

FAMILY COURT OF NOVA SCOTIA

Citation: *O.P. v. S.T.*, 2014 NSFC 15

Date: 2014 10 07

Docket: FLPMCA No. 070211

Registry: Bridgewater

Between:

O.P.

Applicant/Respondent herein

v.

S.T.

Respondent/Applicant herein

Judge: The Honourable Judge William J. Dyer

Heard August 12, 2014, in Bridgewater, Nova Scotia

Revised Decision: The text of this decision has been revised to protect the identity of certain parties. This revised version is released on May 19, 2016.

Counsel: Shawn O'Hara, for the Applicant herein
John MacMillan, for the Respondent herein

By the Court:

Background

[1] S.T. (“the mother”) and O.P. (“the father”) lived in a common-law relationship for about five years. The relationship ended in November, 2009. They have two sons - an eight year old (E.C.), and a six year old (B.C.).

[2] Several past orders have dealt with custody, access and child support issues. The most recent was in September, 2012. It was lengthy and comprehensive. Among other things, it provided that the parents would have joint custody of the children who would be in the day-to-day care of the mother, and that the father would have reasonable access, upon reasonable notice for reasonable periods of time. Some access was specified. For example:

IT IS FURTHER ORDERED THAT O.P. shall have specified weekend access from Friday at 4:00 p.m. to Monday at 8:30 a.m. on the first, second and third weekends of each month. Delivery shall be to the children’s school on Monday and to Ms. S.T.’s residence when there is no school. Ms. S.T. shall have the children ready to go at the pickup time on Fridays and shall send the children with their bookbags and lunch boxes. Mr. O.P. shall be solely responsible for packing the children’s lunch on Monday morning and sending it to school with them.

IT IS FURTHER ORDERED THAT O.P. shall have access every Wednesday during the months of September through to June from 4:00 p.m. until 6:00 p.m.

[3] The parents also spelled out detailed arrangements for a wide range of holidays and special occasions. Most of these had very precise times for pick up and return. Block summer vacation access was also addressed.

[4] The September, 2012 order was uniquely forward-looking. I say this because multiple clauses make the parenting arrangements very clear - not only for the remainder of 2012 - but for 2013, and for subsequent years. (This is significant in the context of the father’s application to vary which cites changed circumstances.)

[5] The last order recited that the father had an annual income of just under \$14,500 in 2011. Based on that income, he was ordered to pay to the mother for the children’s benefit \$172.27 monthly, starting in April, 2012. The parties were

ordered to annually exchange their personal income tax returns before June 1st and their Notices of Assessment when received from the Canada Revenue Agency.

The Applications

[6] Under the **Maintenance and Custody Act (“MCA”)** and **Child Maintenance Guidelines**, the mother sought enforcement of the income tax return disclosure provision and (assuming a change in the father’s income), recalculation and adjustment of the father’s support obligations retroactively effective to July 1st, 2013. Additionally, she said she wanted to change the return time of the children by the father, after his weekend access - but this request was later abandoned.

[7] The father submitted a cross-application to vary. In it, he wrote that the parents have had ongoing communication and cooperation problems, that his access has been problematic at times, that the mother has thwarted his efforts to get timely information about education and medical matters, and that she acted unilaterally regarding schooling decisions, etcetera. Additionally, he said that E.C. has educational and medical issues that require “more support time” with him. He wants a shared parenting regime (one week on/one week off) imposed and proposed that the transition between homes take place on Mondays during the school year. He asked that the children be dropped off at school by one parent and picked up after school by the other parent. And he made specific proposals for transitions during the summer months, school holidays, etcetera.

[8] (Counsel waived formal submissions regarding potentially inadmissible material proffered on behalf of the respective parties on the understanding that I would direct myself to disregard clearly inadmissible evidence and assign appropriate weight to other evidence of questionable value.)

The Mother’s Case

[9] The mother submitted a lengthy affidavit and testified. I have considered and weighed all of her evidence. Some of the highlights of the mother’s evidence follow. As at the hearing, she had lived at her current address for about 17 months. She is employed as a substitute teaching assistant with a local school board and works 10 - 25 hours weekly. Her income includes employment wages of about \$9,352 annually. She also receives the Canada Child Tax Benefit.

[10] The mother lives with her common-law spouse, C.S. She and Mr. C.S. bought a residence about a year ago. Mr. C.S. has a son by another relationship

who spends weekends at the couple's home. He is a plumber by trade and works in the local area.

[11] According to the mother, the father is an electrician whose 2013 Line 150 income was higher than when the last order was approved. Of course, a payor's income changes may constitute a change in circumstances. [See **Child Maintenance Guidelines**, section 14.]

[12] On the parenting front, the mother's evidence was that E.C. has "anxiety issues". She said he has been seeing a counsellor monthly to help him deal with the issues. The child has also been seen by another professional at his school. He underwent an autism assessment (discussed elsewhere) which concluded that the child does not have the condition. She also stated E.C. experiences "separation anxiety" when he is away from her. She acknowledged that it is easier for B.C. to spend longer periods of time away from her.

[13] Both children attend the same school in Liverpool. E.C. has completed grade 3; B.C. has finished grade primary. According to the mother, E.C. has struggled in school but has been doing better lately. B.C. was said to be doing quite well in school.

[14] The mother acknowledged the father rarely misses his weekend visits. However, she said that E.C. does not always stay with his father the entire time. Sometimes, at his request, she brings him home early. On some occasions, she admitted E.C. has balked at going for scheduled visits and she has not forced compliance. She added that the father has missed "a fair number of Wednesday visits" with his sons because of employment commitments.

[15] She wrote the father is often late to pick up his sons and to return them. Typically, according to her, he does not give her any notice or forewarning if he is running late, and he does not offer any explanation about why he is late. Additionally, she complained that sometimes when she arrives at his house to drop the boys off, the father is not there. She said he apparently expects them to wait until he arrives to suit his convenience. More recently, he asked (and expects) that the children will simply be dropped off with his current partner, if and when he is not around.

[16] The mother added the father expects his sons to be ready to go with him "no matter what time he shows up at the house". She said this results in difficulties for both her and the children, and she wrote that he does not seem to grasp that it is

difficult for the children to wait for him. Nor does he appreciate that coming home late causes difficulty for everybody - except him.

[17] The mother referred to a settled evening routine that has been established but complained that it is negatively impacted by the father's inability or refusal to respect her requested return times to make the routine viable and consistent. She noted that the boys have set times for supper, baths, homework and bed times, etcetera. She added that Wednesday visits (from 4:00 to 6:00 p.m.) are especially difficult given the father's propensity to bring them home late.

[18] I accept the mother's evidence on these points and reiterate the last order was quite clear on the transition times and arrangements. Understandably, I find, the mother is frustrated at the father's disregard for the agreed terms. By the same token, I find, she has been sometimes oblivious or indifferent to his concerns and too quick to minimize her own non-compliance (discussed elsewhere).

[19] The mother wrote that she has been primarily responsible for the upbringing of her sons and provided elaboration regarding her responsibilities. (See paragraphs 35, 36 and 37 of her Affidavit.) She is concerned about any upheaval in their settled routines and how this might impact on their progress at school.

[20] The mother characterized her relationship with the father as historically "rocky and difficult". She alleged that he used drugs regularly in the past (and still does so), and alleged that he has a criminal record involving possession and trafficking in marijuana. She freely admits that she and the father continue to have "significant difficulties in communication" about the children and more generally about parenting styles or approaches. She admits that she does not trust the father and states that she does not agree with his lifestyle choices. She said the latter has caused friction and difficulty between them.

[21] The mother conceded that it has been difficult to find common ground and cooperation, despite their agreement to a joint custody arrangement. She admitted that the respective parenting styles are quite different. She conceded that some of this is normal, but she complained that the father has little respect for her views and positions on most parenting matters. She characterized him as opinionated, argumentative, and difficult to deal with. She stopped short of offering any suggestions as to how things might be improved. (But, in fairness, neither did he offer anything constructive,)

[22] The mother referred to instability in the father's residency and relationships. She alleged that he has lived in about seven different places with five different individuals since they [the parents] separated. She noted that the father is now living locally with a new partner (P.G.) and her two sons. She said they have been a couple for only about six months. She wonders how long this will last. She wrote that she has noticed that when the father has a new girlfriend he tends to want more time with the boys than when he is single. She suggested that his most recent application is consistent with this historical pattern – because he made it shortly after he moved in with his current partner.

[23] The mother is aware that the father has a permit to purchase, possess and smoke marijuana for medical purposes. Allowing that his current use may be authorized, she wrote that his past drug use was one of the reasons the couple separated. She thought he had stopped using drugs, but subsequently found out that this is not the case. She said that the father is very open about his drug use and even told their sons about it. She said he smokes marijuana in front of the children, in his residence (i.e., the basement, in his bedroom, etcetera) and with his girlfriend, his sister, and others. She also alleged that he openly smokes cigarettes at the residence and in his car, in the presence of the children. When she has expressed concern, she said the father has simply ignored or dismissed her concerns.

[24] The mother referred to a physical altercation between the parties in the summer of 2010 which was reported to the police. She asserted that there were other incidents of domestic violence between them. However, these incidents predate the last order. She also expressed concern about the boys' hygiene when under their father's care and about bedtimes and other routines at his household.

[25] Although she has not applied to vary the joint custody regime, the mother ventured her personal opinion that the father is not a responsible parent. In her words, "he has given me far too many reasons to question his ability and/or willingness to care for the boys properly for an extended period of time". She provided some elaboration.

[26] The mother relocated within the local area and admittedly placed the boys in a new school. E.C. did not adjust well to the change and, after a meeting with school officials, it was decided that the boys would return to their former school. The mother conceded that she did not consult with the father during this time. Not surprisingly, she agreed the father was very upset when he learned about the

transfers. She claims that she now recognizes that she should have done so. And she said that she has apologized to him.

[27] The mother admitted that the father has started to attend school team meetings, but complained that his attitude and behaviour at the meetings has been disruptive. As a consequence, she said the parents now meet separately with school officials. Indeed, she said that she usually waits for someone to accompany her after meetings, and also court, because “I am afraid of him”.

[28] Returning to E.C., the mother again referred to the negative autism spectrum diagnosis and the child’s consultations with psychologist Janet Wilkins. Regarding E.C.’s anxiety, the mother believes the father has not cooperated with or accepted Wilkin’s involvement and recommendations. At one point she said the father’s position was that he wanted E.C. out of all special programs and services because “there were no problems”.

[29] During testimony, the mother admitted that she does not force access upon E.C. when he says he doesn’t want to go to his father’s. When she was reminded that there was a court order in place dealing with the father’s parenting times, the mother admitted that she has allowed E.C.’s wishes to trump the court sanctioned parenting times. When it was posited that E.C. was “ruling the roost”, the mother reluctantly agreed she understood why that would be suggested. She also conceded that her opinions regarding the father have negatively affected the father’s block summer parenting time and that her own strongly-held personal views (i.e., that the father is irresponsible, etcetera) have been a complicating factor. That said, the mother insisted she does teach both boys to respect their father and claimed that she does not denigrate the boy’s father in front of them.

The Father’s Case

[30] The father submitted a brief affidavit and testified. Highlights of his affidavit evidence include the following. He wrote that there have been changes in the circumstances of the family. Specifically, he said the boys are two years older and referred to changes in E.C.’s schooling in regard to which he was not consulted.

[31] The father appended to his affidavit a copy of a Diagnostic Assessment Report regarding autism spectrum disorder. This report was entered into evidence without objection and confirms that a registered psychologist found that E.C. does show some behaviours that resemble autism. But, the assessment findings did not

confirm an autism diagnosis. Indeed, the author opined that E.C.'s "significant challenges seem to be mostly related to anxiety issues and his sensitive nature" and that the parents' separation also has been hard on him. The psychologist recommended continued mental health involvement, structured activities with peers, and maintenance of supports within the education system.

[32] The father seeks a week on/week off schedule for his sons and expressed his belief that such would be in their best interests. He resides locally with his current partner and her two sons who are now six and five years old, respectively. He said that his partner's children get along well with his sons. His partner did not testify. In a "week about" scenario, this is significant because she would likely assume some parenting responsibilities, particularly if the father is at work or otherwise unavailable. Yet virtually nothing much is known about her or her capacity and ability to provide suitable care (over and above that apparently provided to her own children).

[33] The father said he wants to be "a more active father in the lives" of his children. He also said that because his sons do not live with him during the week it is hard for him to be involved with their friends and extra-curricular activities. He opined that as his sons get older they will need more influence from their father.

[34] The father conceded that their mother is a "good mother" to the boys and he also expressed his belief that the mother's current partner is a good step-father.

[35] The father wrote that he is an electrician by trade but currently unemployed. He said he recently suffered a back injury while working and that he is seeking treatment. No medical reports were entered into evidence.

[36] The somewhat benign picture of the family's situation painted by the father in his affidavit was undermined by his courtroom disclosures, some of which follow. For example, before the children were born, he was convicted of one or more illegal drug-related offences which resulted in a fine, probation and a ten year firearms prohibition. Why the latter was imposed is unclear; but he firmly believes his sons have suffered "a loss" because of it. Given their ages, that is a perspective that is hard to fathom.

[37] Albeit in response to the mother's version of a domestic assault in 2010, he downplayed the seriousness of the events and the implications. And, in February, 2013 when B.C. was just five years old, he wandered off from his father's residence one dark, snowy evening. A half hour or more passed before the father

realized what had happened. Quite by happenstance, the child was found by a local child protection agency employee on a town street near an intersection, about a twenty minute walk away. He was returned to his father's residence, apparently unharmed. The father claimed a "misunderstanding" between himself and the youngster prompted the events. Surprisingly (to me), he did not express any real concern or understanding of the seriousness of the incident which he characterized as a "parenting hiccup".

[38] The father freely admitted to daily "medical marijuana" use which he consumes "when needed". He said that is about five times daily, on average. He admitted he has smoked the drug in front of the children and sees nothing wrong with the practice. In his words: "It's not a violation of happy parenting." He also smokes cigarettes in the children's presence. He consumes as many as five packs daily. He admitted others may be concerned about smoking and the children's health, but he dismissed the concerns. In his words: "It's not an issue"; and "It's not against the law." He rationalized his use of the products as aids to reducing a wide range of complaints, physical and mental.

[39] While I will not make any orders regarding exposure to smoking at this time, I will direct the parents to arrange for a joint medical consultation with the children's physician to discuss the subject and to follow any advice and recommendations given. I will be surprised if, at the very least, there is not strong advice that the children not be exposed to cigarette and marijuana smoke within any residence, motor vehicle or other closed area, by either parent. If the conduct continues, it may be grounds for a future variation application.

[40] Regarding child support, the father claimed he provided the mother with copies of his tax returns (despite her assertions to the contrary). When pressed, he reluctantly conceded he knew his higher income in the intervening years should have triggered recalculation and adjustment. When asked to explain his failure to pay increased support, he volunteered that (in his mind) support was linked to problematic access - that is, if the mother was causing him grief on the parenting front, he could legitimately stall on the child support front.

[41] The father provided a disjointed summary of his 2014 employment. I need not recapitulate all of the details. He characterized himself as a self-employed electrician. He was operating a sole proprietorship in the local area but had little work. In the Spring, he went to the North West Territories where his employment lasted only about six weeks. He quit and gave several reasons. The upshot is that

he returned home. Thereafter, he had work with a local firm. As at the hearing, his 2014 gross income was about \$39,800. It is unclear whether he may be entitled to **Guidelines** or **Income Tax Act** adjustments for travel or employment related expenses.

[42] As at the hearing the father was unemployed. He cited chronic neck and back problems; and said medical tests/assessments are pending. However, he produced no medical reports or other evidence to support his medical history – including evidence about his physical complaints or his marijuana prescription. He is not entitled to employment insurance benefits or Workers Compensation Benefits, at this time.

[43] The husband’s partner does not work outside their rental accommodations. He expects she may do so in the future. From his evidence, I find he voluntarily assumed some financial responsibility for her and her children. Their household finances were not disclosed. His partner receives support for her two children from another relationship. (I hasten to add that he is not legally obliged to support her children.) Finally, the father admitted he has had several previous partners and multiple other residences.

Discussion/Decision

[44] I have had the benefit of oral submissions on behalf of both parents and written submissions on behalf of the mother. As mentioned at the outset, there are competing applications. I will first deal with the parenting arrangements.

[45] To paraphrase from section 37 of the **MCA**, the court may vary a custody and access order if there has been a change in circumstances since the last order. The paramount consideration is the best interests of the child; and section 18 (6) provides a non-exhaustive list of considerations when applying the best interests principle.

[46] The statute does not employ the words “material change in circumstances” but, in practical terms, that has effectively been read into the statute as a result of decisions such as *Robicheau v. MacKay*, 2014 NSSC 199 at paragraphs 34 to 37 in which Justice Dellappina imported the threshold test articulated in the Supreme Court of Canada Decision *Gorden v. Goertz* [1996, 2 S.C.R. 27].

[47] Distilling the case law, I conclude that the onus is on the applicant (here the father) to prove, by evidence, on a balance of probabilities, that there has been a

change in the circumstances of the children and/or the ability of the parents to meet the children's needs, that any alleged changes materially affect the children, and that the changes were either not foreseen or could not have been reasonably contemplated when the last order was approved.

[48] Much of the father's evidence about the parenting arrangements was focussed on the underlying joint custody regime which the parents had agreed to and which neither parent seeks to vary at this time. In my opinion, a different focus is needed when considering what I will refer to as the care arrangements, and whether or not the section 37 threshold has been met such that a shared parenting regime should be considered and implemented.

[49] Putting the best spin on the father's case, if there is evidence that joint custody is not working as originally contemplated and agreed, it does not automatically or necessarily follow that there should be wholesale upheaval of the children's residency and day to day care. With respect, it was open to each parent to seek enforcement of the terms and conditions related to "joint custody". Neither did so – at least until now. Those terms could have been reviewed and enforced - on their own merits.

[50] The upshot, in my opinion, is that the existing order could have (and can) still do the job it was designed to accomplish – provided both parents adhere to it. Moreover, I also conclude the mere passage of time and changes in the ages of the children were reasonably foreseeable and do not constitute a material change. As noted elsewhere, the carefully crafted last order was forward looking - and comprehensive. By necessary implication, the respective ages of the children were factored into that order. The evidence falls short of establishing that the children's needs or the ability of the parents to meet those needs have significantly altered simply because the children are a little older.

[51] With respect, I also find that the father's wish to be actively involved in his children's lives is nothing new. Within the framework of the last order, I find there is ample room to give effect to his wishes, then and now. In that context, the mother is reminded of the following paragraphs in the last order:

IT IS FURTHER ORDERED THAT both parents shall exert their best efforts to work co-operatively in making future plans consistent with the children's best interests and to amicably resolve any disputes that arise. To accomplish this they will share information about the children and consult on all substantial matters that affect the children, including but not limited to religious upbringing,

education, residence, significant changes in social environment, major recreational activities and non-emergency health care. In particular, with respect to information sharing, whenever either parent receives report cards, school notices of events (including but not limited to parent-teacher meetings, school activities and the like), that parent will promptly provide copies to the other parent.

[52] In the result, I conclude the father has not met the threshold for favourable consideration of his shared parenting proposal. His application is dismissed.

[53] If I am incorrect in my analysis (to the extent that the section 37 threshold has been met), I would nonetheless deny the father's variation application by adopting and incorporating the analysis and opinions of Justice Beaton on shared parenting as expressed in *Hustins v. Hustins*, 2014 NSSC 185 at paragraphs 31, 39 and 40, in particular.

Child Maintenance

[54] The mother seeks retroactive child support variation. Mr. O'Hara submitted a helpful chart. (A copy is attached.) Mr. MacMillan did not challenge the calculations. I rely on them.

[55] For **Guidelines**' purposes, I find the father's 2013 Line 150 income was \$39,154.55. The Table amount for two children is \$559 monthly. Giving credit for the support that was paid by the father, I retroactively vary the last order as requested, effective as of July 1st 2013, and fix support arrears for 2013 at \$2,320.38.

[56] Under the **Guidelines** (section 16), his 2013 income may be referenced when estimating his 2014 income. I have also considered the father's evidence regarding his 2014 income until the hearing. The father acknowledged, albeit it reluctantly, that he has already earned slightly more this year – so far – than he did last year i.e. \$39,800. In that context, it was said I could legitimately impute another \$10,000 to him – on the assumption that he can earn more income during the remaining months of 2014. But, \$45,000 was suggested as fair and reasonable. Although it is tempting to do so, I will not impute additional income at this time - given the evidence about his current unemployment and prospects. However, under section 19, I will impute to him a gross 2014 income of not less than \$39,154.55 and order that child support for the children continue at the 2013 rate of \$559 monthly from January 1st 2014 onward, due and payable on the 1st day of each and every month thereafter, until otherwise ordered.

[57] In the circumstances, I will order that the father advise the mother in writing of his return to full or part-time employment and provide her with written proof of his income and employment benefits (if any) when he does find work. Also, the mother's right to seek retroactive review (and potential recalculation) is preserved for 2014. This may occur when she receives from him a true copy of his 2014 Income Tax Return and Notice(s) of Assessment.

[58] Payments are for the benefit of both children and payable to the mother through the Maintenance Enforcement Program (MEP). Referring to the chart, the father is entitled to credit for payments made by him in 2014. From January to August, 2014, I find the shortfall is \$3,093.84.

[59] In summary, child support arrears from July, 2013 to and including August, 2014 (as demonstrated in the chart) are fixed at \$5,414.22.

[60] MEP will update its records to reflect the arrears award to and including August 2014.

[61] As mentioned, "current" support will continue from September 1st, 2014 onward, at the same rate.

[62] On behalf of the father, it was submitted that if the mother achieved a significant financial award it ought not to be payable forthwith. It was argued this would work a hardship on the father's new family unit. The father did not advance a formal undue hardship defence under section 10 of the **Guidelines** at the hearing. With respect, even if he had done so, he would not have succeeded on the available evidence.

[63] Without intending any disrespect, the father's assumption of additional financial responsibilities for a new partner and her children were against the background of his known obligations to his first family under a court order. The children of the first relationship should not suffer because their father deliberately chose to take on additional responsibilities.

[64] Under the **Maintenance Enforcement Act** (section 17), upon request, the Director has the authority to structure repayment schedules for support arrears. This generally will involve some settlement discussions, failing which the Director may proceed to collection as the Director sees fit. In the circumstances of the present case, I will afford the parties through their lawyers time to come up with an

acceptable repayment scheme which can be embodied in a separate or freestanding order. They will have one month from release of this decision to do so.

[65] In the meantime, Mr. O'Hara shall prepare an order which otherwise captures the outcome. If the parties reach settlement on repayment of the arrears, Mr. MacMillan shall submit an appropriate order for approval. If there is no consensus regarding repayment, I simply order that the arrears shall be payable forthwith and collected as the Director deems appropriate. A copy of the calculation chart will be appended to this decision to aid understanding.

Dyer, J.F.C.