

IN THE FAMILY COURT OF NOVA SCOTIA
Citation: A.D.N. v. O.J.B., 2009 NSFC 12

Date: 20090507
Docket: 07SB052469
Registry: Yarmouth

Between:

A.D.N.

- Applicant

v.

O.J.B.

- Respondent

Judge: The Honourable Judge John D. Comeau, Chief Judge of
the Family Court of Nova Scotia

Heard: Shelburne, Nova Scotia

Decision date: April 27, 2009

Counsel: Both parties unrepresented

DECISION

THE APPLICATION:

[1] The Applicant-Respondent was ordered (dated March 6, 2008) to pay child support in the amount of \$580 a month which is the table amount for \$30,300. Payment was due on the 29th of February, 2008 and thereafter the last of each month. He applies for the following relief:

“The Applicant-Respondent is requesting a reduction in child support due to undue hardship.”

[2] When asked if he understands what undue hardship is, the Applicant-Respondent says it means the payment is too hard to make.

FACTS:

[3] Financial information provided by the Applicant-Respondent shows the following amounts from copies of his income tax returns:

2006 - \$32,051

2007 - \$31,318.55

[4] Although the Court does not have his 2008 tax return, he has provided a statement from his employer, Clearwater Foods Ltd. (he has worked here since 1997). The statement indicates he earns \$13.66 now but made \$13.33 an hour in 2008. His court financial statement shows that he works approximately 40 hours a week. Adding his usual E.I. benefits of approximately \$5,200 the gross annual income is estimated at \$26,528. In 2006 he had RRSP income but that appears to have gone. His average income over the past three years is calculated with the information provided at \$29,965.85 and the table amount is \$576 for three children, \$4 less than what he is paying.

ACCESS:

[5] The Applicant-Respondent's access is set out in the order of March 6, 2008 and basically is every other weekend which is:

- Friday at 5:00 p.m. to Sunday at 5:00 p.m.

- 5:00 p.m. to 7:30 p.m. on Tuesdays with all three children

- 5:00 p.m. to 7:30 p.m. with the oldest child

- 5:00 p.m. to 7:30 p.m. with the two youngest children

- other access is on holidays and birthdays (1/2 day) and two weeks in the summer, also 1/2 of March break.

[6] On a rough calculation, considering the hours spent with the Applicant-Respondent over the course of the year, it could amount to him having the children for 43% of the time if all the access is exercised.

ISSUES:

1. Whether there has been a significant material change in circumstances?

2. Whether the Applicant-Respondent fits under the requirement for undue hardship?

3. Whether this is a shared parenting situation so that the Applicant-Respondent be considered in a set off or something less than the table amount?

THE LAW:

Change in circumstances

- [7] The **Maintenance and Custody Act** provides for variation of orders:

“Powers of court

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.”

Shared parenting

- [8] The Child Maintenance Guidelines also provide for a determination of child support when there is shared parenting:

“Shared custody

9 Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child maintenance order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the parents;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought.

[9] The Child Maintenance Guidelines also provides for certain departures from the table amounts:

“Undue hardship

10 (1) On the application of a parent, a court may award an amount of child maintenance that is different from the amount determined under any of Sections 3 to 5, 8 or 9 if the court finds that the parent making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

Circumstances that may cause undue hardship

(2) Circumstances that may cause a parent or child to suffer undue hardship include the following:

- (a) the parent has responsibility for an unusually high level of debts reasonably incurred to maintain the parents and their children prior to the separation, where the parents cohabited, or to earn a living;
- (b) the parent has unusually high expenses in relation to exercising access to a child;

(c) the parent has a legal duty under a judgment, order or written separation agreement to maintain any person;

(d) the parent has a legal duty to maintain a child, other than a child to whom the order relates, who is

(i) under the age of majority, or

(ii) the age of majority or over but is a dependent child within the meaning of clause 2(c) of the **Act**; and

(e) the parent has a legal duty to maintain any person who is unable to obtain the necessaries of life due to an illness or disability, including a dependent parent within the meaning of clause 2(d) of the **Act**.

Standards of living must be considered

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child maintenance under any of Sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other parent.

Standards of living test

(4) In comparing standards of living for the purpose of subsection (3), the court may use the Comparison of Household Standards of Living Test referred to in Schedule II.

Reasonable time

(5) Where the court awards a different amount of child maintenance under subsection (1), it may specify, in the child maintenance order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

Reasons

(6) Where the court makes a child maintenance order in a different amount under this Section, it must record its reasons for doing so.

CONCLUSIONS/DECISION

Change in Circumstances

[10] There has been no significant or material change in the Applicant-Respondent's annual income. Income is determined as set out in section 16 of the Child Maintenance Guidelines which includes use of the payor's tax returns but it is not limited to line 150, given the plain meaning of section 16.

[11] In order for the Court to have jurisdiction to vary child support, there must be a change in circumstances and there is not, so the Court is without jurisdiction.

OBITER:

[12] The parties are self-represented and a number of issues were raised and therefore, it would be appropriate to explain that if the Court had jurisdiction, the arguments of the Applicant-Respondent would fail.

UNDUE HARDSHIP:

[13] The Applicant-Respondent's comment that it is hard to make the payments does not constitute undue hardship. There is no evidence that he comes under any of the preliminary criteria set out in s. 10(2) of the Child Maintenance Guidelines.

SHARED PARENTING:

[14] A rough calculation of access times would amount to 43% with the Applicant-Respondent. The 40% rule, so-called, does not prevent the Court from using the table amounts and in this case and some cases where special expenses are not being paid, that is the fairest thing to do in the children's best interest.

JOHN D. COMEAU
Chief Judge of the Family Court of Nova Scotia