IN THE FAMILY COURT OF NOVA SCOTIA
Citation: K.K.G. v. O.F.G., 2007 NSFC 28

Date: August 2, 2007
Docket: 04BG036253
Registry: Yarmouth

Between:

K. K. G.

Applicant

v.

O. F. G.

Respondent

Judge: The Honourable Chief Judge John D. Comeau

Heard: July 23, 2007, in Shelburne, Nova Scotia

Revised Decision: The text of the original decision has been redacted on September 6, 2007. This decision replaces the previously distributed decision.

Counsel: K. K. G., self-represented Applicant
O. F. G., Respondent (not present)

HISTORY:

[1] This is an application to vary an order of this court dated the 13th of June 2007.

[2] The relevant provisions of the order are as follows:

> "That based on the Respondent's annual income of $21,860.76 he shall pay child support in the amount of $169.00 per month retroactive to January 1, 2006 for the child, L. O. born November 1, 2002 to be paid on the 1st of each and every month thereafter through the Maintenance Enforcement Program."

[3] The June 13th order was made as a result of the Respondent's application to vary dated September 27, 2006. The matter was set for October 23, 2006 and further adjourned to October 30, 2006 at which time both parties were present and they arrived at an agreement with the professional assistance of Marci Melvin, Q.C., of Nova Scotia Legal Aid.

[4] The order is as follows:

> "That based on the Respondent's approximate annual income of $43,700, he shall pay child maintenance in the amount of $380.00 per month commencing November 1, 2006 for the child L. O. born November 1, 2002 and to be paid on

> the 1st of each and every month thereafter through the Maintenance Enforcement Program."

[5] Provision was also made for special expenses of $40 a month for the child's Blue Cross Insurance plan. That whatever the arrears were then, they should be $550 less. It was further ordered:

> "That the Respondent shall file income tax returns, T4's and all supporting vouchers for the previous years income by February 28 of each year, and the Family Court Officer may automatically reduce or increase child support payments based on this information and notice of same will be provided to each party and Maintenance Enforcement. Should either party dispute the amount, they may return to court at any time to have the matter heard."

[6] The order of June 13, 2007 reflected financial information the Respondent provided to the Family Court Officer.

[7] The Family Court Officer has no authority to adjust an order and consequently on an ex parte application to the court, he requested the order be varied to reflect the Respondent's real annual income. The result was the order of June 13, 2007.

[8] The Applicant (payee) has come back to the court as per the provision of the October 30, 2007 order to object to the retroactive nature of the order. She argues

that the order should be made payable commencing on January 1, 2007 rather than January 1, 2006. That the consent order of October 30, 2006 was based on an annual income in 2005 of $43,792.90. She believes child support is and should be always payable on the previous year's income. She does not dispute the financial information presented to the court re: the Respondent's income.

ISSUES:

[9] Determination of annual income under the Child Support Guidelines, adjustment to orders and retroactivity.

[10] Whether notice to the Respondent is required?

THE LAW:

[11] The child maintenance guidelines provide for determination of annual income in section 16 as being the amount (total income) in the T1 general form issued by the Canada Revenue Agency. In this particular case, the Respondent's

annual income in 2005 was $43,792.90. His total income for 2006 was $21,860.76 and the table amount is $169.00.

[12] Section 37 of the Maintenance and Custody Act allows the court to vary an order for child support where there is a change in circumstances since the last order made by the court. In this particular case, the Applicant was given the option by court order dated October 30, 2006 (issued November 1, 2006) to return to court for a hearing if she disputed any adjustments to child support based on information provided to the Family Court Officer. Because the matter was left open in this manner, the ex parte order in itself is a change in circumstances that gives the court jurisdiction to vary.

[13] This is a matter where notice under the Family Court Rules is not required because the court is dealing with variation of an ex parte order.

MAIN ISSUE OF RETROACTIVITY:

[14] The decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.* 2006 37 deals with child support and retroactivity. The following principles were set out:

> "Parents have an obligation to support their children in a manner commensurate with their income, and this obligation and the children's concomitant right to support exist independently of any statute or court order."

> "...Thus, under that scheme (Guidelines), payor parents who do not increase their child support payments to correspond with their incomes will not have fulfilled their obligations to their children."

> "In determining whether to make a retroactive award, a court should strive for a holistic view of the matter and decide each case on the basis of its particular facts."

> "... In doing this, the court should consider the reason for the recipient parent's delay in seeking child support, the conduct of the payor parent, the past and present circumstances of the child, including the child's needs at the time the support should have been paid and whether the retroactive award might entail hardship. Once the court determines that a retroactive child support award should be ordered, the award should, as a general rule, be retroactive to the date of the effective notice by the recipient parent that child support should be paid or increased, but no more than three years in the past. Effective notice does not require the recipient parent to take legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume the status quo is fair. However, where the payor parent has engaged in blameworthy conduct, the date when the circumstances changed initially will be the presumptive start date of the award. Finally, the court must ensure not only that

> the quantum of a retroactive support award is consistent with the statutory scheme under which it is operating, but also that it fits the circumstances.”

> “...at all times, the court should strive for a holistic view of the matter and decide each case on the basis of its particular factual mix.”

CONCLUSIONS/DECISION:

[15] This is a review of an exparte order in which the court has determined notice to the Respondent is not necessary.

[16] The Respondent’s income dropped from $43,792.90 in 2005 to $21,860.76 in 2006. He applied in September 2006 to have child support reduced as per the Child Support Guidelines.

[17] On October 30, 2006, by court order, arrears were set at $550 less than what they were (no figure given to the court). Child support was to be reduced or increased based on the Respondent’s annual income, the details of which he was to provide to the Family Court Officer.

[18] The Applicant is concerned that the retroactive order to January 1, 2006 will wipe out the arrears that existed on October 30, 2006 and that she may owe the Respondent money she has received and spent on the child.

[19] *D.B.S.*, supra is authority for looking at each case on its own particular facts. The court, therefore, is of the opinion that it would be contrary to the child's best interest to interpret the order of June 13, 2007 as eliminating the child support arrears that existed on October 30, 2006. Nor should it mean that monies received by the Applicant on behalf of the child should be repaid to the Respondent either in the form of credit or cash.

[20] The court will issue the following order:

> "The orders of this court dated October 30, 2006 and June 13, 2007 are hereby confirmed to be in full force and effect and enforceable through the Director of Maintenance Enforcement. This includes arrears that existed on October 30, 2006 and;
>
> It is further ordered, for the purpose of clarification, that neither of these orders shall operate to require the Applicant to repay (by credit on arrears or by cash) any child support the Respondent may have paid prior to retroactive order of June 13, 2007."

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John D. Comeau
Chief Judge of the Family Court of Nova Scotia