

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Houston v. Houston, 2007 NSSC 277

Date: 20070924

Docket: SYD-052564

Registry: Yarmouth

Between:

Robert Donald Houston

Applicant/Petitioner

v.

Sharon Rosa Houston

Respondent/Respondent

Judge:

The Honourable Justice Glen G. McDougall

Heard:

September 6, 2007, in Yarmouth, Nova Scotia

Counsel:

Robert Donald Houston, on his own behalf
Gregory D. Barro, on behalf of the Respondent

By the Court:

[1] The parties to this application were married on the 18th day of July, 1987. They separated from one another on the 31st day of October, 2004.

[2] The parties negotiated a separation agreement (the “Agreement”) dated the 9th day of January, 2006. They each had the benefit of legal advice prior to signing.

[3] The Agreement was later varied with the consent of the parties. This varied Agreement was attached to and formed part of the consent order granted by His Honour Chief Judge John D. Comeau of the Family Court of Nova Scotia on the 9th day of August 2006.

[4] One of the changes to the Agreement provided that:

The parties shall share all special and extraordinary expenses which shall include, golf club registration, hockey registration and the cost of a tutor on a 50/50 basis. The party that pays for the registration shall forthwith provide to the other party a copy of the registration or invoice for services.

[5] Only a few months later His Honour Chief Judge Comeau was called upon to vary the provision of the Agreement respecting child support. As a result of his decision the applicant herein was ordered to pay an increased amount of monthly child support for the couple's only child, a son, born the 3rd day of September, 1987. This variation order was issued on the 20th day of November, 2006.

[6] On May 2, 2007, a petition for divorce was filed in the Supreme Court. The petitioner, Robert Donald Houston (the "applicant") seeks to vary the Agreement. Despite having earlier agreed to quit claim his interest in the matrimonial home in return for a lump sum payment of \$3,000.00, he now seeks to have exclusive possession of the home. As well, he asks for a reduction in child support so that his monthly payments reflect the **Federal Child Support Guidelines** (the "**Guidelines**") based on the average of his annual income over the preceding three years.

[7] On May 24, 2007 Sharon Rosa Houston (the "respondent") filed an answer to the petition in which she opposed both the applicant's claim for exclusive possession of the matrimonial home and the reduction of child support.

[8] On June 12, 2007 an interlocutory application was filed by the applicant. In it, he seeks an interim order to decrease his monthly child support obligations for his son. He bases his application on a change in circumstances.

[9] His son has enrolled in a two year post-secondary training program at Kingstec Community College in Wolfville. As a result he has had to move away from home. The applicant also claims to have had a reduction in his annual income since the date of the last variation order which was made under the *Maintenance and Custody Act*, R.S.N.S., 1989, c. 160 (as amended). Although his employment income in 2006 increased to \$69,402.10 from \$60,400.00 in the preceding year, his total income for tax purposes actually went down to \$44,444.23. The reduction in his taxable income was caused by losses from two businesses which he started up in 2006.

[10] One business consists of a residential rental operation and the other offers motor vehicle repairs. Neither business has been incorporated. Losses for the rental business amounted to \$8,794.02. Losses for the vehicle repair business totalled \$14,163.85. These losses were used to reduce taxable income thereby allowing the applicant to claim a rather significant tax refund of \$8,344.02.

[11] Based on this reduction in income and the change in his son's status to full-time student at Kingstec, the applicant now seeks to reduce his monthly child support payments to \$250.00 starting in September, 2007. Under his proposal payments would continue at this amount until August, 2008.

[12] In September 2008 he requests a further reduction to \$220.00 per month which would continue until June, 2009. This is based on the assumption that his son will have completed his educational training program by then. If things proceed according to plan he might very well be able to provide for all his personal needs by that time. That remains to be seen.

[13] Both the applicant and the respondent recognize their responsibilities to provide financial support to their son. They are fortunate to be able to help him in his quest to become financially self-sufficient.

[14] This same sense of responsibility also appears to be shared by their son. He has successfully obtained a student loan totalling \$7,140.00. As such he has personally assumed a substantial share of the overall cost of his own education. He should be commended for that.

[15] The applicant estimates the cost of his son's education in the first year to be \$12,811.89. The respondent places the estimated cost at \$13,847.40. By getting a student loan, the child will be assuming somewhere between fifty-two percent and fifty-six percent of the total annual cost. He also hopes to obtain part-time work during the school year and full-time work next summer. If he is able to do so he might be able to contribute even more to his education or perhaps, even better, not have to borrow so much for the second year.

[16] As indicated previously, this application was made following the filing of a divorce petition under the *Divorce Act*, 1985, c. 3 (2nd Supp.). The applicant is seeking an interim order until such time as a final order can be made. The Court must

take into consideration the Agreement as well as the latest variation order from the Family Court made pursuant to the *Maintenance and Custody Act*. In effect, the applicant is really seeking a variation of an existing order. Before entertaining such a variation, the Court must be satisfied that there has been a sufficient change in circumstances to warrant such a variation. Based on the foregoing I am satisfied that there has been a sufficient change in circumstances.

[17] An interim order under sub-section 15.1(2) of the *Divorce Act* or a variation order under sub-section 17(1) of the *Divorce Act* requires the Court to apply the provisions of the **Guidelines**. (See s. 15.1(3) and s. 17(6.1)).

[18] Sub-section 3(1) of the **Guidelines** states:

Presumptive Rule

3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
 - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
 - (b) the amount, if any, determined under section 7.

[19] Sub-section 15.1(5) and sub-section 17(6.2) of the *Divorce Act* allows the Court to award an amount that is different than the amount that would be determined in accordance with the applicable guidelines if the court is satisfied “(a) that special provisions in 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 these special provisions.”

[20] The Agreement signed by the parties required the applicant to pay child support in accordance with the **Guidelines** based on the applicant’s income at that time. Paragraphs 3 b. and c. of the Agreement provided that:

- 3 b. The husband and wife shall share any special and extraordinary expenses in proportion to their respective incomes.

- 3 c. The aforesaid payments shall continue until such time as one or more of the following occurs:
 - (a) The child ceases to be a “child of the marriage within the meaning of the Divorce Act, 1985;
 - (b) the child ceases to reside with the wife;
 - (c) the child marries, or
 - (d) the child dies.

[21] The consent order and subsequent variation order of Chief Judge Comeau increased the applicant’s monthly support obligations. The consent order also reflected the Agreement of the parties to “share all special and extraordinary expenses, which shall include, golf club registration, hockey registration and the cost of a tutor on a fifty/fifty basis.” There is no mention of the respective income of each of the parties. Since the order was consented to, I assume that their incomes were roughly comparable. This is likely why they agreed to equally cost share extraordinary expenses related to their son’s extracurricular activities.

[22] The applicant now seeks to eliminate the requirement to make monthly child support payments altogether. He bases this on paragraph 3 b. of the Agreement. He argues that his son no longer resides with his mother and as a result he should only have to cover a proportionate share of the education costs not covered by his son’s student loan. He calculates his proportionate share at thirty-seven percent leaving the remaining sixty-three percent to be paid by the respondent. These percentages were determined not in accordance with the consent order, but rather by application of clause 3 b. of the Agreement which required the “Husband and Wife.... share any special and extraordinary expenses in proportion to their respective incomes.”

[23] According to the applicant’s own calculations, his proportionate share of monthly expenses would amount to \$179.20 but he would be prepared to pay \$250.00 per month directly to his son beginning in September, 2007. Such payments would continue up to and including August of 2008.

[24] Based on his son's anticipated 2008 summer earnings, the applicant feels he should be entitled to further decrease his monthly child support obligations starting in September, 2008. He offers to pay \$220.00 per month directly to his son until June of 2009 at which time all child support payments would then cease.

[25] For the Court to accept this proposal it would have to ignore the reality of the situation. Given the location of Kingstec in proximity to the home where the dependent child resides with his mother, there is a considerable likelihood that he will make frequent visits home to visit on week-ends. There is also a relative certainty that he will return home for the Christmas holidays as well as Spring break and at Easter time. The respondent must maintain adequate accommodations for her son and will no doubt be called upon to provide food, clothing and other necessities for him regardless of whether he is at home or at school. According to the respondent's testimony, which was not challenged by the applicant, her son plans to return home next summer to live with her and hopefully find employment so he can save money for his second year at Kingstec. He will be expected to cover his own recreation costs and the costs of maintaining his vehicle but he will not be charged for room and board. His mother will continue to bear these expenses. The applicant cannot reasonably expect to simply contribute to some proportionate share of his son's education costs while leaving it to the respondent to cover the remainder plus all the expenses while their son is living at home.

[26] The inequity in this would be further magnified if the Court was to simply base its decision on the applicant's taxable income for 2006. The reported losses from his two new businesses warrant some close examination.

[27] One of those businesses involved the purchase of two rental properties. Each of the properties has two units. One was purchased from the applicant's new common law spouse. The other was acquired from her parents. When questioned on the witness stand about the price paid for these properties the applicant became evasive and rather vague in his answers. Actually, he could not even say how much he paid for either one of the properties. He was also rather vague when asked about the losses sustained by the motor vehicle repair business.

[28] The applicant will not be criticized for showing initiative. He should, however, recognize his primary obligation to provide financial support for his son. His two new businesses might one day become profitable. Until then he can at least expect to benefit from any increase in equity as the mortgages on the rental properties are paid

down. He might also benefit from what has, historically, always been an increase in real property values over time. His son should not have to wait for this to happen . He needs financial support now and he will continue to need it until such time as he ceases to be a child of the marriage.

[29] Under section 19 of the **Guidelines** the Court has authority to impute income. Section 19 reads:

Imputing Income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
 - (b) the spouse is exempt from paying federal or provincial income tax;
 - (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
 - (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
 - (e) the spouse's property is not reasonably utilized to generate income;
 - (f) the spouse has failed to provide income information when under a legal obligation to do so;
 - (g) the spouse unreasonably deducts expenses from income;
 - (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
 - (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust

Reasonableness of expenses

(2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[30] I find that the applicant has diverted income to his new business ventures which affects the level of child support he could and should be making. Taking into consideration sub-section 19(2) of the **Guidelines**, I also find that the applicant has unreasonably deducted expenses from his income which affects his ability to pay child support. As a result, I impute his income to be \$67,402.10. This is his income from employment in 2006 prior to the deduction of business losses.

[31] Taking into consideration the on-going requirement for the respondent to maintain suitable accommodations for her son's frequent visits on week-ends and during holidays, I order the applicant to pay child support to her in accordance with the **Guidelines** based on his employment income, but at forty percent of what the **Guidelines** would otherwise require. At \$67,400.00 annual income and one child, the applicant would ordinarily pay \$586.00 per month. Forty percent of this would amount to \$234.00 (rounded off). This reduced amount should be paid to the respondent through Maintenance Enforcement beginning on the normal payment date for October, 2007. Payments shall continue at this level, unless otherwise varied by mutual consent of the parties or ordered by a court with jurisdiction in such matters, up to and including April of 2008. From May, 2008 up to and including August, 2008 payments shall be increased to the full \$586.00 per month provided the child returns home to live with his mother during the summer months.

[32] In addition to the monthly child support payable to the respondent, the applicant shall also pay a proportionate share of the cost of his son's education over and above the amount covered by student loan.

[33] The applicant's income is only \$2,651.00 less per year than that of the respondent. In my mind this is not an appreciable difference and when one considers the parties mutual agreement in August, 2006 to cost share their son's special and extraordinary expenses on a fifty/fifty basis, I see no reason to vary this. Indeed, when one looks at the contribution being made by the student himself, both parents are getting off quite easy. They can both afford to make a greater contribution towards their son's education costs than what they are being asked to do.

[34] I set the son's total education costs at \$13,140.00. After deducting the \$7,140.00 student loan there remains a balance of \$6,000.00. Each parent should pay fifty percent of this. Given the nature of tuition payments, the applicant shall pay \$1,500.00 directly to his son no later than October 31, 2007. The remaining \$1,500.00 shall be paid directly to the son no later than January 31, 2008.

[35] The cost of education includes the apartment rent for the entire 12 month period of the lease. If the apartment is sub-let during the summer months of 2008, the amount realized shall be included in the dependent child's contribution towards his own education. It should not be used by the applicant to reduce his monthly child support for that period.

[36] Unless there is a significant change in the income of either parent, the method used to calculate the proportionate contribution to their son's education should remain the same in the second year of the program.

[37] When the dependent child returns to Kingstec in September, 2008, the applicant's monthly payments to the respondent should once again be reduced to forty percent of the applicable **Guideline** amount based on his 2007 income. As well, the two instalment payments reflecting the applicant's fifty percent share of the parents' contribution towards their son's education costs should be made no later than October 31, 2008 and January 31, 2009. When the dependent child ceases to be a child of the marriage which is anticipated to happen sometime in the Spring of 2009, all support payments shall then cease.

[38] The parties shall bear their own costs of this application.

[39] I would ask the applicant to prepare the order reflecting my decision. If he would prefer, he can request the respondent's counsel to prepare the order. Should he do so he shall be responsible to pay costs to the respondent in the amount of \$150.00.

[40] Finally, the court once again reiterates what was urged upon the applicant at the conclusion of the hearing. He should fulfil the promise he made to his son at the time of his graduation from High School which was to purchase him a reasonably priced lap top computer suitable for his needs.

J.