IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Plourde v. Morin, 2005 NSSC 332

Date: 20051130
Docket: 1201-056927
Registry: Halifax

Between:

Yves Plourde

Petitioner

v.

Claire Sylvie Morin

Respondent

Judge: The Honourable Justice Deborah Gass

Heard: July 15, 2005, in Halifax, Nova Scotia

Counsel: Julia Cornish, for the Petitioner
Deborah Conrad, for the Respondent

[1] This is an application to vary a Corollary Relief Judgment respecting a child support payment of $900.00 per month payable by the applicant to the respondent, for three children: Andrée-Anne Lucie Marie Plourde, born December 12, 1994, Samuel Pierre Plourde, born March 15, 1996 and Chloé Marie Plourde, born January 7, 1998.

[2] The facts are fairly straightforward and essentially not in dispute.

[3] The parties are divorced and their three children live with each parent in alternating weeks. As a result of their shared parenting arrangement, they agreed on maintenance of $900.00 per month. This is reflected in their separation agreement dated June 12, 2002:

> 37. The parties agree that their parenting arrangement results in neither of them having the children more than 60% of the time for the purpose of calculating child support pursuant to the Child Support Guidelines. Commencing August 1, 2001, and continuing on the first day of each month thereafter, the husband shall pay to the wife the amount of $900.00 per month child support. The husband further agrees to pay to the wife a one-time lump sum of $3,300.00 as retroactive child support for the period from August 1, 2001 to June 30, 2002, less the set-off amounts of $625.00 (pursuant to clause 26), $460.00 and $828.00 (pursuant to clause 40).
>
> 42. The parties have agreed to share extracurricular activity expenses including hockey, gymnastics, soccer, summer camps, swimming lessons, music lessons in the following percentages: Wife 30% Husband 70%. This proportion may be reviewed if the income of either party changes significantly.

[4] Each of the parties has entered into new relationships and there are other children in each household. The combined household income of the applicant is now $168,000.00 comprised of his income of $116,000.00 per year and his spouse's annual income when working of approximately $52,000.00. He and his partner now have twin sons, born October 2, 2003.

[5] Mr. Plourde initially sought a variation to reflect his family's circumstances while his spouse was on maternity leave and a different amount when she went back to work and they incurred child care expenses.

[6] According to their Corollary Relief Judgment, the applicant is to pay 70 percent of the children's extracurricular activities and there was also an agreement that he would pay for 70 percent of their clothing (coats, boots, sneakers). There has been some disagreement about some extracurricular activities, and certain clothing costs.

[7] As for the applicant's expenses, his twins have been on a waitlist for daycare, which will be $27.00 per child per day. Up until now, there has been in home care. They have debt of about $40,000.00 besides their mortgage.

[8] The children's mother looks after the doctor and dentist appointments. She purchases school supplies for teachers and he reimburses her. She buys gifts for teachers and takes the girls for their hair cuts and pays for them. The Applicant/father provided Sam with his birthday party this year.

[9] Ms. Morin's income is $60,000.00 and her partner's income is $49,596.00 resulting in a total household income of $109,596.00. Her partner also has shared parenting of his two biological children, who live with them in alternating weeks also.

[10] The children actually spend more time with mother during the summer. She purchases Halloween costumes and does most of the birthday parties. She is of the opinion that she carries more of the financial responsibility and when he approached her for a reduction in anticipation of the twins' birth, she agreed to a reduction to $700.00 per month but with the other $200.00 per month being placed in an education fund for the children.

[11] Both parties have fixed costs to maintain homes. She maintains she bears the increased cost of shared parenting. She buys more clothing for the children. Clothes go back and forth. She says he reduced his contribution to 50 percent of the children's costs of extracurricular activities and she cannot afford a decrease in support.

[12] At the time of their agreement in June 2002, which was incorporated and formed part of their Corollary Relief Judgment upon divorce, the applicant's income as an actuary was $106,500.00 and the respondent's income as a teacher

was $38,000.00. If one were to apply a straight set-off (the sum produced by subtracting the three children table amount based on the mother's income from the three children table amount based on the father's income) the differential table amount payable by the father would have been $1,006.00 ($1,705.00 - $699.00 = $1,006.00), but they agreed on $900.00 per month. Their agreement provides for sharing of other expenses, and there is no application before the court to change those provisions.

[13] The twins are in the father's household full time and the respondent's partner's children are in her household 50 percent of the time.

Changes in Circumstances:

[14] Although the only provision of the agreement calling for a review based on changed circumstances is set out in paragraph 42 relating to proportionate sharing of expenses, and support after high school, maintenance orders in themselves are inherently subject to variation if there is a material change in circumstances. The *Guidelines* themselves contemplate changes in payment of the table amount commensurate with changes in income.

[15] The governing provisions are set out in the *Divorce Act* and the *Federal Child Support Guidelines*.

[16] Section 17 of the *Divorce Act* states:

> 17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> Terms and conditions
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
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> Factors for child support order

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Guidelines apply

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

Court may take agreement, etc., into account

(6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

Reasons

(6.3) Where the court awards, pursuant to subsection (6.2), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

Consent orders

(6.4) Notwithstanding subsection (6.1), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

Reasonable arrangements (This is on p. 5 and not sure if you wanted it included)

> (6.5) For the purposes of subsection (6.4), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

[17] The *Guidelines* make special provision for shared custody:

> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 percent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amount set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[18] Clearly there have been changes in circumstances in both households to warrant a review of the base amount of child support. Not only have their incomes changed, but both parties have entered into new relationships and with that the introduction of new dependents into each household.

[19] Having determined that there is a change in circumstances, the court must determine if those changes warrant a variation in quantum of maintenance.The Supreme Court of Canada has now rendered its decision on this subject in *Contino* v. *Leonelli-Contino*, 2005 SCC 63, heard on appeal from the Ontario Court of Appeal.

[20] There the court answered the following questions with regard to the issue of quantifying child support in shared custody situations:

1. Can a s.9 support order be greater than the Guidelines table amount?

2. Is there a presumption that the Guideline table amount applies?

3. Are all three factors in s. 9 to be given equal weight?

4. Do “increased costs” in s. 9 refer to the increased costs of the previous non-custodial parent or increased costs resulting from the shared custody arrangement?

5. Can a multiplier be used in the absence of evidence of increased costs?

6. How are actual needs, conditions and means taken into account in deciding on a deviation from the Guidelines table amounts?

[21] The Supreme Court of Canada ruled there is no presumption in favour of awarding at least the guidelines amount, nor is there a presumption that the amount should be reduced because of shared parenting. And although there is no presumption that the table amounts apply, they must be taken into account. There are times when, taking into consideration all the factors, the result will in fact be the table amount.

[22] The set-off is a useful starting point. Bastarache J. at paragraph 41 states:

> “ ... The value of the set-off is in finding a starting point for a reasonable solution taking into account the separate financial contribution from each parent. - A court will depart from the set-off amount or make adjustments to it if it is appropriate in light of the factors considered under ss. 9(b) and 9 (c).”

[23] The court considered three set-off scenarios that have been adopted by courts throughout the country and concluded that the simple or straight set-off is the preferable starting point, emphasizing however, that it has no “.. presumptive value”. (para 49)

[24] This then leads to the next stage of the inquiry, where the court exercises its discretion to modify the set-off amount, considering the factors set out in ss 9 (b) and 9 (c).

s. 9(b) increased costs of shared custody

[25] In *Contino*, supra, the actual parenting arrangement switched from one of primary care with the mother, to one of shared parenting. The father who had been paying a table amount, sought a reduction from the table as a result of this change.

[26] In this case, the parties shared custody of the children from the outset, or at least shared custody prevailed in the previous order which is the subject of this variation application. Thus, in the case at bar, there is no change in the parenting arrangement and thus no changed or increased costs arising from the parenting arrangement in and of itself. Those "increased costs" were contemplated in the structuring of the original agreement. Thus in determining the quantum in this case, the issue of "increased costs" fades in relation to the other factors, as the weight given to each factor will vary with the facts.

S. **9 (c) Condition, means, needs and other circumstances:**

[27] Again, the application of this factor must be considered against the backdrop of the facts of this particular case. This is not a new application, nor is it a change in the parenting regime. The change is primarily with regard to the birth of the applicant's twins and the economic impact of that change on his household and his means.

[28] On the other hand, the recipient parents' costs would have remained, for the most part, unchanged, insofar as the three children are concerned. Those costs were the foundation for the current consent order.

[29] On this point, the Supreme Court of Canada opined that sufficient evidence is necessary for the court to make such determinations.

[30] The Supreme Court rejected the idea of making "common sense" assumptions about costs incurred by the payor and the use of a multiplier as adopted by the Ontario Court of Appeal to account for the recipient's fixed costs.

[31] According to Bastarache J. at para 68:

> 68 Section 9 (c) vests the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children. As mentioned earlier, this suggests that the table amounts used in the simple set-off are not presumptively applicable and that the assumptions they hold must be verified against the facts, since all three factors must be applied. Here again, it will be important to keep in mind the objectives of the Guidelines mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.

and at para. 70:

> 70 ... financial statements and/or child expenses budgets are necessary for a proper evaluation of s. 9 (c)

<u>S. 10 - undue hardship:</u>

[32] The applicant in the case at bar initially advanced an undue hardship claim but subsequently abandoned it.

[33] The Supreme Court of Canada in *Contino* supra expressly rejected the concept in the application of s. 9, as unnecessary in all but extraordinary situations. Bastarache, J. noted at para. 72:

> 72 ... In my opinion, there is no need to resort to s. 10, either to increase or to reduce support, since the court has full discretion under s. 9 (c) to consider "other circumstances" and order the payment of any amount, above or below the table amounts (see "Case Comment: *Contino v. Leonelli-Contino*", at p. 332). It is not that "other circumstances" of each spouse and "hardship" are equivalent terms, it is that the discretion of the court, properly exercised, should not result in hardship. It may be that s. 10 would find application in an extraordinary situation, but that is certainly not the case here.

<u>Application of s. 9 analysis to the facts:</u>

> 9 (a) The amounts set out in the applicable tables for each of the spouses.

[34] According to the applicant's Income Tax Return for 2004 his income was approximately $111,000.00 and the respondents was approximately $55,600.00. Their anticipated incomes for 2005 based on the most recent evidence is $116,000.00 and $60,000.00 respectively.

[35] If one applies their 2004 incomes, the set-off amount required to be paid by the applicant to the respondent would be $786.00 (table of $1,767.00 - table of $981.00 = $786.00).

[36] If one applies their projected incomes for 2005, the set-off amount would be $786.00 per month ($1,837.00 - $1,051.00 = $786.00). The court is urged by the applicant to accept a 2005 figure for the respondent of $60,000.00, representing a combination of one half of two different income levels, based on pay stubs to the end of June and anticipation that her income would revert to the previous level of $57,700.00 for the latter one half of the year.

[37] I accept this rationalization of her income for 2005, and the set-off figure of $786.00.

9. (b) the increased costs of shared custody arrangements:

[38] This subsection relates primarily to the increased costs for both parents to set up and maintain a household in the first instance. Here, as has already been stated, the parties have a pre-existing arrangement that was accounted for in coming to their agreement. Thus, while all factors under s. 9 must be considered, the weight to be given to each factor will vary according to the facts of each particular case. In the context of this family and these facts, increased costs have already been established and thus this factor warrants little, if any, consideration.

9 (c) conditions, means needs and other circumstances of the parties and the child for whom support is sought

[39] The set-off amount of $786.00 per month must now be examined within the context of s. 9 (c). The court must rely on the evidence before it to determine whether and to what extent that amount should be adjusted.

[40] The parties' agreement provides that the applicant is to contribute 70 percent of the cost of the children's extracurricular activities. The mother is to receive the child tax benefit. The father also paid child care costs for Chloe until June 2003 and a base amount of support of $900.00 per month. This is lower than the actual set-off amount which would have been $1,006.00, based on their incomes at the time. It was adjusted to take into account all the circumstances.

[41] Both parties now reside with other partners, each who have income and contribute to the actual household expenses. The applicant has two more children in his household, along with the three subject children. The respondent has two more children in her household 50 percent of the time, along with her three biological children 50 percent of the time for ten months. In the summer, her three children are primarily in her care, while they spend alternate weekends and one full week with their father.

[42] The applicant's expenses increased with the birth of their twins.

[43] The expenses he has as they relate to the three subject children are not specifically enumerated. Nor are the respondent's fixed costs as they relate to the three children broken down in her statement of expenses.

[44] However, one can extricate expenses directly relating to the children and a portion of the expenses for the benefit of the three children from their respective statements of expenses. While this is not ideal as there is no separate children's budget, this determination differs from making assumptions which the Supreme Court specifically rejected.

[45] Because there is no specific budget, the court must therefore determine what are reasonable expenses based on the evidence:

Father's Budget for Children		**Mother's Budget for Children**	
shelter	$600.00	shelter	$ 600.00
food	250.00	food	250.00
toiletries	30.00	toiletries	30.00
clothing	200.00	clothing	200.00
vehicle	150.00	vehicle	300.00
child care	50.00	child care	300.00
extracurricular	45.00	extracurricular	45.00
books, school	25.00	school supplies/books	25.00
allowances	25.00	allowances	75.00
hair & grooming	10.00	hair/grooming	35.00
Christmas, gifts	100.00	Christmas, gifts	125.00
holidays/entertainment	100.00	holiday/entertainment	100.00
		medical/dental	104.00
TOTAL	**$1,585.00**	**TOTAL**	**$2,189.00**

[46] His deficit, with support of $900.00 per month is $1,226.00 per month. The child care expense (nanny) is short-term and without that expense his deficit will dramatically reduce.

[47] The statement of expenses of the respondent for her household disclosed a deficit of $2,600.00 per month with the $900.00 per month support payment.

[48] Her expenses attributed to the children are approximately $604.00 more per month. This recognizes an equal expense apportionment for food, shelter and clothing, but accounts for the mother's responsibility for many other expenses already discussed, and the extra time in the summer. This also accounts for the reality that some expenses are duplicated in both households.

[49] The applicant disagreed with summer hockey and did not contribute. He has not assisted with the purchase of special sneakers for Andree Anne, but expressed a willingness to do so if asked. He has not been sharing the cost of clothing as had been agreed. When he purchased bicycles for the children, he

required the applicant to pay her share by deducting it from his contribution towards school supplies.

[50] The objectives of the Guidelines are to provide for a fair standard of support for the children, and a fair contribution from both parents. The court must be mindful of the standard of living of the children in each household.

[51] The ratio of income of the parents on the figures I have accepted is: $116,000.00 + $60,000.00 = $176,000.00 is 66:34.

[52] Their household income ratio is: 60:40 ($168,000.00 + $110.00 = $278,000.00)

[53] If one concludes that the total cost of providing two households for the three children is $3,774.00 per month then based on their respective incomes alone:

His proportionate share is	$2,491.00	(66%)
His actual share is	1,585.00	
	- 906.00	

Her proportionate share is	$ 1,283.00	(34%)
Her actual share is	2,189.00	
	$ 906.00	

[54] If one does the same calculation using their household incomes

His	$3,744.00 X 60%	=	$2,246.00	(60%)
	actual share	=	1,585.00	
			- $ 679.00	

Hers $3,774.00 X 40%	=	$1,510.00	
actual share		2,189.00	
		$ 679.00	

[55] Up until this litigation the respondent/mother was receiving $900.00 per month from the applicant/father. Even with that, she has a deficit.

[56] Thus, while the court is mindful that the twins are in the applicant's house full time and Mr. Fortin's children are in the respondent's home 50 percent of the time, this is offset by the following:

- the disparity between the parties' individual and household income
- the additional days during the summer holiday months when the 3 Plourde children are with their mother
- the additional transportation the mother undertakes for doctor, dental and other appointments
- the additional incidental expenses covered by mother (Halloween costumes, birthday parties, etc.)

[57] The set-off table amount is $786.00.

[58] Considering the configuration of each household and the above factors, I conclude that maintenance of $786.00 per month is the appropriate amount of maintenance for the three children.

Effective Date:

[59] The applicant sought a reduction effective October 2004. His application was made November 29, 2004. The hearing was July 15, 2005. The need for continued maintenance at $900.00 per month continues, but the means to pay has been affected by change.

[60] The respondent requires the benefit of time to adjust to the reduction and to retroactivity impose the reduction and require a significant payback will adversely affect the children. Thus, the effective date of the variation is 1 August, 2005.

J.