NOVA SCOTIA COURT OF APPEAL
Citation: ***MacCulloch v. MacCulloch***, 2012 NSCA 10

Date: 20120125
Docket: CA 347774
Registry: Halifax

Between:

Keri Lynn MacCulloch

Appellant

v.

James Daniel MacCulloch

Respondent

Judges:	Oland, Farrar and Bryson, JJ.A.
Appeal Heard:	January 23, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Farrar, J.A.; Oland and Bryson, JJ.A. concurring.
Counsel:	Appellant in person Respondent not appearing

Reasons for judgment:

[1] The appellant and respondent separated in 2004. They are the parents of two children (Trevor, presently age 19 and Cameron, age 16). Trevor resides with his father, Cameron with his mother.

[2] On August 10, 2010, the appellant made an application under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160 for child maintenance for Cameron. The application was originally scheduled to be heard on September 9, 2010, however, it was adjourned from that date to allow the parties to provide the court with certain information, including particulars of extraordinary expenses.

[3] On October 28, 2010, the matter came on for hearing before Judge Levy. At that time he gave an oral decision granting Ms. MacCulloch $237 per month child maintenance for Cameron commencing November 1st, 2010, and continuing on the 1st of every month thereafter. No support was ordered for Trevor nor was any sought. The matter was set over to December 2nd, 2010, for hearing.

[4] On December 2nd, 2010, Mr. MacCulloch was in Newfoundland and unable to attend the hearing.

[5] At the December 2nd, 2010, hearing Ms. MacCulloch was seeking to have Mr. MacCulloch reimburse her for the health care premiums for the children and 50% of extraordinary expenses (hockey and driver's education program), retroactive child maintenance and retroactive health premiums.

[6] The matter came on for hearing before Judge Gibson and, because Mr. MacCulloch could not be present, made another interim order requiring Mr. MacCulloch to pay to Ms. MacCulloch:

i. health care premiums for Cameron and Trevor in the amount of $154 per month commencing on December 31, 2010 and payable on the first day of each and every month;

ii. 50% of the hockey registration for Cameron in the amount of $225 and 50% of the driver's education program;

iii. retroactive health benefit premiums to July, 2010, in the amount of $770 payable on or before January 31st, 2011;

iv. retroactive child maintenance to July, 2010 in the amount of $987; and

v. child maintenance in the amount of $237 per month for Cameron payable on the fist of each and every month.

[7] The order from the December 2, 2010 hearing was issued on January 19, 2011 (the Interim Order).

[8] The matter was set over for hearing to March 10, 2011, at which time the Interim Order would become final unless further representations were made by the parties.

[9] On January 28, 2012, Mr. MacCulloch filed an application seeking "to vary the order dated December 2nd, 2010, with respect to special ordinary expenses" and asking for "proof of the amount of Ms. MacCulloch's health benefit premiums."

[10] The matter came on for hearing before Judge Levy on February 24, 2010. After hearing representations from the parties, Judge Levy gave his decision as follows:

> 237 a month stands and paragraphs 1, 2, 3 and four, that deal with the extra expenses, I will order that those sums in total be reduced by one-third, and leave it at that. ...
>
> What I'm doing is taking into account that there would be some expenses associated with Trevor. I'm taking into account that some of the health insurance premium would cover yourself, Ms. MacCulloch.

[11] When the judge refers to paragraphs 1, 2, 3 and 4 he is referring to the Interim Order. As a result of the decision, an order was issued on March 18th, 2011 (the Final Order), reducing the amounts payable to Ms. MacCulloch as set out in the Interim Order by one-third each. The chart below shows the differences in the amounts under the Interim Order and the Final Order:

	Interim Order	Final Order
Health Benefits	$154 per month	$103 per month
Hockey Registration $112.50	$225.00	$150.00
Driver's Education Program	$334.44	$222.96
Retroactive Health Benefits	$770	$513
Retroactive Child Maintenance	$948	$632

Throughout the proceedings before the Family Court both parties represented themselves.

[12] Ms. MacCulloch appeals the Final Order arguing the judge erred in:

1. reducing the amounts payable for these extraordinary expenses of hockey registration and driver's education program; and

2. reducing the amount of the retroactive child maintenance payments;

as neither of these items were in issue before him.

[13] Ms. MacCulloch filed a factum and represented herself at the appeal hearing. Mr. MacCulloch did not file a factum nor did he appear on the appeal.

[14] For the reasons that follow, I would allow the appeal and reinstate the terms of paragraphs 2 and 4 of the Interim Order.

Standard of Review

[15] The standard of review on matrimonial appeals was summarized by Cromwell, J.A. (as he then was) in **MacLennan v. MacLennan**, 2003 NSCA 9 at ¶ 9:

> 9 In both support and division of property cases, a deferential standard of appellate review has been adopted: **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 (N.S.C.A.); **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321 (C.A.); **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 (C.A.). The determination of

> support and division of property requires the exercise of judicial discretion. Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice: **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136 (S.C.A.D.) at 162; **LeBlanc v. LeBlanc**, [1988] 1 S.C.R. 217 at 223 - 24; **Elsom v. Elsom**, [1989] 1 S.C.R. 1367 at 1374 - 77; **Hickey v. Hickey**, [1999] 2 S.C.R. 518 at paras. 10 - 13.

[16] Having reviewed the materials filed on behalf of the parties and the representations made before Justice Levy, I am of the view that the judge simply misspoke when he reduced the amounts under paragraphs 2 and 4 and that it was never his intention to do so. Alternatively, if he did intend to do so, his decision was so clearly wrong as to amount to an injustice.

[17] I will explain why I think that Judge Levy did not intend that his decision would have the affect of reducing the amounts payable for hockey registration and the driver's education program nor did he intend that it would reduce the amount of retroactive child support payable.

[18] At p. 12 of the trial transcript Judge Levy says:

> **THE COURT:** Yeah. So I'm not going to revisit that 237 ... I'm not going to revisit any ... look at your income or her income. We've been there and done that. The question is, as I understand it, what about the extra expenses that were ordered by Judge Gibson in December when you couldn't have been here.

[19] In this excerpt the trial judge is making it clear that the only issue he is dealing with is the "extra expenses" which were ordered by Judge Gibson. He was not going to revisit the amount payable for child maintenance and it is clear from a review of all of the materials that he did not intend to impact on the retroactive payment.

[20] Similarly, the focus at the hearing was on the amount payable for health benefit premiums. There was no evidence adduced which would support the reduction of the expenses for driver's education or hockey registration by one-third. Further, there was no suggestion or any evidence that called these amounts into question nor suggest that they were not proper extraordinary expenses. I am also of the view that Judge Levy did not intend to impact the amount payable by Mr. MacCulloch for these amounts. Again, if it was his intention to reduce those

amounts, there was no evidence before him and no basis for him to do so. His decision would be so clearly wrong as to amount to an injustice.

[21] In her factum, Ms. MacCulloch asks us to increase Mr. MacCulloch's portion of the expenses for the driver's education program and hockey registration. However, at the hearing on December 2nd, 2010, Ms. MacCulloch only sought reimbursement of 50% of the amounts despite being asked by Judge Gibson whether she wished to have the amounts pro-rated in accordance with the parties' incomes. She made it clear that she was only seeking 50%. Similarly, she did not seek an increase in those amounts at the February 24th hearing. Judge Gibson gave her exactly what she requested, 50% of the amounts to be paid by the respondent. As a result, I am of the view that the issue of increasing the amount payable to Ms. MacCulloch for the driver's education program and the hockey registration are not properly before us on this appeal.

Conclusion

[22] The appeal is allowed and the provisions of the Interim Order of Judge Gibson requiring Mr. MacCulloch to pay:

1. 50% of the hockey registration and 50% of the driver education program; and

2. retroactive child maintenance in the amount of $948

are reinstated and the amount of any balance still owing as a result of the reduction in the Final Order of Judge Levy is to be paid as a lump sum to Ms. MacCulloch forthwith.

I would also grant costs of this appeal in the amount of $500 to Ms. MacCulloch inclusive of disbursements.

Farrar, J.A.

Concurred in:
Oland, J.A.
Bryson, J.A.