $1,000 in total in the thirteen years since the order, leaving by my rough estimate, some $18,000 unpaid for that period.

6. A printout from the Maintenance Enforcement Program shows only sporadic minimal payments since 1998, consistent with the fruits of a federal garnishee. Thus, from February of 1998 when the M.E.P. records begin, until June of 2002 when the Applicant argues that his obligation ceased, only $1,964.01 was

collected, whereas in that same period some $6,625 was due. From 1998 through 2002 his own tax records that he submitted shows that he earned an average of $38,885.42 per year. For the sake of interest, at that latter figure a Nova Scotia resident payor, (and I recognize that for a time he lived in Alberta), would have had to pay, under the Tables of the Child Support Guidelines, approximately $325 per month. He can therefore hardly maintain that the payment of $125 per month was oppressive. In 2002, the last year for which he supplied information, he earned $41,600, and at that rate his monthly support, per the Tables, would have been $347. I have no indication that his income has decreased in the interim.

7. In 1996 the child went to live with her mother who now lives in Dartmouth. The court order wasn't changed. The court order however, still bound the Applicant. His payments, if received, could simply have been forwarded along to the child's mother. The grandmother and the mother of the child both say that the child dropped out of full-time attendance in school in 1999 when she was in grade 8 because she was pregnant, having the child in 2000. Between then and late 2001, having taken correspondence courses, she obtained her grade 12 certificate. In 2002 she took part-time course at the Community College to get the pre-requisites to enter a course on American Sign Language. By September of 2003 she had gone from being in grade 8 through a high school certificate and thence through a Community College preparatory course. She then commenced full-time attendance at the Community College taking the sign language program, graduating in June of 2005. I accept this evidence. She is apparently living on her own now and with her child and struggling because she cannot find work.

8. The Family Court order, as noted, seemingly incorporated, advertently or not, the terms of the Separation Agreement as to the child maintenance, only changing the payee. At the time of that order the Family Maintenance Act was the applicable statute and it specifically provided, section 8, that a parent was under a legal obligation to support their child, absent "lawful excuse", so long as that child was then under the age of majority. The wording is identical in section 8 of the current Maintenance and Custody Act. The age of majority was then and is now, 19 years of age. (Age of Majority Act, Stats. N.S. 1970-71, c.10).

9. By adopting the age of 18 as the "cut-off date" (absent full-time attendance pursuing an education, illness or disability), the court made an order that was at odds with the legislation. Only a "lawful excuse", whatever that might be, can remove the statutory support obligation until the child is of the age of majority and that is not the kind of thing that can be determined some seventeen years in advance. To the extent that it is inconsistent with the legislation in my view it cannot stand. Furthermore, it is the provincial legislation, not the federal Divorce Act as the Separation Agreement provides, that determines eligibility for maintenance in the Family Court. One cannot fault the Applicant for not appreciating the legalities, but in my view that order and his understanding cannot over-ride the legislation.

10. Here the child achieved the age of majority while pursuing an education, albeit, for reasons unexplained, on a part-time basis, and within a little over two months was in full-time attendance at a Community College. Given her solid, even remarkable, accomplishments since dropping out of school in grade 8 she had to

have been very diligently applying herself to her education to the extent that it would be surprising if she could at the same time have been able to have been financially independent. Accordingly, notwithstanding the terms of the 1985 order I find that she remained a “dependent child” within the meaning of the legislation until she graduated from Community College in June of 2005.

11. I feel compelled to say that the Applicant’s almost total non-adherence to his maintenance obligation puts one very much in mind of the 1976 case of **Young v. Young** (1976), 17 N.S.R. (2d) 375 (S.C., App. Div.). However, the evidence clearly establishes that the child is no longer dependent, and hasn’t been since 2005, so I cannot very well decline a retroactive recission to that point in time. In doing so I express the hope that the Maintenance Enforcement Program will be vigourous in its pursuit of the arrears. At the current rate of collection under the federal garnishee the Applicant’s debt to the Respondent will take forever to be retired.

DECISION

12. The maintenance order herein will be retroactively rescinded effective with the payment due as of July, 2005.

Bob Levy, J.F.C.