

FAMILY COURT OF NOVA SCOTIA
Citation: *Harnish v. Harnish* 2015 NSFC 5

Date: 2015-06-25
Docket: FTMCA 093700
Registry: Truro

Between:

Shayna Harnish

Applicant

v.

Heather Harnish and Troy Canning

Respondents

Judge: The Honourable Judge Jean Dewolfé

Heard: June 19, 2015, in Truro, Nova Scotia

Written Decision: June 26, 2015

Counsel: Morgan Manzer, for the Applicant
Bryen Mooney for the Respondent, Troy Canning
Heather Harnish, appearing without counsel

By the Court:

Background

[1] Shayna Harnish is the 21 year old daughter of Troy Canning and Heather Harnish. Shayna's parents were very young when she was born and did not live together after her birth. Mr. Canning has had no contact with Shayna, and has paid no child maintenance. In a 1997 maintenance agreement, brokered by the Department of Community Services, Mr. Canning agreed to pay \$127 per month in child maintenance. He attempted to make his first payment through the Maintenance Enforcement Program, but could not do so as the case had not been registered. No one contacted him further, and he made no further payments.

[2] Shayna has been in her mother's care. She graduated from high school in 2011 and enrolled at NSCC in a business program. In 2012 she switched to Dalhousie University, but left after the first term due to academic and personal challenges. In 2013 she attempted to get a student loan so that she could upgrade in sciences, but was refused. She re enrolled at NSCC in September 2014 and is now three credits short of completing the business program. She is taking two of the necessary credits this summer, and will complete the other so as to graduate by the spring of 2016. She testified that she could not take this final course due to the

cost, and that her mother and grandmother paid for the other two courses. She has been accepted into a two year social science program at NSCC beginning in September 2015. She has chosen this program after career counselling and reflection. She hopes to be able to use these NSCC credits towards a university degree. This would mean an additional two years of study.

[3] Shayna has accumulated over \$20,000 in student loans. She has worked part time, often in multiple jobs during most of her post-secondary years. She has moved back to her mother's home on several occasions. Her mother testified that she helps Shayna in any way she can, but she is a single mother with two younger children and a limited income.

This Application

[4] Shayna seeks maintenance from her mother and father. In particular, she seeks monthly child maintenance from Mr. Canning, and a proportionate sharing of her post-secondary educational expenses from both of her parents.

[5] Mr. Canning submits that Shayna is no longer a "dependent child" pursuant to the *Maintenance and Custody Act*. Ms. Harnish supports her daughter's application.

The Law

[6] The *Maintenance and Custody Act* provides:

10 (1) When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.

(2) The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.

37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

(2) When making a variation order with respect to child maintenance, the court shall apply Section 10. R.S., c. 160, s. 37; 1997 (2nd Sess.), c. 3, s. 11.

[7] The *Nova Scotia Child Maintenance Guidelines* provides:

Presumptive rule

3 (1) Unless otherwise provided under these Guidelines, the amount of a child maintenance order for children under the age of majority is

(a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the parent against whom the order is sought; and

- (b) the amount, if any, determined under Section 7.

Child the age of majority or over

(2) Unless otherwise provided under these Guidelines, where a child to whom a child maintenance order relates is the age of majority or over, the amount of the child maintenance order is

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to the maintenance of the child.

Special or extraordinary expenses

7 (1) In a child maintenance order the court may, on a parent's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation:

- (e) expenses for post-secondary education; and

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents in proportion to their respective

incomes after deducting from the expense, the contribution, if any, from the child.

Subsidies, tax deductions, etc.

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

Subsection 7(3) replaced: O.I.C. 2007-321, N.S. Reg. 294/2007.

[8] Post-Secondary education may result in a child over the age of majority continuing to be a dependent child. Various court decisions have developed lists of factors relevant to determining whether a child enrolled in post-secondary education is a “child of the marriage” pursuant to the *Divorce Act*, for example, **Farden v. Farden** (1993) 48 RFL (3rd) 60, **Martel v. Height** (1994), 130 NSR (2) 313 (CA) and **Kusnir v. Kusnir** (2001) 21RFL (5th) 90 (OCJ). This analysis is transferable to a large extent to the definition of “dependent child” under the *Maintenance and Custody Act*.

[9] Relevant factors include age, ability to secure employment at the end of a course, eligibility for student loans, ability to contribute through part time employment, whether the child could have reasonably expected assistance if her parents were cohabiting, and whether she is expeditiously pursuing her education.

There is no rule which says a child is disentitled to maintenance if she is enrolled in a subsequent academic program, see: **Lee v. Lee** 2009 NSSC 121 at paragraph 23. There is no longer an age cap on the definition of “dependent child”.

[10] The onus is on the person seeking continued child support to prove entitlement. In this case, it has been four years since Shayna completed high school and she is almost 22 years old. She will not complete her first academic program (Business at NSCC) until 2016. She has changed programs twice and has had academic successes and failures. She has struggled financially and has often worked more than one part time job. She impressed me as a serious student, who is both capable and reasonable in her expectations. She has obtained career counselling, matured and come to appreciate her academic strengths and weaknesses. She wants to be able to support herself and she is willing to work hard to obtain an education.

[11] Shayna has continually relied on her mother to assist her, who has done so to the best of her ability, i.e. providing her with a home base and periodic financial assistance (e.g. the course tuition this summer and car repair bills). Shayna shares an apartment with a friend in Truro as she cannot drive daily from her mother’s home.

[12] Shayna's income is currently approximately \$830 per month from two part time jobs. This was slightly higher earlier in the year when Shayna had a third part time job. In September 2015, her income will drop to approximately \$400 per month from one part time job.

[13] Shayna's non-discretionary living expenses are approximately \$1500 per month before tuition, fees or related educational expenses. She has not been able to meet those expenses or save, and has had assistance from her mother.

[14] Shayna could have finished her business program this summer but she did not have the financial resources to do so and could not get a student loan. She is not planning to seek employment with that program, and it is unclear as to whether she could support herself with that diploma alone. I find that she has acted reasonably by proposing to finish that program by the spring of 2016. I also find that she is acting reasonably by enrolling in the two year social services program, which she has determined will allow her the option of completing a university degree, or qualify her to work with youth or corrections.

[15] I adopt the reasoning of Justice Lynch in **Lee v. Lee** 2009 NSSC 120, (Par. 23) in coming to this conclusion:

“...There is no automatic cut-off or finding of independence after a first degree. As the case law indicates I should consider the economic climate and that a bachelor's degree does not ensure self-sufficiency. Children are remaining

dependent on their parents longer than in previous generations. Jacalynne is only 23 years old and it is not unreasonable that she is not independent...”

Conclusion

[16] I therefore find that Shayna is a “dependent child”.

[17] Mr. Canning did not provide his 2014 tax return. His pay stub for December 19, 2014 showed a total earning of \$95,526, including \$9124.57 overtime. He has, in the past earned in excess of \$120,000. His evidence is that there have been changes in his employment which have led to a reduction in his income due to the elimination of overtime but I have no independent verification of this. However, his vacation pay and statutory holiday pay, and other pay adjustments would presumably continue. This had provided Mr. Canning with approximately \$5400 additional income to February 13, 2005. I am therefore prepared to use Mr. Canning’s 2014 income as estimated by counsel for the Applicant, i.e. \$97,767 as Mr. Canning’s income.

[18] Mr. Canning testified that he is not living with anyone else, and has no other children. He contributed significantly to an RRSP plan in 2011, 2012 and 2013. He owns a home. He does not dispute that he has the ability to pay maintenance for Shayna.

[19] Heather Harnish testified that her 2014 income was approximately \$38,000. She supports two younger children and receives child support for them.

[20] Shayna is not living with her mother and Ms. Harnish is not receiving maintenance for Shayna. Therefore I do not think the approach taken by our Court of Appeal in **Lu v. Sun** 2005 NSCA, is appropriate in this case.

[21] Shayna's post-secondary education expenses will total \$5981 for 2014-2015 academic year. I accept this amount even though some amounts (e.g. books) are estimates. Her non-discretionary living expenses total approximately \$1500 per month when such "expenses" as income tax, future student loan repayments, donations to charity and savings are deducted. She intends to apply for student loan assistance, but does not want to accumulate "crippling" debt. As noted by our Court of Appeal in **Selig v. Smith** 2008 NSCA 54, the "trend" is to determine parents' ability to contribute before considering student loan availability. This is especially so when considering a parent like Mr. Canning who has the ability to pay.

[22] Mr. Canning's proportionate share of Shayna's Section 7 post-secondary education expenses is approximately 72%. I order that he shall pay \$4603.32 as his share of Shayna's Section 7 post-secondary education expenses for the 2015-2016 academic year.

[23] In addition, Mr. Canning shall pay Shayna 72% per month of her net non-discretionary living expenses for those months when she is in school. Shayna's net living expenses are approximately \$1100 per month after her \$400 contribution from part time employment. Therefore Mr. Canning's contribution will be \$792 per month. Mr. Canning questions whether the duration of Shayna's program will be eight or nine months each year. I note the attachment to Shayna's Statement of Special or Extraordinary Expenses clearly notes the end date for this program's term as May 29, 2016.

[24] Therefore, for 2015-2016, Mr. Canning will pay Shayna \$7128 (9 x \$792) for living expenses plus \$4306.32 for Section 7 expenses. Payment will be made in two lump sums, 50% payable on or before July 24, 2015, and 50% on or before January 1, 2016.

[25] For the 2016-2017 academic year, Mr. Canning will pay the same contribution to Shayna's living expenses, \$7128. He will also pay 72% of Shayna's post-secondary education costs. Shayna will provide Mr. Canning with confirmation of the costs (as identified in items 1-18 on her Statement of Eligible Post-Secondary Expenses).

[26] It is anticipated that Shayna will be working in the summer months, and should be able to support herself during these months, possibly with assistance from her mother.

[27] Shayna and her mother will also be responsible for the remainder of her \$1500 per month expenses during the school year, as agreed between them. This may involve Shayna incurring student loans, or using any savings she may accumulate in the summer.

[28] Shayna may be able to find employment when she finishes in 2017. She will have two NSCC diplomas. If she intends to go to university she may apply for further maintenance, and her entitlement, if any, at that time will have to be reassessed.

[29] Counsel have not made representations as to the tax benefits of Shayna's educational expenses. As Mr. Canning will be providing for the majority of Shayna's post-secondary education costs, I will order that Mr. Canning receive any unused credits to be signed over to him by Shayna by March 15 of each year. Shayna will provide Mr. Canning with confirmation of her continued enrollment at NSCC prior to his payments in August and December of each year. She will also provide him with her transcript by June 30 each year. Mr. Canning will provide

Shayna with an address or email address where this information may be sent, and Shayna will provide her address where her payments can be sent.

[30] There will be no order for costs.

[31] Counsel for the Applicant, please draft the Order.

Jean Dewolfe, JFC