

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Hubley v. Tanner, 2012 NSSC 338

Date: 20121019

Docket: 1201-48902

SFHD13728

Registry: Halifax

Between:

Sheila Bridget Hubley

Applicant/Petitioner

v.

Arthur Edward Tanner

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

September 17, 2012 in Halifax, Nova Scotia

Counsel:

Jennifer Schofield, Counsel for Sheila Hubley
Arthur Tanner, Self-Represented

By the Court:

[1] The parties were divorced effective December 28, 1996. There were two children of the marriage: Nathan born January 27, 1989 and Alissa born October 13, 1990.

[2] The respondent father Arthur Tanner was unemployed from November 2001 and was in receipt of employment insurance of \$21,476.

[3] A variation application occurred reflecting the fact that their oldest child (a son) went to live with his father in September 2006 at the age of 17 . This resulting in a variation of the original order dated June 18, 2002.

[4] The set off resulted in a payment of \$452 owed by Mr. Tanner on a monthly basis to the mother Sheila Hubley.

[5] A further variation and consent court order was issued December 14, 2009. The parties agreed that both children were no longer in school. The son was living with the father and the daughter with the mother.

[6] On December 14, 2009, Associate Chief Justice Ferguson (as he then was) granted a consent order terminating child support **effective November 1, 2009** given that the children attained 19 years of age, were employed on a full-time basis and neither was attending an educational institution.

[7] Although Mr. Tanner overpaid based on the old orders (\$3,079), the parties came to an agreement that child support cease effective November 1, 2009. Mr. Tanner would not seek repayment of the overpayment. Child support arrears were fixed by order at nil.

[8] Ms. Hubley advises that the daughter graduated from Sackville High School in June of 2009 with a grade 12 education. She was 18 years of age. Mr. Tanner continued to pay child support from June to November 2009.

[9] Between June 2009 and September of 2010 Ms. Hubley advised her daughter worked two jobs, resulting in full time work.

[10] The daughter registered in university commencing September 2010 some 15 months later at 19 years of age. She would be 20 in October 2010.

Application for Retroactive and Prospective Child Support /Delay

[11] **On November 30, 2010** Ms. Hubley filed a variation application seeking to reinstate child support for the daughter, retroactive to September 2010. She was required to file financial documentation to perfect her application.

[12] The matter was scheduled for a pre-trial conference on May 9, 2011.

[13] More than six months later her documentation was not filed in order to perfect the application. On June 15, 2011 the application was discontinued.

[14] Discussions between the court office and Ms. Hubley about a new application occurred on September 26, 2011. A meeting occurred between court staff and Ms. Hubley on October 27, 2011. At that time no application had been filed.

[15] Ms. Hubley was to send the final documentation to support the variation application to the court by January 9, 2012. This documentation was finally filed on **February 23, 2012** and the matter set down for a hearing.

[16] Ms. Hubley sought to recover child support and section 7 university expenses retroactively to September 2010.

[17] Ms. Hubley acknowledged that Mr. Tanner contributed \$3,000 toward these expenses during this time. In addition, he contributed \$4,300 for a car, plus an additional \$1,280 for tires and maintenance.

[18] Ms. Hubley advised in conciliation that her daughter's school expenses for the 2010 and 2011 year were \$7,200.

[19] In addition, for two years the daughter contributed a total scholarship of \$2,000, a student loan and she brought in to the equation \$3,000.

[20] Ms. Hubley advises by January 2012 she contributed \$4,202.66.

[21] Obviously the Court does not have sufficient evidence to determine with any certainty the actual expenses to which everyone contributed.

[22] When I advised the parties I would consider the transportation contribution of \$4,420 made by the father in the 2010 -2011 year towards the daughter's transportation costs, the mother withdrew her request for retroactive section 7 expenses.

Facts

[23] From November 2009 to September 2010, the daughter was not involved in an educational course and was working.

[24] In September of 2010 she commenced her degree program at St. Mary's University.

Issue

[25] The issue before the Court is what if any child support contribution (retroactive and prospective) should be made toward the child support for the daughter while she is in attendance at university and living at home.

[26] The Court cannot go beyond the November 2009 order to consider Mr. Tanner's overpayment as a setoff if child support is due and owing.

The Student's Income

[27] In 2009 the daughter declared income of \$8,936; \$14,503 in 2010; and \$5,184.31 in 2011.

[28] I will attempt to summarize the evidence on their respective contributions even though the evidence is not always precise and is incomplete.

[29] I recognize the mother is not seeking retroactive section 7 expenses. I do this to lay a foundation for the decision and for future applications should the

parties not resolve their differences.

[30] Ms. Hubley stated her daughter entered the September 2010 entrance term with \$3,000 in savings. She received during the first two years \$2,000 in scholarship, some bursary money (\$641.50 and \$590.18) and a student loan as her contribution towards her living expenses. She also had some summer savings although this appears minimal.

[31] In November of 2010 Mr. Tanner purchased a 1999 Honda Civic for \$4,300 in order to assist the daughter commute to university.

[32] Mr. Tanner had the vehicle rust checked twice, costing approximately \$240, replaced the water pump, new timing belt and new door lock, costing approximately \$400 and purchased four new summer tires mounted on rims for the approximate cost of \$600. In addition, he contributed \$1,000 toward the daughter's expenses.

[33] Ms. Hubley admits that Mr. Tanner did assist the daughter with tuition in the first academic year in that he contributed \$3,000 toward her tuition in the 2010-2011 academic year. That does not include the cost of the car.

[34] Ms. Hubley purchased her daughter's books at \$731.08; paid her parking pass for \$400 and contributed \$1,507.50 toward tuition.

[35] Ms. Hubley's indicates her contribution to the past special expenses exclusive of room and board was \$4,204.66.

[36] This also does not account for the daughter's residence and food costs. The daughter lives with her mother.

[37] This does not include a calculation for any other repairs to the car done by either parent and gas costs.

[38] In 2012 the daughter's section 7 costs were covered by student loan.

[39] For the next term, Ms. Hubley anticipates the daughter will have a student

loan.

[40] Ms. Hubley is seeking a contribution towards her daughter's tutoring costs.

Summer Employment

[41] For the last two summers (2011 and 2012) the daughter has flown to Italy to gain employment. Ms. Hubley first suggested this was a good experience for her daughter. She later added that the daughter left Nova Scotia because of the difficulty in the relationship between the father and the child. However, there were other more plausible reasons for the trip to Italy.

[42] The daughter has made no effort to find employment during the summer months in Nova Scotia.

[43] In the second summer, the daughter returned to Italy and came home shortly thereafter only to go back to Italy during the same summer break costing a total of \$2,000.

[44] Given the expense for university, looking for employment in Italy was not a reasonable cost. Most of her earnings were used to pay for the cost of the flight.

[45] The daughter is currently working (according to the mother) four shifts a week, earning \$10 per hour.

[46] The daughter was approved for her first student loan of \$6,002 and she has to apply for the second student loan.

[47] Paragraph 18 of Ms. Hubley's affidavit filed January 6, 2012 appears to suggest that not only did her daughter receive a Canada Student Loan for \$6,002, she also received a Canada Student Grant in the amount of \$2,000 although that is not evident in the calculations.

[48] This is a situation in which the child is covering as many expenses with her loan as she can. She is directed to make every reasonable effort to find work during the summer to assist herself.

[49] The financial positions of the parties appears to be as follows.

Ms. Hubley's Income

[50] The history of income for Ms. Hubley from 2008 to 2011 includes a gross 2008 income for her in-home hairdressing business of \$25,972 for a net income of \$11,712; gross income in 2009 of \$21,705 for a net of \$3,704; gross income in 2010 of \$20,970 for a net of \$4,249 and a gross income in 2011 of \$20,343 for a net of \$8,682.

[51] Ms. Hubley was unable to enlighten the court on the percentage of her household deductions attributed to the self-employment income. An analysis of the reasonableness of these deductions for the purposes of determining her net business income for child support purposes could not be completed.

[52] There was very little information given for the decline in business income other than some suggestion by Ms. Hubley that she is unable to maintain the same level of income given her health concerns.

[53] There were no specifics or details with respect to her health concerns and no evidence on which I can conclude that she unable to earn currently that which she earned earlier.

[54] To accept \$8,682 as her net income for the purposes of section 7 expenses would not be supported by the evidence and result in an unfair distribution of the section 7 expenses.

[55] I am unable to conclude that her 2011 income reflects her true ability to pay given the historic income and the lack of explanation for the decline.

Mr. Tanner's Income

[56] Mr. Tanner has a history of income in 2008 of \$46,722; \$100,191 in 2009; \$60,538 in 2010 and \$54,304 in 2011.

[57] His new employment income comes from base salary and commission.

[58] It has been estimated to be \$67,596, starting with a base of \$40,000 plus commission sales. It remains to be seen whether he will be able to attain and maintain this level of employment income for the 2012 year. Some retroactive adjustment may be necessary.

[59] Mr. Tanner advises that he is unable and unwilling to pay the child support on a regular monthly basis to Ms. Hubley given the history of his contribution and his current ability to pay.

[60] He advises that he waived reimbursement for his overpayment (\$3,079) in 2009.

[61] Mr. Tanner has also advised the Court that in 2005 when Ms. Hubley was purchasing a home with her current husband, he represented her as a realtor. As a result of Ms. Hubley's and her husband's inability to come up with the funds, he waived his real estate fee, as did his firm, for a home which was purchased for approximately \$160,000.

[62] Mr. Tanner also advises that their son is 23 years old and that he has had to absorb some post educational costs and guarantee a loan in his name.

[63] Aside from purchasing a vehicle for his daughter, when his son was in university he contributed towards his university costs and co-signed a student loan of \$5,000. He helped in purchasing the first vehicle for his son which was \$1,500 and helped to purchase a second vehicle. For a third vehicle he gave his son his own 1998 Honda Accord, valued at \$7,500. In 2008 he assisted his son by paying for his laser surgery in the amount of \$3,000 and in 2011 consolidated his debt to put on his own credit line to obtain a lower interest rate. The son is to pay him \$500 per month toward this but he is not always able to do so.

[64] Mr. Tanner is prepared to pay 1/3 of all extraordinary costs associated with university and he is prepared to house and feed his daughter for no contribution. I did not take his offer to include 1/3 of the section 7 costs if his daughter did not live with him.

[65] Both Mr. Tanner and Ms. Hubley live in the HRM area in similar proximity to the university and thus a transfer from the mother's home to the father's home would not result in a deduction in transportation costs.

[66] In part as a result of the conflict between the parties and the fact that the daughter has become engaged in the financial difficulties between the parents, the relationship between the father and the daughter has broken down. It is unlikely that the daughter would willingly move in with the father at this time.

[67] It is clear to me that Mr. Tanner supports his daughter and wishes her to continue university and wishes to contribute to her in a way in which he feels assists her in being financially responsible.

[68] It is my conclusion that the Court would not be in a position to order the daughter to live with her father.

[69] Because the child is over age, a number of options are available to the Court. Under section 3.2 of the *Child Support Guidelines* I am able to deviate from the child support tables when the child of the marriage is over the age of 19.

[70] In this particular case, the daughter is continuing to live at home in order to reduce her costs and to complete her university course. However, the residence and food costs for this student would be something both parties would have to assist her with while she was enrolled and attending university. Thus, it is reasonable to pay the Guideline amount for the student as long as she is living in her mother's home.

Retroactive Child Support

[71] Both children were previously declared independent by consent court order. There was a lack of communication between the daughter, the father and the mother in bringing this forward until February 2012.

[72] These are factors to consider when considering retroactive awards.

[73] The father contributed to the university expenses and transportation costs and to their son. Mr. Tanner was absorbing extra expenses for his son and Ms. Hubley was not contributing toward those expenses.

[74] This contribution to his son was voluntary and occurred while there existed a consent order terminating his obligation to pay child support to either child.

[75] Mr. Tanner made these contributions in light of his then existing obligations.

[76] A retroactive lump sum payment would result in an onerous payment given his other responsibilities to the mother's household in the past (waiver of real estate fees) and to his daughter and son.

[77] There are two other reasons why I decline to order a retroactive to 2010.

[78] The daughter has not communicated with the father in any way, shape or form about her university, confirmation of enrolment, confirmation as to course content and her attendance.

[79] Child support was legitimately terminated when both children finished school and were independent.

[80] Thirdly, while Ms. Hubley was absorbing some of the costs for her daughter, the daughter was also earning an income for 2010 of \$14,500 plus her bursary and scholarship for her first semester.

[81] It would be impossible at this time to try to balance the equities to look at what each contributed to their independent children and then to seek on top of that a retroactive award overlapping the period of time during which both were absorbing costs for each of their independent children.

[82] I decline to order retroactive to 2010.

[83] Both parties have other household incomes. Ms. Hubley's partner earned \$47,805 in 2010 year.

[84] Of the expenses set out, essentially the daughter's rent and food are being covered by her mother.

[85] The mother appears to have an agreement with the daughter who is responsible for paying her car insurance, the gas and her cell phone.

[86] The child support award based on Mr. Tanner's income in these circumstances is not unreasonable.

[87] Clearly if the daughter lived outside of the mother's home that would be sufficient to revisit the child table amount.

Conclusion

[88] Commencing January 1, 2012 Mr. Tanner shall pay \$572 per month up to an including to April 2012, while the daughter was living at home and attending school.

[89] The daughter travelled to Italy this summer. For the months of May through August 2012 child support payments are suspended.

[90] Child support payments are to be reinstated in September 2012 on confirmation of the daughter's attendance in school and confirmation as to her living arrangements.

[91] If the daughter intends to live at home during the summer of 2013 (May through August) and continues to diligently seek employment in this region and intends to return to university in September 2013, the father shall continue to pay \$572 per month.

[92] The mother shall obtain details of the daughter's intention regarding summer employment and living circumstances and provide that to the father by April 1, 2013.

[93] Failure to do shall result in a suspension of the child support until the child returns to school in September 2013.

[94] The mother shall provide confirmation of attendance in September 2013 and keep the father apprised of the daughter's attendance and standing until she completes her course and leaves school, whichever is earlier.

[95] The mother will also advise the father in writing within 24 hours of her daughter leaving her residence to reside elsewhere.

[96] With respect to special expenses, the mother advises that the student loan

will cover all university expenses for the 2012 - 2013 year.

[97] I have insufficient information on whether tutoring costs are necessary or actually occurring.

[98] With respect to the sharing of ordinary costs related to medical and dental expenses, excluding orthodontic, the parties shall share 50-50 any uninsured costs. Ms. Hubley has not explained adequately the reduction in her income and I decline to use the proportionate sharing given her income is lower than her historic ability to earn income.

[99] It is my understanding that the daughter is covered both under her mother or spouse's plan and her father's plan currently. Therefore, the uninsured costs ought to be minimal except for orthodontic. If orthodontic is to arise, that will require a special assessment.

[100] Mr. Tanner has indicated he has no problem with sharing the costs of the medical/dental and uninsured. He can only obtain insurance to cover his daughter if he can show proof of her being a full-time student and the insurance will only cover her during the time she is a full-time student.

[101] Therefore, on or before September 1st of each year the mother shall ensure that the daughter provides to her father immediately proof of enrolment as a full-time student and he will in turn provide the mother with information as to his insurance, his group and policy number so that the daughter can obtain coverage for any insured costs and determine whether other costs are insured or otherwise.

[102] With respect to the car, Mr. Tanner shall be entitled to have the car assessed and arrive at an estimate of the costs to continue to keep the car road worthy.

[103] Neither parent has contributed in 2012 to the extra curricular expenses given that the student loan has covered those expenses. Should that change the matter may return to conciliation.

[104] With respect to secondary degrees, a further application will have to be

made.

[105] Obviously, if there is a change in circumstances including a change that may affect the daughter's ability to obtain a loan to assist her in covering the university costs, the matter may be brought back before the court for resolution.

[106] I am prepared to order retroactive to January 2012 monthly support in accordance with the Guidelines and Mr. Tanner's annual income, which is projected to be \$67,596 for the period of time the daughter is living at home in 2012 except for the summer months mentioned above.

[107] Should the daughter move out of the mother's residence, this base amount ought to be immediately reevaluated.

[108] In this particular case, both parties want their daughter to obtain her first degree. The father is clear that he wishes her to continue with her education and he wishes to contribute.

[109] The course appears reasonable. This child has an ability to contribute toward the expenses and toward her support.

[110] The summer employment and trips to Italy appear to be a luxury which at this time may not be affordable. The father has accepted that the first trip to Italy was a wonderful experience for his daughter. However, the second time resulted in two trips home and as a result of the decision to go to Italy, only her expenses of flight back and forth were covered. This does not appear to be a pursuit that is appropriate given this young person wishes to complete her education.

[111] Ms. Hubley has mentioned there are maintenance costs associated with the car. Ms. Hubley is to give the car to Mr. Tanner so that he can have it assessed and get an appropriate calculation for repair.

[112] Each party shall provide to the other on or before May 1st of each year full and complete copies of their Income Tax Returns whether filed or not together with Notices of Assessment and Reassessment when received.

[113] The mother shall provide to the father a full and complete copy of their daughter's Income Tax Return whether filed or not and shall provide confirmation of her summer employment income by August 15th of each year the daughter remains in university.

[114] This is not a situation in which I would consider terminating support as a result of the child's decision not to be in a relationship with her father; nor would I condone the expectations of the young person that she continue to receive support without an obligation to report to the father as to her ongoing efforts to attend university, the results of her university courses and confirmation of her ongoing attendance.

[115] Counsel for the mother shall draft the order.

Legere Sers, J.