

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Gandy v. Gandy*, 2015 NSSC 300

**Date:** 20151023

**Docket:** STMCA 044413

**Registry:** Truro

**Between:**

Alan Clarke Gandy

Applicant

v.

Kimberley Dawn Gandy

Respondent

**Decision**

**Judge:** The Honourable Justice Gerald R. P. Moir

**Heard:** September 9, 2015, in Truro, Nova Scotia

**Counsel:** Lloyd I. Berliner, for the Applicant  
Tammy C. MacKenzie, for the Respondent

**Moir J.:**

[1] *Introduction.* The parties had a five-year marriage in the early 1990s. Three daughters were born to them. I have to decide whether to terminate child support obligations of the father now that the girls are adults.

[2] *Child Support Orders.* The divorce order was supported by a separation agreement. It was granted by Justice Mitchell of the Supreme Court of Prince Edward Island (Trial Division) in 1999 when the girls were six, five, and three.

[3] The divorce order provided for Ms. Gandy to have primary care and for her daughters to stay with Dr. Gandy on specified days making up about a fifth of the year. The order declared his income to be \$145,000 a year and ordered child support at \$2,235 a month.

[4] The divorce order was varied by Justice Scanlan of this court a year later. Dr. Gandy assumed responsibility for extracurricular expenses and child care costs. Otherwise, income and child support were unchanged. The order was granted on agreement.

[5] Justice Scanlan made another consent variation order in 2006. Declared income was increased to \$232,425. Child support was increased to \$3,689, but the

obligation to underwrite child care costs ended. This was varied on consent in 2009 to increase income to \$254,187 and child support to \$4,007.

[6] The latest order was made by Justice Scanlan after a contested hearing. It is dated March 29, 2012. Income is \$316,000. Dr. Gandy was required to pay for post-secondary education. His monthly child support obligations were \$4,912, but he was entitled to a credit for post-secondary education expenses of \$583 for each child for whom he paid those expenses.

[7] Dr. Gandy now makes \$349,497 a year.

[8] Those of Dr. Gandy's children who wanted him to pay for university had to provide him with statements of account from the university, file an income tax return, and transfer the deduction to Dr. Gandy. Otherwise, he was entitled to make reductions in the reimbursement for university expenses.

[9] *Circumstances of the Children.* The children are Ruth, who will soon be twenty-three, Sara, twenty-two and a half, and Grace, twenty and a half.

[10] Ruth finished an undergraduate degree in Asian Studies at St. Mary's University last spring. She approached her father about taking a master's degree. He told her he would not pay support for that. He expects her to get a job.

[11] Consequently, Ruth enrolled for certificates that would accredit her to teach English as a second language. She plans to move to Korea next spring to teach.

[12] Ruth does not live with either parent. For the time being, she works in retail in Halifax and stays with friends. She stays at her mother's home outside Truro often, and her mother helps her out from time to time.

[13] Sara goes to St. Francis Xavier University in Antigonish where she studies Human Kinetics. She is an accomplished athlete, but her academic performance is poor. She was scheduled to graduate in 2014, but will not do so until at least next June. She has applied for admission to a bachelor of education program in the following academic year.

[14] Sara earned \$15,000 in the summer of 2014. She has a twelve-month lease with other students on a home in Antigonish, but she spends most of the summers at her mother's home or travelling. She comes home on some weekends, and for holidays, during the school year. Her mother helps out from time to time.

[15] In recent years, Grace lived on her own more than she lived with her mother. Most recently, she has been on her own this past year. Ms. Gandy explained that she kicks Grace out because she does things forbidden in her mother's home. She

also testified that she and Grace made plans for Grace to move back home this month. When not at home, her mother helps her out.

[16] Last December, Grace dropped out of high school in Truro. She has not returned. She plans to enter an adult learning program with the Nova Scotia Community College in Truro.

[17] *Information and Payments.* Dr. Gandy suspended payments last May. Ms. Gandy failed to tell him and the PEI enforcement people that Grace had moved out in October, 2014 or that she had dropped out of school. The enforcement program on the Island requires the recipient to file a "child status report" when there is a significant change in care. Ms. Gandy did not do so until after Dr. Gandy started this application.

[18] Neither Ruth nor Sara complied with the requirements for statements of accounts from their universities or filing income tax returns. Dr. Gandy paid the expenses. He was able to claim the transferred tuition tax credit. He did not pay Sara's expenses for her last semester. Ms. Gandy said she paid \$6,800 towards these expenses.

[19] Dr. Gandy justifies his refusal to pay child support after May, 2015 on the bases of the failure to disclose Grace's independent living, the failure of Ruth and

Sara to deliver accounts and file returns, and his understanding that none of his children were living with Ms. Gandy.

[20] *Change in Circumstances*. Ruth's living away from home and working full-time and Grace's move to independent living constitute material changes of circumstances since the time of the last variation order, as required by s. 17(4) of the *Divorce Act* before a further variation can be made.

[21] *Variation of Child Support*. Under s. 2(1) of the *Divorce Act*, Ruth, Sara, and Grace are not children of the marriage unless they are "under their [the parents'] charge" and are "unable by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life". The obligation of child support is limited to children of the marriage: s. 15.1.

[22] Grace ceased to be under the charge of either parent a year ago. She may want to go back to school and live with her mother while she does so. However, her history makes it clear that we cannot rely on her present intentions as regards either returning to school or placing herself under her mother's charge. The situation is similar to that in *Patriquen v. Stephen*, 2010 NSSC 248.

[23] I am not satisfied that Grace is under parental charge. Therefore, I will order that Dr. Gandy's child support obligation has ceased.

[24] Sara remains under her parents' charge because she requires assistance to attend university and because she returns to her mother's home when she is not in school or involved in sports away from Truro. Dr. Gandy's support obligation continues.

[25] Under the *Federal Child Support Guidelines*, s. 3(2), my obligation is to order "(a) the amount ...[under] these Guidelines as if the child were under the age of majority" or "(b) ... the amount that ...[the court] considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child".

[26] If the guideline amount under s. 3(2)(a) was ordered as if Sara were still under nineteen, the obligation would be \$2,740 a month plus extraordinary expenses for university and sports. That would be inappropriate for an adult dependant because her mother bears no household expense for her most of the year and the cost of university is a significant part of the expense of the dependant. Therefore, I must set an amount under s. 3(2)(b).

[27] Taking an approach similar to *Strecko v. Strecko*, 2013 NSSC 49 upheld 2014 NSCA 66 and *Provost v. Marsden*, 2009 NSSC 365, I would fix a monthly amount based on the guidelines but only for the fraction of the year that Sara may

be at home. This is not a situation in which the custodial parent bears costs when the child is away, such as mortgage payments, heat, and taxes, only to provide accommodation when the child returns home. I will order \$600 a month.

[28] Dr. Gandy will continue to be obligated to pay up to \$14,000 of Sara's university expenses. However, the system of reductions in monthly child support has not worked to ensure delivery of accounts and filing of tax returns. I will order that the obligation to reimburse Sara, or to pay the university directly, arises on delivery of a copy of the account and a promise to file a tax return.

[29] Ruth is in the final stages of withdrawal from parental dependency. She is not there yet because she holds a low paying job, cannot afford an apartment, returns home often, and needs to complete courses and move to Asia to become independent. Had she not accepted her father's refusal to support post-secondary graduate studies, the court might well have ordered Dr. Gandy to cover the expenses. He bears some responsibility for the transition she is undertaking.

[30] I forecast Ruth leaving Canada by next June. I will order support based on my estimate of the time she is at home and the help her mother provides. Eight hundred dollars a month until next June is appropriate. Also, Dr. Gandy is responsible for special expenses related to the transition. He will be obligated to



pay, on delivery of invoices, receipts, or accounts, the cost of courses necessary to obtain credentials to teach English as a second language and to travel to a place where Ruth takes a teaching position.

[31] *Other Support Issues.* The application was filed last March. For the reasons already discussed, Dr. Gandy was justified in suspending payments last May. The order will be effective June 1, 2015.

[32] Dr. Gandy included a claim for "an order seeking credit to the Applicant for \$6,240 in overpayments from June 2012 – June 2014 when Ruth Gandy ... was living full time in Korea". Ruth lived there for one year, not two. Dr. Gandy knew about this but did nothing to secure a variation of the 2012 order. Had he done so, the application would likely have failed. The year in Korea was part of Ruth's Asian Studies program. This part of the application is dismissed.

[33] Dr. Gandy also included in his notice of application a claim for variation of the original divorce order for "Removal of the Respondent from the Applicant's group health plan effective immediately."

[34] A separation agreement dated April 28, 1999 provided:

The Husband shall provide medical and dental coverage for the Wife and the children of the marriage for as long as the policy under which he is covered permits and the Husband further agrees that notwithstanding the terms of his

employment change and he is not covered under a Group Policy, that he will retain and maintain coverage for medical and dental purposes for the Wife and the children.

This provision was included under a part titled "Child Maintenance and Support".

The agreement was incorporated into the divorce order.

[35] The marriage lasted only five years. The part of the agreement titled "Spousal Maintenance and Support" limits spousal support payments to thirty-one months ending in 2000.

[36] Dr. Gandy complains that he cannot put his present wife on his group policy despite having been divorced from Ms. Gandy in 1999 and having ceased to have spousal support obligations fifteen years ago. Ms. Gandy complains that she has extraordinary needs for prescription drugs and only has a disability pension to live on. However, the needs and the unemployment resulted from injuries in car accidents after separation and Ms. Gandy's losses were compensated.

[37] This is a situation similar to that confronted by Justice Warner in a case that went on appeal: *Kenny v. MacDougall*, 2007 NSCA 126. Justice Cromwell summarized Justice Warner's decision this way at para. 6:

The judge linked the health coverage issue to Mr. MacDougall's spousal support obligations set out in the Minutes of Settlement and the corollary relief judgment. He found (and this conclusion is not challenged) that those spousal support

obligations had been discharged. The judge concluded, looking at the agreement as a whole, that it was not consistent with the parties' intentions at the time of their agreement or with the support provisions of the **Divorce Act** that Mr. MacDougall would be required to maintain his former spouse on his medical/dental insurance after he had discharged his other spousal support obligations to her, he had remarried and she was in a new relationship. As he said:

The circumstances have substantially changed, materially changed, beyond the reasonable contemplation of the parties; and to enforce that clause as a forever clause, in my view, would not promote the support objectives of the **Divorce Act**.

There was no error within the standard of review on appeal.

[38] The task for me is similar to Justice Warner's. Does the clause about medical insurance survive forever?

[39] Part III of the agreement is titled "Maintenance and Support". In turn, it has two separate parts: III(1) "Child Maintenance and Support" and III(2) "Spousal Maintenance and Support". The clause about medical insurance is III(1)(4). The rest of the substantive provisions of III(1) also refer to "children of the marriage" and, when read with the *Divorce Act*, they expire on majority or independence. Clause III(1)(4) itself is limited by "the children of the marriage".

[40] The spousal support provisions are simple. III(2)(1) creates the obligation and the April 30, 2000 expiry. III(2)(2) is about postdated cheques for spousal support and child support.

[41] I do not interpret III(1)(4) as a spousal support provision. It is for child support and relieves the mother from personal medical expenses as well.

However, it is so tied to "children of the marriage" that its termination coincides with cessation of child support obligations rather than the termination of spousal support obligations as in *Kenny v. MacDougall*.

[42] The separation agreement does not intend the medical insurance obligation to go on forever, but it did not terminate with the termination of spousal support obligations. For both Ms. Gandy and the three daughters, the obligation terminates only with the termination of child support obligations.

[43] There are material changes since 1999. However, the court should not rewrite the separation agreement in this case. The obligation will soon expire on its own terms. Therefore, I dismiss this part of the application but will make a declaration about termination under the agreement.

[44] In his affidavit, Dr. Gandy asserts that he paid more than \$14,000 in 2014 for Sara's education expenses. He claims \$4,229.85. He says, "I do verily believe that the overpayment was made". His opinion is not admissible evidence. He refers to information he obtained on December 22, 2014 from an unnamed agent of

the Children's Education Funds Inc., but that proves nothing either. See Rule 5.17. Nothing else is offered as evidence. I am not prepared to entertain this claim.

[45] In his brief, Dr. Gandy claims for overpayment of child support calculated at \$7,386. He says that he ought not to have paid anything for any of the three daughters in May, 2015 and he ought not to have paid anything for Grace Gandy after September, 2014.

[46] I found that two of the daughters remain children of the marriage and exercised my discretion to implement the varied child support effective June 1, 2015. As regards Grace Gandy, no one could have made the call in October, 2014 that she had permanently left her mother's care. Her pattern of leaving home and coming back started during minority. It would even have been difficult to make that call as of the date of the application, some six months later. I found that a year's absence was enough, whether or not she intended for now to return to her mother and school. Again, the June date seems a good estimate.

[47] *Conclusion.* I will grant an order recognizing that Ms. Grace Gandy is no longer a child of the marriage and her father has no obligation under the *Divorce Act* to pay support for her. I will vary support for Ms. Grace Gandy to \$600 per month starting June 1, 2015 plus reimbursement of her for university expenses, or

payment to the university, to a maximum of \$14,000 due when an invoice, receipt, or university account is delivered to Dr. Gandy. I will vary support for Ms. Ruth Gandy to \$800 a month terminating on June 1, 2016 plus payment of the cost of courses necessary to obtain credentials to teach English as a second language and to travel to a place where she takes a teaching position.

[48] The claims for an overpayment of \$6,240, \$4,229, and \$7,386 are dismissed. The claim for a variation in Dr. Gandy's obligation to provide medical insurance is dismissed, but I will grant a declaration that the obligation under the divorce order terminates when his child support obligations terminate.

Moir J.