SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Nickerson v. Ammouri*, 2015 NSSC 344

Date: 2015-11-20
Docket: *Halifax* No. 1201-063552
Registry: Halifax

Between:

Jody Nickerson

Petitioner

v.

Jennifer Ammouri

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	June 18 & August 17, 2015, in Halifax, Nova Scotia
Counsel:	Nicholas Fitch for the Petitioner Vanessa Jass for the Respondent

By the Court:

[1] Mr. Nickerson filed a variation application on December 4, 2013. He requested a variation of the terms related to section 7 expenses as contained in a Consent Variation Order issued May 22, 2013 ("Consent Order"). The Amended Response to Variation Application was filed by Ms. Ammouri on February 26, 2015. She requested changes to the terms of custody, access and s.7 expenses (including a claim for retroactive s. 7 expenses). The hearing commenced on June 18, 2015 and continued on August 17, 2015.

[2] The Consent Order confirmed Mr. Nickerson's income to be $82,394 in 2010 and $77,266 in 2011. The Consent Order includes the following:

> Preamble- It is not necessary to make a determination as to Jennifer Ammouri's income, as the parties have agreed to a method of calculating those costs without requiring disclosure of Jennifer Ammouri's income. The parties have agreed that for the purpose of calculating the net child care expenses, the gross expense shall be subject to a 38% discount to take into account any income tax deductions available to Jennifer Ammouri.

[3] The table amount of child support was set at $654 per month beginning on July 1, 2012 and continuing until June 30, 2013.

[4] The table amount of child support payable by Jody Nickerson was to be adjusted July 1st of each year based on the previous years method calculation of support. The recalculation was to use Line 150 of Jody Nickerson's income tax returns adjusted in accordance with Schedule III (with the exception that no deduction for any dividends were to be taken into account due to the dividend gross up calculation).

[5] The Consent Order confirmed that Mr. Nickerson's contribution to the childcare was fixed at the amount of $115 per month and not subject to any annual adjustment regardless of any differences in circumstances. Potential changes in circumstances included changes to income, costs or income tax brackets. The fixed contribution to childcare costs ended on August 31st of the year the child begins grade 7. Prior to that time, the agreement could not be varied and was a "fixed arrangement" unless child care costs stopped completely "in the opinion of the mother".

[6] Despite the fixed arrangement related to child care, Mr. Nickerson sought to vary the Order in terms of his contribution to child care. There is no basis upon which the terms of Mr. Nickerson's contribution to child care is to be varied. His contribution to child care remains as set out in the Consent Order.

[7] There was a subsequent Interim Consent Order issued December 16, 2014, which varied the table amount of child support. Child support was set at $737 per month as of November 1, 2014, based on the 2013 annual income of Mr. Nickerson of $87,398. None of the other provisions of the previous Consent Order of May 2013 were varied (including Mr. Nickerson's contribution to child care).

[8] As a result of Ms. Ammouri's Response Application seeking a retroactive s.7 adjustment, further financial disclosure was ordered to be provided. When the matter returned to court in August, Ms. Ammouri indicated that she was not seeking ongoing contributions to s.7 expenses, with two exceptions: 1) she reserved her right to apply for a contribution to private school (if the child commenced attending private school) and 2) reserved her right to apply for Mr. Nickerson to contribute to post-secondary expenses when the child graduates high school and attends a post-secondary institution.

[9] Counsel for Ms. Ammouri confirmed that she was seeking a retroactive variation of s. 7 expenses (other than child care) for the period of September 2012 to August 2015. The difficulty with this claim is that the request for retroactive relief predates the Consent Order issued May 22, 2013. A term of that Order provided that:

> "This order constitutes a comprehensive settlement of any retroactive child support payment, including payments for special or extraordinary expenses, for all previous years and time periods."

[10] There is no jurisdiction to go behind the Consent Order of May 22, 2013 and any claim for retroactive s.7 expenses will not be considered prior to May 22, 2013. The only relevant period for consideration is therefore May 2013 to August 2015.

[11] The Consent Order of May 22, 2013 also contained the following provision:

> "5. While there will be no change to the contribution to childcare costs, either parent is entitled to bring a claim for a contribution to other expenses in the future, that would fall under categories of section 7 in the Child Support Guidelines and they would leave it to that future day as to whether those costs are

> shareable and the formula which they are shared and the calculation of the parties' respective incomes in order to share them. Either parent may make a claim for other special or extraordinary expenses."

[12] The section 7 expenses referred to in the documentation are:

(a) Medical plan premiums attributable to the child;

(b) Psychological fees;

(c) Tutoring;

(d) Extra-curricular activities- skating, tae kwon do, hip hop, soccer, drum lessons.

[13] With respect to the medical plan premiums attributable to the child, these expenses were not noted on the Amended Statement of Special or Extraordinary Expenses filed on June 18, 2014. The only quantification with respect to these expenses is attached as Exhibit "A" to the Affidavit of Mr. Nickerson (Exhibit 1, Tab S). The costs related to the premiums for this insurance were calculated as of September 2010 when the correspondence was dated. There is no current documentation or calculation in relation to these expenses and they are disallowed.

[14] The psychological fees and tutoring may well qualify as section 7 expenses capable of contribution by both parties. The psychological fees (net of insurance coverage) were $1,265 and the tutoring fees were $3,250 up to June 2015 with further anticipatory gross costs of $600 per month during the school year (reference Updated Financial Disclosure of Ms. Ammouri filed July 31, 2015). I have not been provided with a net costing of the tutoring expenses by Ms. Ammouri.

[15] In examining these expenses claimed under section 7, I am to take into account section 7(3) of the Federal Child Support Guidelines which states:

> "Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense."

[16] The most common application of this section is that the tax deduction for child care be taken into account prior to apportioning the child care costs to the parties. In this case, Mr. Nickerson requests this court to go further than calculating the net section 7 expense and instead requests the child tax and

disability benefit amounts between himself and Ms. Ammouri be divided equally. His calculation of these benefits to which he believes he is entitled (for the period of 2006 through June 2012) is $11,970.76 (50% of $23,941.51). I do not agree with Mr. Nickerson's position that these benefits are shareable between the parties.

[17] Ms. Ammouri, as primary care parent, is entitled to receive the child tax benefit and disability benefit for the child- Mr. Nickerson is not entitled to receive these benefits. S. 7(3) does not direct the court to share the benefit of all government subsidies, benefits, deductions or credits between the parties. That subsection directs the court to take those subsidies, benefits, deductions or credits into account **that relate to the expense being claimed**.

[18] I requested counsel for Mr. Nickerson to provide case law authority for his proposition that the benefits were shareable. One of the cases cited (*Almeida v. Almeida* 1995 (ABQB)) is easily distinguishable as it predates the Federal Child Support Guidelines. Likewise *Rhyno v. Rhyno* 2004 NSSF 61 can be distinguished as that case related to split custody of the children and other distinguishing factors (such as the low income of the payor parent*)*. *J.C. v. C.S.* 2009 PESC 8 confirms my finding that the tax credits and benefits examined by the court must relate to the applicable section 7 expense being claimed.

[19] The evidence of Ms. Ammouri was that the expenses related to psychological assistance for the child and the expenses related to tutoring are related to the child's disability. As such, I am able to take into account any government benefits that relate to those expenses. Ms. Ammouri is entitled to receive a monthly child disability payment (in excess of $100 per month) and is able to take advantage of a disability tax credit claim.

[20] I have taken into account the relative incomes of the parties, the sharing of expenses between Ms. Ammouri and her partner as well as the government benefits received and direct that no cost sharing of these expenses will occur. Ms. Ammouri will continue to receive the benefits, tax credits and any other government subsidies to which she is entitled to receive from the government without sharing these benefits with Mr. Nickerson.

[21] In relation to the other expenses claimed for extraordinary expenses, I would not mandate that those costs be shared. They are not extraordinary taking into account the means, needs and conditions of the parties. Many of the costs are nominal given the parties' income levels (i.e. hip hop, soccer, guitar).

[22] In addition to the financial issues, Ms. Ammouri requested that the March Break access provided to Mr. Nickerson be discontinued as he does not exercise this right. Mr. Nickerson indicates that he may not be able to take advantage of this time with the child given his work schedule but will advise Ms. Ammouri by February 1st of each year. Ms. Ammouri requests to be notified if Mr. Nickerson intends to exercise this parenting time by January 1st. In order to make appropriate arrangements for the child over the March Break, I find it reasonable that notification be done at the earliest opportunity. Given that January 1st is a holiday, if Mr. Nickerson cannot exercise this parenting time over March Break, he is directed to advise Ms. Ammouri in writing by January 5th of each year.

[23] Ms. Ammouri also raises a concern in relation to the childcare arranged by Mr. Nickerson. Mr. Nickerson's response to this concern is contained in his affidavit at Exhibit 1, Tab S, paragraph 32. Mr. Nickerson was not cross examined in relation to his explanation of child care providers. His evidence that he uses child care approximately 6-9 hours per year with trusted individuals is reasonable. There is no necessity to alter the current Order to reflect any changes to the parenting arrangements.

[24] The final issue is the appropriate table amount of child support payable by Mr. Nickerson. The child support should have been adjusted as of July 1, 2015 to reflect any changes in income for Mr. Nickerson. Mr. Nickerson's 2014 income tax return (Exhibit 4) reveals the following in relation to his income:

(a) Employment income of $94,754.62;

(b) Dividend income of $1,631.89; and

(c) Taxable capital gain of $2,946.58.

[25] The Consent Order of May 2013 indicated the format to be used in making annual adjustments to the table amount of support. Paragraph 3 of the Order provided that Mr. Nickerson's line 150 income was to be used (with any schedule III adjustments) with the exception that no deduction for any dividends be taken into account due to the dividend gross up calculation. As a result, Mr. Nickerson is found to have a gross annual income for the purposes of determining the appropriate amount of spousal support of $99,333, calculated as follows:

(a) Employment income $94,754.62

(b) Dividend income $1,631.89

(c)	Actual capital gain	2 x	$2,946.58
	Total		$99,333

[26] I have not been provided any exhibits relating to further Schedule III deductions for consideration. As a result, child support as of July 1, 2015, should reflect the amended table amount of child support to be $831.60 per month.

Chiasson, J.