SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: ***McGrath v. McGrath***, 2023 NSSC 50

Date: 20230213
Docket: SFH-DVRO 113272
Registry: Halifax

Between:

Heather Lynn McGrath

Applicant

v.

Patrick John McGrath

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Elizabeth Jollimore
Submissions:	November 24, 2022 for Patrick McGrath December 19, 2022 for Heather McGrath
Summary:	Former wife applied to vary parenting and child support terms of foreign divorce order which was subsequently registered in Nova Scotia. Former husband challenged the court's jurisdiction.
Key words:	Family, Parenting, Child support, Jurisdiction, Variation application
Legislation:	*Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 *Federal Child Support Guidelines*, SOR/97-175 *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 9 *Parenting and Support Act*, R.S.N.S. 1989, c. 160

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Written Release:	February 13, 2023
Counsel:	Diana Musgrave for Patrick McGrath Yvonne LaHaye, K.C. and Kelsey Hudson for Heather McGrath

Introduction

[1] At issue is whether I have jurisdiction to vary the child support terms of an Agreed Final Decree of Divorce granted in Texas in 2018 and registered under section 19.1 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp), as an order of this court in June 2021.

[2] The parties made written submissions only. In addition to this issue, Patrick McGrath has also made submissions on 2 other issues.

[3] Heather McGrath applied to vary the parenting time and child support terms of the order in August 2021. Patrick McGrath says that the court doesn't have jurisdiction to decide her variation application.

Jurisdiction

[4] A variation proceeding is one where one or both former spouses seeks to vary a support order or a parenting order.

[5] There is jurisdiction to vary an order where either former spouse is habitually resident in the province when the application is started: *Divorce Act*, clause 5(1)(a). The requirement of habitual residence is met. Both former spouses and their 3 daughters live in Nova Scotia and have lived here for the past 4.5 years.

[6] The *Divorce Act* doesn't require that a variation application be heard in the province where the former spouses divorced. We know that a corollary relief application can be heard in a province other than the one where the former spouses divorced: *Arsenault*, 2006 NSCA 38.

[7] The *Divorce Act* anticipates that one court may vary the order of another court. Subsection 17(11) directs:

> Where a court makes a variation order in respect of a support order, parenting order or contact order **made by another court**, it shall send a copy of the variation order, certified by a judge or officer of the court, to that other court.

[8] Mr. McGrath relies on *Leonard v. Booker*, 2007 NBCA 71 for the proposition that a foreign support order must be registered under the *Interjurisdictional Support Orders Act* before it can be varied, and a foreign parenting order must be registered under the provincial family law legislation so it

can be varied under that statute. Dual registration is necessary because the *Interjurisdictional Support Orders Act* deals only with support orders.

[9] I find *Leonard v. Booker* isn't applicable to the McGraths for 2 reasons.

[10] First, *Leonard v. Booker* is truly an interjurisdictional case. When court orders were issued by the New Brunswick Court of Queen's Bench in 1999 and 2003, Ms. Leonard was living in New Brunswick and Mr. Booker was not.

- The parties were divorced in Bermuda in 1997 and their consent order addressed parenting and support for their son.
- Ms. Leonard and the child returned to New Brunswick in 1997.
- The Bermuda order was not registered in any way under any statute in New Brunswick when a consent variation order was granted in September 1999 varying the amount of Mr. Booker's child support.
- In December 1999, Ms. Leonard filed a motion under New Brunswick's *Family Services Act* and the Bermuda order was recognized as it related to parenting. A motion was granted dealing with parenting.
- In January 2003, a consent order was granted varying Mr. Booker's child support. The original order had still not been registered as a support order in New Brunswick.
- In August 2005, Mr. Booker moved to New Brunswick.
- After his return, Mr. Booker applied to vary parenting. Ms. Leonard appealed the decision from his variation application. Justice Larlee, for the New Brunswick Court of Appeal, only briefly considered the grounds of appeal, because of her view that the motion judge lacked jurisdiction to vary the Bermuda order.

[11] Second, this is not an interjurisdictional case: both parties are habitually resident in Nova Scotia. There is no "other" jurisdiction with which either party (or the children) has any connection.

[12] The *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 9 does not apply where both parties reside in Nova Scotia.

[13] Ms. McGrath registered the Texas order under the *Divorce Act*.

[14] I find there is jurisdiction to hear Ms. McGrath's variation application.

Has there been a material change?

Child support

[15] Section 17(4) of the *Divorce Act* and – by reference – section 14 of the *Federal Child Support Guidelines*, SOR-97/175 govern the variation of child support.

[16] Child support was initially determined in Texas and done without regard to the *Federal Child Support Guidelines*. Where the amount of child support doesn't include a determination made in accordance with a child support table, I must consider whether there's been any change in the condition, means, needs or other circumstances of either parent or any child entitled to support: subsection 14(b), *Federal Child Support Guidelines*.

[17] Mr. McGrath acknowledges that Ms. McGrath's income circumstances have improved. This is a change that gives rise to varying child support.

Parenting

[18] A parenting order may be varied where there's been a change in the children's circumstances since the last order was granted: *Divorce Act*, subsection 17(5).

[19] "Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way": *Gordon v. Goertz*, 1996 CanLII 191, (SCC) at 12.

[20] Ms. McGrath wants to vary the Christmas parenting time. At the time of their divorce, the parents agreed they would annually alternate the entire school holiday period in December and January.

[21] Ms. McGrath was unemployed when the parties divorced. She now operates 2 rental units as short term AirBnB rentals. This may mean that her availability to the children during the winter holiday break is limited by her work. Evidence is needed to determine if this is a material change in circumstances or not.

What is the applicable date for purposes of the variation application?

[22] Ms. McGrath asked to have the order varied effective August 23, 2021. She later amended her application to ask that changes take effect as of January 1, 2020.

[23] Ms. McGrath wants to vary child support both prospectively and retroactively. I deal with prospective child support before retroactive child

support: *Staples v. Callendar*, 2010 NSSC 49 at 41, so as not to jeopardize the payment of current support by creating “instant arrears”.

[24] A prospective claim begins when the application was filed. A retroactive claim covers any period before the application was filed. So, the prospective timeframe begins in August 2021 and the retroactive period is before August 2021.

[25] The period of any retroactive award will be determined on the evidence and in accord with *Colucci*, 2021 SCC 24 at 80 *et seq*.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia