SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *McSweeney v. Baird*, 2015 NSSC 186

Date: 20150625
Docket: *Halifax* No. 1203-002368
Registry: Halifax

Between:

Duane McSweeney

Applicant

v.

Margo Baird

Respondent

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: April 21, 2015, in Halifax, Nova Scotia

Counsel: Kim A. Johnson for the Applicant
J. Brian Church, Q.C. for the Respondent

By the Court:

[1] The Applicant, Duane McSweeney, filed a Notice of Variation Application on September 12, 2014 seeking to terminate child support for the child Rachel McSweeney, born January 6, 1993 (currently 22 years of age). The parties have three children together: Rachel, Josephine and Roman. Prior to the hearing of the matter, both parties acknowledged that the Corollary Relief Judgment issued March 8, 2011, required an amendment to acknowledge the fact that the child, Josephine (currently 13 years of age), has been in the primary care of Mr. McSweeney since June 2014. The parties confirmed that Roman (currently 11 years of age) remains in Ms. Baird's primary care.

[2] Mr. McSweeney requested that the termination of child maintenance for Rachel take effect as of July 1, 2014. Ms. Baird filed a response seeking to continue child support payable for Rachel.

ISSUES:

1. Whether Rachel continues to qualify as a dependent child entitled to child maintenance?
2. What is the ongoing child support obligation of the parties given the current split custody arrangement?
3. What is the appropriate calculation of arrears of child support owing, if any, by Mr. McSweeney?

LAW & DISCUSSION

[3] Subsection 2(1)(b) of *The Divorce Act*, R.S., 1985 provides the statutory definition for "child of the marriage" where the child is over the age of majority:

> 2(1) "child of the marriage" means a child of two spouses or former spouses who, at the material time…
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life."

[4] The onus is on Ms. Baird to show that Rachel continues to be a child of the marriage and therefore there is entitlement to child support (see: *Klavano v. Howell*, 2011 NSSC 435, paragraph 39).

[5] Reference was made by counsel for Mr. McSweeney to the case of *Erickson v. Erickson*, 2007 NSSC 333. Justice Legere-Sers stated at paragraphs 154-164 of her decision:

> 154 It must be shown that the child is unable to withdraw himself or herself from parental charge. The party claiming support (over the age of majority) has the burden of establishing entitlement (See MacLennan v. MacLennan, (2003), 212 N.S.R. (2d) 116, at para. 39). Further, in MacLennan, supra, the Court of Appeal reiterated the direction in Yaschuk v. Logan (1992), 110 N.S.R. (2d) 278 (S.C.A.D.) at para. 40 as follows:
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> > … each case be examined carefully in light of its own facts. The weighing of these facts and exercising judgment in relation to them is, as he said, particularly in the province of the trial judge …
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> 155 The Court of Appeal in MacLennan, supra, referred to Farden v. Farden (1993), 48 R.F.L. (3d) 60; [1993] B.C.J. No. 1315 (Quicklaw) (S.C. Master); T.W. Hainsworth, "Support for Adult Children" (1999 – 2000), 17 Can. Fam. L.Q. 39 at pp. 51-53. The "Farden" factors are well known. They delineate factors that are to be reviewed by a court when determining whether the payor continues to be obliged to support an adult child in post-secondary education.
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> 156 These include whether the child is enrolled in full-time, part-time, whether the program is a reasonable pursuit, past academic performance, etc. They require the court to address the question as to whether the children are unable to withdraw from the support of a parent.
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> 157 More recently, in the Canadian law Quarterly, an article entitled Post-Secondary Education & the Twixters (Aaron Franks, Epstein Cole LLP with research assistance from Hilary Braden) consolidates cases dealing with post-secondary education, referencing a table of considerations in courts across Canada.
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> 158 **What is clear is that there has to be evidence on which a judge may conclude that a child over the age of majority continues to be entitled to receive assistance.** There is no suggestion in any of the case law relating to this enquiry that the court may disregard the rules of evidence or burden of proof. The fact finding process remains and integral part of the process of applying the law on child support to the facts of each case.
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> 159 Moreover, "the mere fact that an adult child is enrolled full-time in a course of education is not sufficient by itself to justify an order for support".

> Each case and a number of relevant circumstances must be examined (See Jarzebinski v. Jarzebinski, [2004] O.J. No. 4545, at para. 19).
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> 160 There have been numerous opportunities given to the mother and the children through the mother, including a direct request by the father and a request through the court process, to provide concrete evidence of the courses of studies, the plans, the success or failure of the student, the time of enrollment, confirmation of attendance and other details that would allow a court to weigh the reasonableness of the plan, including the expected date of completion, etc.
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> 161 These are not matters that a judge can infer or conclude without evidence. They require proof. The person who can access this information in this case is the person asking that support be continued.
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> 162 There is growing expectation that child support continue simply because a recipient indicates the child is enrolled in a post-secondary institution. That simply is not the law.
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> 163 To continue the support beyond majority, there is an onus on the recipient and the adult children to provide the facts to the court. Furthermore, there is an implied responsibility on the parents to address the objectives set out in the Federal Child Support Guidelines to encourage settlement of these matters by disclosure before the court process begins.
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> 164 In this case, there is vague evidence supporting some enrollment, certainly not consistent enrollment, and little concrete evidence upon which a court might determine the reasonableness of this post-secondary plan for the adult children wanting to receive support.

[6] The issue of the entitlement to child support for an adult child was also addressed in the decision of Justice Lynch in *Klavano, supra*. At paragraph 21 Justice Lynch cites with approval the decision of the Court of Appeal in *MacLennan v. MacLennan*, 2003 NSCA 9 (N.S. C.A), and in particular paragraphs 37-41 of *MacLennan, supra*:

> [37] The issues here are framed by ss. 15.1 and 2(1) of the Divorce Act, R.S. 1985, c. 3 (2nd Supp.). The Court may make an order requiring a spouse or a former spouse to pay for the support of a child of the marriage: s. 15.1. A "child of the marriage", for the purposes of this case, means a child of the spouses who, at the material time, is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life: s. 2(1). As pointed out by Freeman, J.A. for the Court in Giorno v. Giorno (1992), 110 N.S.R. (2d) 87 (S.C.A.D.) at para. 15, "other cause" includes, but is not limited to the pursuit of higher education.
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> [38] Freeman, J.A. also provided an admirable summary of the authorities In Martell v. Height (1994), 130 N.S.R. (2d) 318 at para. 8:

> 8 It is clear from the various authorities cited by counsel that courts recognize jurisdiction under s. 2(1) of the Divorce Act to hold parents responsible for children over 16 during their period of dependency. How long that period continues is a question of fact for the trial judge in each case. There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier. As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field.
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> [39] I agree with the appellant that a child at or over the age of majority is not automatically a child of the marriage for the purposes of support simply by virtue of being a full time undergraduate university student, although I would add that most such students will qualify as such. As required by the provisions of the Divorce Act to which I have referred, it must be shown that the child is unable to withdraw himself or herself from parental charge. The party claiming support has the burden of establishing entitlement.
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> [40] The application of this threshold requires, as Chipman, J.A. pointed out in Yaschuk v. Logan (1992), 110 N.S.R. (2d) 278 (S.C.A.D.) at para 59, that each case be examined carefully in light of its own facts. The weighing of these facts and exercising judgment in relation to them is, as he said, particularly in the province of the trial judge. The issue is whether the judge made an error of law or a palpable and overriding error of fact in concluding that Allan would be a child of the marriage if he returned to full time university attendance in the coming weeks.
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> [41] The authorities have developed lengthy lists of factors relevant to determining whether an adult child remains a "child of the marriage" for support purposes: see, for example, Cole v. Cole (1995), 143 N.S.R. (2d) 378; N.S.J. No. 362 (Q.L.)(Fam. Ct.) at paras. 12 and 13; Farden v. Farden (1993), 48 R.F.L. (3d) 60; B.C.J. No. 1315 (Q.L.) (S.C. Master); T.W. Hainsworth,"Support for Adult Children" (1999 - 2000), 17 Can. Fam. L.Q. 39 at pp. 51-53. As helpful as they are, such lists of relevant factors must not be used in place of the language of the statute or be invoked to impose a burden on parties to call evidence about the obvious or on judges to address non-issues in their reasons for judgment. Judges are entitled to draw reasonable, common sense inferences from the proven facts and to take into account notorious facts such as that post secondary education is expensive, well paid part time employment for full time students is scarce and that the demands of full time course work limit the time available for part time work: Darlington v. Darlington (1997), 32 R.F.L. (4th) 406; B.C.J. No. 2534 (Q.L.)(B.C.C.A.).

[7] *Farden v. Farden*, 1993 CanLII 2570 (BS SC) is a leading case in cases of adult children and their potential entitlement to ongoing child support. An

expansion of the *Farden* factors was provided by the Ontario Superior Court in *Menegaldo v. Menegaldo* 2012 ONSC 2915. Justice Chappel in *Menegaldo* reviewed the case law in *Farden, supra* and expanded the factors to be considered by the court in determining the eligibility for child support of adult children continuing to attend post-secondary education. The factors to be considered are:

1. Whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies.

2. Whether the child has applied for or is eligible for student loans or other financial assistance, or has received any bursaries or scholarships, and if so, the amounts received.

3. The ability of the child to contribute to their own support through part time employment.

4. Whether the child has a reasonable and appropriate education and career plan, or whether they are simply attending an ongoing educational program because there is nothing better to do.

5. In reviewing the child's education and career plan, important factors include the nature and quality of the plan, the duration of the proposed study period, the prospects of the child succeeding in the program, the potential benefit of the studies and the associated cost of the course of study.

6. The child's academic performance, and whether the child is demonstrating success in the chosen course of studies.

7. The age, qualifications and experience of the child.

8. The aptitude and abilities of the child, their level of maturity and commitment and their sense of responsibility.

9. Whether the child is performing well in the chosen course of studies.

10. What plans the parents made for the education of their children, particularly where those plans were made during cohabitation. In considering this factor, the court should bear in mind that reasonable parents are ordinarily concerned about treating each of their children comparatively equally.

> 11. The means, needs and other circumstances of the parents and the child.
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> 12. The willingness of the child to remain reasonably accountable to the parents with respect to their post-secondary education plans and progress. If a child is unwilling to remain accountable, or has unilaterally and without justification terminated their relationship with a parent, they may have difficulty establishing that they are unable to withdraw from parental charge based on a reasonable course of post-secondary education.

[8] Not all twelve factors are relevant in all cases. It is up to the court to consider any factors that are relevant to the proceeding before the court.

[9] The fact driven nature of these considerations was highlighted in the case of *Galbraith v. Galbraith*, 2014NSSC 337. Justice Jollimore reinforces the need to look at the specific facts in each case. She states at paragraph 63 of the decision:

> "…In MacLennan, 2003 NSCA 9 at paragraph 41, Justice Cromwell explicitly says lists such as that in Farden, 1993 CanLII 2570 'must not be used in place of the language of the statute or be invoked to impose a burden on parties to call evidence about the obvious or on judges to address non-issues in their reasons for judgement.'"

[10] I have examined the relevant factors as set out in *Farden, supra* and *Menegaldo, supra*. I have reviewed these relevant factors in light of the evidence in the case before me. In the present case the evidence confirmed the following:

> 1) On the date Mr. McSweeney's application was filed, Rachel was over the age of majority and not attending school full time.
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> 2) Mr. McSweeney had paid child support in relation to Rachel up to June 2014.
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> 3) At that point Rachel had already undertaken two courses of study: Memorial University in Newfoundland for theatre (which Rachel did not complete); and a hairdressing course through the Hair Design Center which was completed in July 4, 2014, (reference Exhibit 1 of the Affidavit of Margo Baird, sworn March 6, 2015). Rachel's graduation ceremony in which she was valedictorian was held in July 2014.

4) Rachel's email to her father (reference Exhibit 1 in the hearing) refers to her performing the duties of a hairdresser at the commencement of summer, 2014 (i.e. commencing in July 2014).

5) Ms. Baird, however, testified that Rachel could not work in the field of hairdressing as a result of health issues related to her diagnosis of Apha 1 Anti-Trypsin Deficiency. This diagnosis was made in 2005. The evidence of Mr. McSweeney was that Rachel had a variant of the deficiency and tested slightly below normal when tested in 2005 but had been advised that it was a latent condition which rarely develops symptoms of the disease.

6) No evidence was provided by Ms. Baird that Rachel has had any medical treatment in relation to this diagnosis since 2005.

7) The evidence provided in relation to Rachel's health included a copy of the medications Rachel took from 2012 to 2014. These pharmacy records were put in evidence by counsel for Ms. Baird (reference Exhibit 2). This Exhibit demonstrates that, contrary to the assertion of Ms. Baird, medications for Rachel actually declined during her course of study as a hairdresser (as well as subsequent to her finishing her course and performing her duties as a hairdresser). During her course of study commencing on September 23, 2013 to July 2014, only one prescription was filled. Far from showing that this career choice needed to be averted as a result of health issues, the medication printout showed the opposite- i.e. that Rachel was healthier in 2014 than in the previous two years. Rachel's enrolment in the hairdressing course was approximately eight years after the diagnosis and did not appear to be a barrier in relation to her enrolment in the course.

8) Ms. Baird gave evidence that Rachel was now pursuing a third course of study as a veterinary technician. At the time of the application, Rachel had taken a few upgrading courses prior to commencing a course of study as a veterinary technician. Ms. Baird asserted that this course of study would have fewer health implications than Rachel's potential career as a hairdresser.

9) Further, Ms. Baird seemed completely unaware of any health risk posed by exposure to animals. This seems to contradict her insistence that a term regarding limiting exposure to animals be placed in an Interim Consent Order of September 6, 2005. Paragraph 4 of that Order provided:

> "Both parties shall exercise care when the children are in their respective care so that the children are not exposed to mold, dampness, second-hand smoke or extensive exposure to animals."

10) Ms. Baird was insistent that Rachel's dream was to work at Disney World in some capacity- either in theatre, in hairdressing or as a veterinary technician at Animal Kingdom in Disney World.

11) Since Rachel's graduation she had been hairdressing for various people and had been working in Ms. Baird's on line businesses. Further Ms. Baird gave evidence that Rachel was buying Disney related items for resale, and Ms. Baird anticipated Rachel would be launching her own Disney memorabilia website.

[11] Even if Rachel is accepted and attends a course of study related to veterinary technician, this is not a course of study which would qualify Rachel to continue to receive child support. There must be a limit placed on a parent's legal obligation to pay child support for an adult child. Clearly, Rachel's dream to work at Disney World at all costs is not a reasonable course for which Mr. McSweeneey should be responsible to pay.

[12] The legal obligation of Mr. McSweeney to pay child support in relation to Rachel is terminated effective August 1, 2014. Rachel's graduation from hairdressing school took place in July, 2014. Child support in relation to Rachel will terminate on the 1st day of the following month (i.e. August 1, 2014).

[13] With respect to the issue of ongoing child support, the two younger children are in a split custody arrangement. One child resides primarily with Ms. Baird and one child resides primarily with Mr. McSweeney. Counsel on behalf of the parties have confirmed that the set off method of calculation is appropriate in relation to the two younger children. Evidence was provided by both counsel to confirm that the income for Ms. Baird in 2014 was $27,362 and for Mr. McSweeney was $73,873. The resulting set off figure results in Mr. McSweeney paying to Ms. Baird the sum of $300 per month effective August 1, 2014.

[14] The order is to be prepared by counsel for the Applicant. The child support obligations of Mr. McSweeney will result in a recalculation of support through the Maintenance Enforcement Program and an adjustment related to monies owing.

Chiasson, J.