

IN THE FAMILY COURT OF NOVA SCOTIA
Citation: Wood v. Legge, 2004 NSFC 12

Date: 20040920
Docket: FK-031264
Registry: Kentville

Between:

Sonja Wood

Applicant

v.

Hubert Legge

Respondent

Judge: The Honourable Judge Corrine E. Sparks, J.F.C.

Heard: Kentville, Nova Scotia
June 11, 2004 and July 23, 2004

Written Decision: September 20, 2004

Counsel: Jonathan Cumming, (Article Clerk) for the Applicant
Tim Peacock, for the Respondent

By the Court:

[1] The primary issue on this application by Sonja Wood is the matter of retroactive child support for Alysha R. Legge-Wood, who is 9 years of age, prior to the application date. Secondly, *defacto* joint custody is also in dispute between the parties as the father, Hubert Legge, is seeking an order for shared physical custody of Alysha at least forty percent of the time. Placement of Alysha on her father's medical and dental plan as well as transportation in a motor vehicle operated by a driver with a valid license and satisfactory motor vehicle inspection have been resolved by the parties.

FAMILY RELATIONSHIPS AND CHILD CARE ARRANGEMENTS:

[2] During the hearing, five witnesses testified including the parties themselves. Briefly, the parties co-habited in a common-law relationship for five years which ended in June, 2000. No substantial support was paid by Hubert Legge since 2000, nor was there a formal demand for child support until this application which is dated April, 2004. Apparently, shortly after the parties separated there was an outstanding debt concerning a telephone account. While there is a discrepancy between the

parties concerning the manner in which this debt was paid, there does not seem to be any intention on the part of either party that payment of this debt would be in lieu of child support payments for Alysha. In any event, after the telephone account was settled between the parties, Sonja Wood requested that Hubert Legge pay child support in the amount of \$180.00 per month. It seems one or two payments were made, and then sporadic payments of up to \$100.00 at various and irregular times. However, since this application was filed, \$180.00 has been paid by Hubert Legge.

[3] Since the separation, Sonja Wood explained she has encroached on her capital assets to support herself and her two daughters, Alysha and Ayla. Ayla, who is a child from a previous relationship, is not the subject of this application; however, Sonja Wood does receive child support from Ayla's father in the amount of \$188.00 monthly. Sonja Wood is confined to a wheelchair with physical disabilities, has no full-time employment, and, at times, has been a community advocate. She is self-employed, operating a small museum from her home. Her business is not self-sustaining, and operates during the tourist season only. Regarding the delay in requesting child support, it was explained by Sonja Wood that the separation between herself and Hubert Legge was very emotional for her, and as she knew Hubert Legge was similarly experiencing emotional and financial difficulties with the separation,

she, therefore, elected to “let it go”. In fact, one Christmas knowing the dire financial need of Hubert Legge, Sonja Wood actually provided him with \$200.00 in cash. She says she took “a lot of flak”, and kept her mouth shut over the years. However, on those occasions when she did request child support from Hubert Legge, she became embarrassed. Nonetheless, as recently as April, 2004 she again requested child support, at which time Hubert Legge became annoyed and hollered at her. According to Sonja Wood, she was told by Hubert Legge to get a job, and she should be paying support to him.

[4] Regarding the request for joint custody, Sonja Wood believes the custodial arrangement presently in place should remain in tact. Both girls are in the primary care of their mother with visitation alternate weekends with each father. They spend one weekend with Alysha’s father, Hubert Legge, and the alternate weekend with Ayla’s father; plus every Wednesday, alternatively, is spent with either Hubert Legge or Ayla’s father. Each father has the same amount of time with the girls. During the school year, Sonja Wood has the children from Monday, Tuesday and Thursday as they are picked up from school for access visits which start on Friday after school and finish on Monday after school when the girls are returned to their mother’s care. Sonja Wood has the children during the day during the summer months, and she

refers to this as her time, however, she does point out that she does not have much time with the girls and this has been difficult, especially when relatives are in town visiting. She wishes to have the girls continue their visits as presently scheduled, and furthermore she itemized the benefits accruing to Alysha from her visits with Ayla's father such as swimming, library visits, riding lessons, etc. Generally speaking, she states Alysha enjoys the visits with her sister, Ayla, and Ayla's father, and furthermore she would prefer the children to remain together during their visits with these two different fathers.

[5] Responding to the request for retroactive child support, Hubert Legge says he is insulted when Sonja Wood claims he has not paid child support regularly. He submits he has spent money on Christmas and vacation for Alysha, and has only missed four months' payment. No receipts have been provided to the court however. He has been employed since December, 2001 with a starting salary of \$31,000.00, and he presently earns \$37,514.00. He is and has been employed by a local school board full-time providing computer maintenance.

[6] Hubert Legge is recently married, and has purchased a home for the sum of \$70,000.00. The down payment was taken from his RRSP account.

[7] Hubert Legge would like to have Alysha in his care one extra weekend per month, and states that he believes that Alysha should have maximum contact with each parent. He would like to see her call one place home, and not see his daughter “living out of a bags” as he describes it. Alysha is described as an endearing and loving child. He seeks to have shared custody with Alysha spending at least forty percent of her time with him.

APPLICATION FOR RETROACTIVE CHILD SUPPORT:

[8] Retroactive child support can be best described as an exercise of the application of judicial discretion in “appropriate” circumstances as prescribed by relevant case law. Judicial discretion has been applied throughout the country with various approaches, and with various guidelines provided by provincial appellate courts see: **Gordon, Marie: Retroactive Child & Spousal Support, paper presented at the 2004 National Family Law Conference, LaMalbaie, Quebec.** It seems in applying the legal test, especially on an application for retroactive support prior to the application itself, is no longer one of “exceptional circumstances”, but rather more a matter of “appropriate circumstances”. These “appropriate

circumstances” have been itemized, generally, as circumstances where there is “intimidation, intentional non-disclosure or under reporting of income, and knowing that the children are in financial need and ignoring that obligation”, see paragraph 22 in *Whitton v. Shippelt* (2001) ABCA 307. In applying this approach Mason, J. in *Miller v. Miller* (2003) ABQB 689 at paragraph 41 lists several factors which should be considered and weighed on an application for retroactive child support prior to the commencement of an application and they are:

1. Retroactive child support should not solely operate to redistribute capital between the parties;
2. The payor should not be treated unfairly by a sudden demand to pay support for a period which, objectively, a reasonable parent would think has passed;
3. Where the payee has clearly indicated an intent to pursue child support, the passage of time cannot diminish the obligation of the non- custodial parent;
4. The children and not the payee parent should benefit first and foremost from retroactive child support orders;
5. If the child’s needs can only be met by a retroactive maintenance order, then the Court should exercise its discretion accordingly;
6. A broad or contextual rather than a structural view is appropriate;
7. Appropriate circumstances include, but are not limited[sic] these scenarios...

[9] Roscoe, J.A. in *Conrad v. Rafuse* (2002) 27 R.F.L.5th 315(N.S.C.A), at paragraph 14, affirmatively comments on judicial jurisdiction to make an order for retroactive child support which pre-dates an application, even in the absence of

blameworthy conduct of the payor. At a policy level, the court then goes on to adopt the guidelines promulgated *S. (L.) v. P.(E.)* (1999), 50 R.F.L. 4th 302 (B.C.C.A.) at paragraph 66 as follows:

A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodian parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

Factors militating against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

[10] Legislatively, under Section 37 of the **Maintenance and Custody Act**, there is specific reference to retroactive support as it states the court may, “make an order varying , rescinding, or suspending, prospectively or retroactively...” Unlike Section 37 of the **Maintenance and Custody Act**, Sections 9 and 10 have no specific reference to retroactive child support, however, Section 10 states child support, principally, must be in accordance with the Child Support Guidelines. It should be

mentioned that the **Child Support Guidelines** in Section 1 sets out the following objectives:

- (a) to establish a fair standard of maintenance for children that ensures that they benefit from the financial means of both parents;
- (b) to reduce conflict and tension between parties by making the calculation of child maintenance orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance orders and encouraging settlement; and
- (d) to ensure consistent treatment of parents and children who are in similar circumstances. [Emphasis added]

Plus Section 8 of the Act itself explains every parent is under a legal duty to provide reasonable needs for a child, unless there is a lawful excuse for not doing so.

[11] I have considered, among other cases, *Reardon (Smith) v. Smith* (1999) 180 N.S.R.(2d) 339 (N.S.S.C); and *Lee v. King* (2001) N.S.R. (2d) 75 (N.S.C.A). In *Reardon (Smith) v. Smith*, the court found there is no explicit authority in Section 15 of the **Divorce Act** to either “authorize” or “prohibit” retroactive child support. In awarding child support, the court applied the preamble of the **Child Support Guidelines** as well as the principles which apply for child support to be awarded in an amount lower than the amount stipulated in the tables. It was also reaffirmed that maintenance is indeed the right of the child. In *Lee v. King* the Nova Scotia Court of Appeal decided that child support, pursuant to the **Family Maintenance Act** could

be ordered retroactively to the date of paternity test results and the commencement of the application. Commenting by way of obiter, Flinn, J. stated, “assuming without deciding that there is jurisdiction to make the order effective prior to the date of the filing of the application, the record here does not support its exercise”.

[12] All in all, from a review of the case law and legislation, I am persuaded this is an appropriate case for the court to award retroactive support beyond the date of commencement of the application. In the present circumstances, I find Sonja Wood made ongoing requests for support, but these requests were never taken seriously by Hubert Legge. Furthermore, I find the actions of the respondent father have not been consistent with the objectives of the **Child Support Guidelines** in that he did not meaningfully or substantially acknowledge his joint responsibility to financially contribute toward the costs of child rearing. Although, it seems Hubert Legge occasionally made sporadic child support payments to Sonja Wood, these payments were never consistent, and these sums are unsubstantiated. I do not accept Hubert Legge’s evidence that he made regular payments for child support. Furthermore, Hubert Legge has been able to build up his RRSP savings and draw from these savings in order to recently purchase a new home, while at the same time forcing Sonja Wood to draw upon her capital resources in order to provide child rearing

necessities for their daughter. As well, I accept the evidence of Sonja Wood that the parties have had verbal disagreements over child support resulting in insulting comments directed toward Sonja Wood. This is viewed as intimidating behaviour on the part of Hubert Legge. It is more difficult to discern the motives of Hubert Legge when he suggested that Sonja Wood should get a job, especially in view of her apparent physical disabilities. It seems to me, while she may be employable, any employment prospects for her would have enormous limitations.

[13] Significantly, Hubert Legge has been employed since December, 2001, with a starting annual gross income of \$31,000.00, but yet he did not make appropriate arrangements to share child rearing expenses with Sonja Wood despite her requests and attempts to negotiate a settlement between the parties. Although, funds have been expended for gifts, vacations and clothing for Alysha, this cannot be construed by the court as a substitute for regular monthly child support. In fact, the evidence concerning these expenditures was vague and unconvincingly presented to the court. Given the lack of record keeping by either party, and the vague financial evidence regarding child support payments, only a modest adjustment should be made for sums paid by Hubert Legge directly to Sonja Wood. There will, however, be no financial credit given for gifts, trips and other funds expended on Alysha, particularly since the

respondent knew he was jointly responsible for Alysha's expenses. The court has also taken into account that Hubert Legge has been gainfully employed since 2001, but his employment sources before 2001 are uncertain. I accept that prior to 2001 Hubert Legge lacked the financial capacity to contribute toward child rearing expenses for Alysha. It would, therefore, seem reasonable to calculate any retroactive child support payments from the date of his employment in December, 2001.

[14] In accordance with the **Child Support Guidelines**, Hubert Legge would have been required to pay the sum of \$266.00 per month based upon his gross annual income of \$31,000.00 which started in December, 2001. Calculating monthly child support for 27 months at the rate of \$266.00, excluding the month of the present application, the sum of retroactive child support owing is \$7,182.00. At the conclusion of the hearing, the court ordered child support pursuant to the **Child Support Guidelines** retroactive to the date of the commencement of the application, that is, April, 2004. Under the circumstances, given that Hubert Legge is required to pay ongoing monthly child support in the amount of \$266.00, and in consideration that he has, albeit, inconsistently paid support there should be a reduction in the outstanding retroactive child support owing. In the present circumstances, I would, accordingly, reduce and fix the retroactive support in the amount of \$5,000.00.

APPLICATION FOR JOINT AND SHARED CUSTODY:

[15] Regarding the request by Hubert Legge for shared custody which in effect would mean Alysha would have reduced time with her mother. I cannot agree such an arrangement is in Alysha's overall best interest. It seems to me Alysha is a lovely young girl who has adjusted reasonably well to the time she shares with her biological parents and her sister's father. This is a blended family which seems to be functioning well, not only regarding Alysha's overall adjustment but also concerning her interactions with her sister. Alysha seems to enjoy sharing access visits together with her sister and this seems to be working well for her. In short, there is no convincing evidence to support an order for shared custody with expanded contact with Hubert Legge. Although Hubert Legge bases his application on the premise that Alysha should have maximum time with each parent, which as a post-separation parenting principle and objective, is always laudable, but not always practical. Nonetheless, it must be remembered that the objective of maximum time with each parent is only one of several objectives under the rubric of the best interest of the child rule: see *King v. Low* (1985) 44 R.F.L. (2d) 133 (S.C.C.), *Foley v. Foley* (1993) 124 N.S.R. (2d) 198 (N.S.S.C.) particularly paragraph 16, and more recently *Dixon*

v. Hinsley (2001) 22 R.F.L. (5d) 55 (Ontario Court of J). Broadly speaking, Zuker,

J in *Dixon v. Hinsley* at page 72 explains:

The “best interests” of a child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual and moral well being of the child. A court must look not only at the child’s day to day needs but also to his or her longer term growth and development. It is characterized by its fluidity and flexibility to respond to the circumstances of each child. This is its strength.

[16] In the present circumstances, I find Alysha spends considerable meaningful parenting time with Hubert Legge. Although, she is back and forth between the homes of both parents, she is still able to share time with her sister, Ayla. Sibling bonding is important to Alysha’s overall long term development, as is her parenting time with her father. It seems to me a balance has already been struck, therefore, the court should not interfere without a compelling reason to do so.

[17] Furthermore, Hubert Legge’s request for shared parenting forty percent of the time appears to be curiously coincidental as an attempt to fit within the parameters of Section 9 of the **Child Support Guidelines** for reduced child support payments. In the end, based upon all of the evidence, on the balance of probabilities, I find it is Alysha’s best interest to maintain the status quo with the *de facto* joint custodial arrangement already in place for her.

[18] To recapitulate the following is hereby ordered:

(1) That Alysha is hereby placed in the joint custody of Sonja Wood and Hubert Legge, with Sonja Wood having primary care and control of the child subject to reasonable access upon reasonable notice.

(2) That reasonable access shall include access every alternate weekend commencing Friday after school and ending Monday morning with the return of Alysha to school and each alternate Wednesday afternoon after school until Thursday morning. There shall be such other reasonable access as can be mutually agreed upon between the parties from time to time.

(3) That by consent the parties agree that during access visits Alysha shall be transported in a motor vehicle which is being operated in compliance with the **Motor Vehicle Act** by a duly licensed driver with a vehicle which is properly insured and safety inspected.

(4) That the parties agree Alysha will be placed on Hubert Legge's medical and dental plan provided through his employment.

(5) That based upon Hubert Legge's gross annual income of \$37,514.00 child support pursuant to the **Child Support Guidelines** is hereby set in the amount of \$315.00 from the date of the application April, 2004. Payments may be made on a bi-weekly basis (\$145.49) payable directly to the Maintenance Enforcement Plan.

(6) That the application for retroactive child support is granted to December, 2001 and fixed in the amount of \$5,000.00 with timely payment arrangements to be made with the Maintenance Enforcement office within sixty days.

(7) That there shall be no order respecting costs.

[19] Order accordingly.

Corrine E. Sparks, J.F.C.