DOCKET: FKMCA-048872

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
Cite as: R.S. v. D.M., 2006 NSFC 46

BETWEEN: **R. S.**
-APPLICANT

AND

D. M.
-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATE HEARD: NOVEMBER 28, 2006

DECISION DATE: DECEMBER 8, 2006

APPEARANCES: SIOBHAN DOYLE FOR THE APPLICANT
HEIDI FOSHAY KIMBALL FOR THE RESPONDENT

DECISION

Subject: Whether daycare costs while a parent is at home on maternity leave with a new infant is an expense "incurred as a result of that parent's employment" to which the Respondent can be obliged to contribute pursuant to section 7 (1) (a) of the Child Maintenance Guidelines

Whether an ordinary daycare necessarily is an "educational program" per section s. 7(1)(d), and whether, when both parents are bilingual French and English, attendance at an English daycare meets a "particular need" of the child and is "necessary in his best interests"

Whether the parent's need to tend to the needs of the new infant by itself creates a "particular need" for a three year old to attend daycare as an "educational program" per s. 7 (1)(d)

Result: The daycare expense in this instance is not covered by section 7 of the Child Maintenance Guidelines and no contribution was ordered.

By the Court:

1. The Applicant R. D., and the Respondent D. M., are the mother and father respectively of two boys aged three and a half years old and four and one half months old. The Applicant has the primary care of the children. The parties are not married; they commenced cohabitation in 2002 and separated in March of 2006. Both are members of the Canadian military stationed at C.F.B. Greenwood. Mr. M. has a salary of $64,400 per year. Ms. S. is currently on maternity leave with an annual income of $59,396, but when she returns to full-time employment as of next July her income will be $62,000 per year. It appears likely that both parties will remain stationed at Greenwood for the foreseeable future.

2. Both parties submitted an affidavit and a supplemental affidavit. There is no issue as to the facts so counsel agreed that cross-examination the parties was not necessary. The matter was simply argued before me, with the assistance of the affidavits and pre-hearing memoranda, on November 28. Ongoing child maintenance per the 'table' of the Guidelines from the Respondent to the Applicant has been agreed upon in the amount of $909 per month. Two outstanding issues were identified as requiring an answer:

> -A. The Applicant has maintained the older child in daycare since she commenced maternity leave on August 1, and proposes to continue to do so until the leave is over next July. She seeks a contribution from the Respondent toward that cost. He objects.
>
> -B. There is a question as to the amount of arrears of child support back to the date of separation.

A. Child care costs

3. The authority to award a contribution to child care costs over and above the table amount of the Child Maintenance Guidelines is to be found, if at all, in section 7 of the Guidelines. That section, with section 7 1 (A) added in 2005, reads:

> 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:
> **(a)** child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
> **(b)** that portion of the medical and dental insurance premiums attributable to the child;
> **(c)** health related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counseling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
> **(d)** extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
> **(e)** expenses for post-secondary education; and
> **(f)** extraordinary expenses for extracurricular activities.
>
> **(1A)** For the purposes of 1(d) and (f), the term "extraordinary expenses" means
> **(a)** expenses exceeding those that the spouse requesting an amount for the extraordinary expenses can reasonable cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is in appropriate, the amount that the court has otherwise has determined is appropriate; or
> **(b)** where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
> (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs or talents of the child or children,

(iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

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) 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.

4. Counsel for the Applicant holds that her client's claim can be maintained under section 1 (1) (a) or, in the alternative, section 7 (1) (d) of the Guidelines. Her reasoning can, I believe, be summarized as follows:

-Citing Bastarache, J. in *Francis v. Baker*, [1999] 3 S.C.R. 250, she argues that every family law Act in particular should receive "such fair, large and liberal construction" as will best attain the objects of the Act. The objective in question, she asserts, is to be found in section 1 (a): that children "benefit from the financial means of both parents".

-She argues that the temporary period of maternity leave be taken as included in the enumerated provisions of section 7 (1) a), (a parent's employment, illness, disability or employment training program).

-She maintains that keeping the child in daycare is necessary as the Applicant has been advised, (see Exhibit "B" to the Applicant's supplemental affidavit), that otherwise there is no guarantee that a daycare space will be available for him when the Applicant returns to work in July of 2007. Thus, the

expense is necessary "as a result of the (Applicant's) employment" under section 7 (1) (a).

-In the alternative Ms. Doyle argues that the child's child care cost be considered under section 7 (1) (d), being an "extraordinary expense...for any other educational program that meets the child's particular needs...". The "particular need", she says, is that the child care facility is unilateral English and both parents speak French to the child and that therefore the child will be insufficiently fluent in English when he starts school without the daycare attendance.

-Ms. Doyle argues as well that the obligation on the Applicant to attend to the new infant will leave her unable to address the needs of the older child, and that for this reason too the "particular need" and the "necessity of the expense in relation to the child's best interests" is established.

5. Counsel for Mr. M. argues that daycare during maternity leave is not an employment-triggered expense per subsection (a). Further, she argues that this particular daycare is simply that, a daycare, and should not be seen as " an educational program". In the alternative, if it is considered to be an "educational program", it has not been proven to be "necessary". Specifically, she says, it is not necessary because her client does in fact speak English to the child and that in any event the child attends a pre-school program twice weekly which would give him sufficient exposure to English.

6. Section 7 (1) speaks of add-ons being available for "the following expenses" and then lists them (a) to (e). It does not, as does section 10, the "undue hardship" section, employ the phrase "*include* the following". I quote from the Annual

Review of Family Law 2005 by the late James G. MacLeod and by Alfred A. Mamo, Thompson Canada Limited, page 139:

> "The list of "special" expenses listed in s. 7 of the (Child Maintenance Guidelines) for which "add-on" support may be ordered is exhaustive. A court cannot order extra support for any other expense no matter how reasonable it seems: *Borden v. Cachene*, 2004 CarswellSask 863...(Q.B.) (Cost of someone to play with child or for books so child can learn to enjoy reading not shareable); *Zutter v. Power*, 2004 CarswellNS 538, 228 N.S.R. (2d) 309....(list exhaustive; career counseling not within)...*Sobotka v. Sobotka* (2005), 14 R.F.L. (6th) 149. ...(S.C.J.); *C. (D.B.) v. W. (R.M.)*...(2004), 12 R.F.L. (6th) 14 (Alta. Q.B.); *Hiemstra v. Hiemstra* ...(2005), 13 R.F.L. (6th) 169 (Alta. Q.B.)."

7. I have not found any cases that hold otherwise. In fact I found a number of others that agree. The point was made rather succinctly, I believe, by Master Nitikman of the B,C. Supreme Court in *Stanton v. Solby* (1999), 49 (R.F.L. (4th) 422 at p. 424. The issue was whether the other party could be called upon to contribute to the cost of alternate weekend respite care for a disabled child requiring 24 hour care. I quote:

> "I have reviewed the legislation and conclude that respite care does not fall under any of the heads of special or extraordinary expenses. Perhaps it should: it is certainly not unreasonable to request that a parent or step-parent assume some of the cost of such an expense related to a severely disabled child. However, the legislature has not seen fit to include it and there is, in my view, no possible way to interpret the various category (*sic*) of expenses under section 7 so as to include this particular category."

To like effect on a request for respite care, (I know we are not talking about respite care here, at least not necessarily as a primary reason): *Y. (A.L.) v. Y. (L.M.)* (2001), 17 R.F.L. (5th) 233 (Alta. Q.B.).

8. The Guidelines begin, s. 1, with a statement of objectives which include ensuring consistency and promoting settlement. An interpretation of section 7 (1)

(a) which is as elastic and as malleable as the Applicant through her counsel espouses cannot but breed uncertainty and litigation. This is not to say anything one way or another whether in an ideal world the Respondent ought to consider helping out in some fashion. It is rather an observation that the extent that you throw open the door to judicial discretion you close another door on predictability. The legislature has clearly stated its objectives and enumerated the available grounds. The court has no role re-writing either.

9. I haven't lost sight of the Applicant's argument that the need to hold open a daycare spot for when she returns to work is an expense "incurred as a result of (her) employment". Arguably, yes, but that does seem to be stretching things a bit. And even if it is, taking into account the "reasonableness" and the "necessity" of such a plan, and the scant evidence on either count, obliging the Respondent to contribute for a whole year to that end is simply not justified. Surely the child could be put on a waiting list if necessary, perhaps at more than one daycare.

10. Similarly, I am not satisfied that the daycare in question is an "educational program that meets the child's particular needs" under section 7 (1) (d). That is not to say that daycares don't have educational and socializing value. Rather, that a "particular need" has to be proven to trigger any liability under the section.

11. Counsel for the Applicant argues in essence that as the Applicant will be so busy tending to the new infant that the older child will not get the attention he needs and that this represents a "particular need" for which this "educational program" is the answer. Without in any way seeking to minimize the demands and

stresses of caring for a new infant and a three year old, it simply doesn't strike me as falling under the umbrella of a "particular need" or, absent cogent evidence, as a "necessity". If the legislature wanted to designate obligations to other children as a ground under section 7, it would have and could have said so easily enough.

12. The Applicant also argued that this child has a particular need to be in an English environment as both parents have French as their first language and the child, so long as he is in Nova Scotia at least, will grow up in an English speaking environment. She said that both parents speak French to the child but acknowledged that she doesn't know if the Respondent does or not. He says he does speak English to the child and he notes that the child is already in an English pre-school two afternoons weekly which would give him sufficient exposure to English. For that matter, as I understand that the Applicant speaks English, there is nothing to prevent her from doing so to the child as well, at least some of the time.

13. The issue isn't whether there might be some benefit if the child attends daycare but, under s. 7 (1) (d), whether a "particular need" and the "necessity" *viz à viz* the child's best interests have been established. I cannot conclude that they have been. In doing so I have benefitted from reading the approach taken in two Nova Scotia cases on necessity under s. 7 (1) (d), although they dealt with private school which is somewhat, but not entirely, analogous. These cases are *Burton v. Burton* (1998), 167 N.S.R. (2d) 155 (Hood, S.C.J.) and *Maginley v. MacKay* (2003), 212 N.S.R. (2d) 62, (Kennedy, C.J.S.C.).

2. Arrears

14. The parties separated during the month of March, 2006. The younger child was born July 16, 2006. Mr. M., to repeat, earns $64,400 per year. It is agreed that Mr. M. has made a number of payments enumerated in the material, that as of November 1, 2006 totaled $5,484.00. Except in September when he made no payment, he has been paying the monthly payment at the end of each month or, perhaps more accurately, on the first of the following month. I do not know if by now he has made the payment for November, 2006.

15. Prior to May 1, 2006 there was a different "table" in use under the Guidelines. Thus, at $64,400 he would have been obliged to pay $527.00 for each of March and April, (both counsel agree to include March in full and onward), for a total of $1,054.00. For May and June the new rate for one child would have been ($560.40) per month for a total of $1,120.80 and a total through June altogether of $2,174.80.

16. There was some light skirmishing on the question of what should be paid for July as the second child was born half way through the month. I will hold that the amount for two children should be paid for the whole month. At the Respondent's income that would work out to $909.32 monthly, which, through to the end of November would total $5,456.60. Thus, he should have paid a total as of the end of November for the period March 1 to November 30 inclusive, the sum of $6,721.40.

17. As of the date of the hearing, November 28th, and counting November as being due, he had arrears of $1,237.40. If by now he has made the end of November payment of $909.32, his arrears would stand at $328.08.

18. (I appreciate that counsel had rounded off the current figure to $909.00 per month by consent. However, in asking me to figure out the arrears owing they did not stipulate rounding off anything else so I felt obliged to be precise. That leads me to the extra 32 cents monthly. If counsel want to leave that out of the order, (which I would ask Ms. Doyle to draft), I will accede to their wishes.

19. The arrears shall be paid forthwith. Counsel will agree or have already agreed whether the payments are to be direct to Ms. S. or through the Maintenance Enforcement Program. Small point, perhaps, but I should think that the payment for any month should be payable at the latest by the end of that month and not at the beginning of the following month. If counsel cannot agree otherwise I will so order. Lastly, as there likely will be, after July of 2007, shareable daycare expenses when Ms. S. returns to work, I will order that not just the Respondent, but both parties exchange Income Tax returns and Notices of Assessment by the first of June every year, starting June 1, 2008.

____

Bob Levy, J.F.C.