

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: M.J.H. v. B.E.N., 2007 NSSC 326

Date: 20071113

Docket: 1209-000362

Registry: Annapolis Royal

Between:

M.J.H.

Petitioner

v.

B.E.N.

Respondent

Judge: The Honourable Justice Suzanne J. Hood

Heard: September 11, 2007, in Annapolis Royal, Nova Scotia

**Final Written
Submissions:** October 1, 2007

Counsel: Petitioner, on her own behalf
Respondent, on his own behalf

By the Court:

INTRODUCTION:

[1] The mother seeks payment of special expenses from the father as well as changes to child support.

ISSUES:

- 1.) Special expenses;
- 2.) Child of the marriage; and
- 3.) Child support

FACTS:

[2] The mother makes an application:

- 1.) To adjust child support payments June 1st, 2006 and June 1st, 2007 using the appropriate income tax information and May 2006 Federal Tables.
- 2.) To Establish the AUTOMATICA CALCULATION of yearly child support payments by Maintenance Enforcement based on the Federal Child Support Amounts: Simplified Tables (2006).
- 3.) To establish as Special Expenses, College Tuition to Concepts: School of Cosmetology & Counselor in Training: Halifax Campus based on parent's income. To have order signed
- 4.) To establish as Special Expenses, living expenses for M. during the school year while attending college.
- 5.) To establish as Special Expenses, Driving Education Courses and to establish payments based on parent's income. To have order signed.
- 6.) To establish as Special Expenses, Medical expenses incurred prior to medical coverage in October 2004.
- 7.) To establish as Special Expenses, ice hockey expenses for a goaltender.
- 8.) To adjust child support payments of June 1st, 2000 to September 1st, 2000 using the 1999 income tax information supplied by B.E.N. in court on the 7th November, 2000, as per instruction by Justice Boudreau.
- 9.) To establish a permanent address for respondent, B.E.N. after October 1st, 2007.

10.) To establish that the non-custodial parent shall deliver a copy of his/her COMPLETE UNALTERED income tax form to the opposite party each and every subsequent year on or before June 15th following the filing date of the return.

[3] These parties have been before the courts on a regular basis since their separation and divorce in 1994. Their children are now 18 and almost 20 and have lived at various times with each parent. The 18-year old now lives with his mother and the 19-year old shares an apartment in Halifax with two others while attending college. The mother lives in the Annapolis Valley.

[4] The father has regularly been paying monthly child support and the mother seeks to have it ordered retroactively for a period in 2000 as well as updated to reflect the amended Child Support Guidelines which took effect May 1, 2006. She also seeks sharing of some expenses.

[5] Several of the issues the mother raises were previously dealt with by Justice Boudreau. I will deal with these first.

1.) Child Support June 1 - September 1, 2000

[6] Justice Boudreau's order dated December 12, 2000 provided that child support was to commence October 1, 2000, based on the father's 1999 income. Subsequently, in his oral decision of September 13, 2005 (written release January 20, 2006), he said in para. 4:

I am not satisfied that I should order at this point, in view of all that has transpired in this file, any retroactive child support for 2000, whatsoever.

[7] This issue has been adjudicated on by the court and not appealed. It cannot be raised again.

2.) Medical Expenses Pre-2004

[8] In para 6 of the decision referred to above, Justice Boudreau also concluded he would not make an order for retroactive support for medical expenses. That issue too has been dealt with by the court and cannot be brought forward again.

3.) Ice Hockey Expenses

[9] Also in para 6 of the above decision, Justice Boudreau said he had no evidence of extraordinary recreational expenses. That is still the case. He did not order such expenses to be paid, nor do I.

[10] In any event, unless the level at which the son played was such that the expense would be extraordinary, such expenses are not considered special expenses to be cost-shared. Hockey is an expensive sport, especially for a goaltender, but expensive does not equate with special.

[11] I decline to award any retroactive support for such expenses.

[12] The issues now before me:

1.) Drivers' Education Expenses

[13] The mother provided receipts for drivers' education expenses for both children. For the daughter, they date back to 2004 and for the son to 2005. No explanation was given for not dealing with these at one of the earlier hearings.

[14] In any event, the mother testified that these are "normal" expenses for a parent to incur for children. She referred to their value and the cost-savings on her insurance. In order to be cost-shared by parents, when one is receiving child support, they must be extraordinary expenses. In the mother's own words, they are not, they are normal expenses. I agree with her and do not order cost-sharing of these expenses.

2.) College Tuition

[15] The daughter took a cosmetology course costing \$10,000. It ran from September 2006 to August 2007. The mother testified she paid the entire cost of this course from Registered Education Savings Plans (RESP's) and provided receipts from the course and evidence of withdrawals from RESP's.

[16] The mother, one year later, now seeks to have the father pay his proportionate share of the tuition costs, although already paid from the RESP's. I cannot conclude that is appropriate. The daughter's course was fully paid for from RESP's, not directly by the mother. It appears she put most, if not all, of the money into the

RESP's: Exhibit 8 shows that one of the RESP's began in 2001. Nonetheless, there was no shortfall for tuition costs to which the father should be required to contribute.

[17] The mother also claims cost-sharing from the father for the second program into which the daughter has been accepted. Exhibit 10 is a letter of acceptance into the Counsellor Training Institute of Canada. The total cost is \$9,693 for the program which runs from September 2007 until February 2008. In addition, the Institute estimates a cost of approximately \$850 for textbooks, depending upon courses chosen. The mother testified she has paid \$5,000 towards the cost, again from an RESP. (Exhibit 10).

[18] There are three reasons why I decline to make a child support order for these expenses.

[19] First, as with the cosmetology program, the costs are being paid from RESP's and there is no apparent shortfall.

[20] Secondly, parents are normally only required by the courts to pay for the cost of one degree, diploma or certificate. If a student wishes to continue, he or she should pay his or her own way for a second or subsequent program. Since the daughter now is a graduate of the cosmetology program, she is trained to work in that field. She will be 20 in December and is an adult.

[21] Thirdly, I am not satisfied that in all the circumstances, that the daughter is still a child of the marriage. She is 19, almost 20, has completed one program and is living with her boyfriend and his brother in a two-bedroom apartment and has been since September 2006. Although her mother paid her expenses in 2006 - 07 and proposes to continue to do so, I cannot conclude that it is the parents' legal obligation to do so. Just because the mother opts to support her daughter, does not mean that the father must be ordered to do so.

[22] I therefore do not order the father to cost-share the costs of the counselling course.

3.) Living Expenses of Daughter While at College

[23] The mother seeks to have the father pay his proportionate share of the daughter's living expenses for the school year 2006 - 07 and September 2007 - February 2008. For the reasons stated above, I do not order the father to pay any portion of the living expenses for the period September 2007 to February 2008.

[24] For the period September 2006 to August 2007, there is no evidence before me of most of the daughter's living expenses. There is no copy of the lease or receipts for utilities, such as electricity, cable or telephone.

[25] The mother had the opportunity to provide proof of these expenses and has not done so. I therefore can make no order of child support for sharing these expenses. This was the mother's chance to prove these expenses since this is her application and she cannot bring a further application on the same subject should she later obtain such information. The matter has now been finally adjudicated upon, subject to any appeal which would be based upon the same exhibits before me. I say this because of the issues previously addressed by Justice Boudreau which were raised again before me.

[26] Print-outs of bank records are Exhibits 6 and 7. They show amounts deposited to the daughter's account and various expenditures. Some are for hairdressing supplies but not large amounts, in total less than \$175. Many expenses are for fast food restaurants like Wendy's, Subway's and McDonald's. There are also expenditures at the Nova Scotia Liquor Commission and movie theatres, the latter appearing to be for more than the cost of a single admission.

[27] The mother testified that the apartment expenses are shared three ways but there is no evidence of the cost. The mother testified she gave \$800 - \$1,000 per month to her daughter, \$500 at month end and approximately \$100 per week. Exhibits 6 and 7 show deposits of varying amounts. Between the two accounts shown in the two exhibits, the mother made the following deposits:

Date	Dollar Amount
September, 2006	1,700
October, 2006	450
November, 2006	400
December, 2006	1,365
January, 2007	1,150
February, 2007	775
March, 2007	800
April, 2007	1,400
May, 2007	1,050
June, 2007	750
July, 2007	840
August, 2007	<u>690</u>
Total \$ 11,370

[28] That is an average of \$947.50 per month. The mother testified the daughter's share of the rent was \$300 so she paid approximately \$650 on average beyond what she believed to be her daughter's share of the rent for her other living expenses. In my view, that is a large amount for someone sharing expenses three ways. If the mother chose to be generous, that is very good of her but it is not something the court will impose on the other parent.

[29] The question for me is what portion of these expenses, if any, should the father be ordered to pay, without evidence of the hard expenses like rent, electricity, telephone and cable television. I conclude I cannot speculate about these costs or how the three in the apartment shared these expenses. There are additional expenditures shown in the exhibits, which I would categorize as "pocket money". If reasonable,

that is not an unnecessary expense. I conclude a reasonable amount is a living expense and a special expense. However, the mother is receiving child support from the father for the daughter as well as the son. Since the daughter is not residing at home with her mother, a portion of the child support should be attributed to her living expenses in Halifax. The mother also testified that her daughter did not live with her even when she finished her high school education. Normally a student living away from home for a college education returns to the custodial parent for holidays, school breaks, etc. That apparently was not the case here. Accordingly, the mother was not incurring costs of maintaining her home for her daughter and can provide to her her share of the child support she receives for her. Since the son does reside with her, one cannot say one-half of the child support is available for the daughter but a substantial portion is, just as it was when she resided outside of her mother's home as a high school student.

[30] I conclude \$200 of the child support payment is available for the daughter's living expenses in Halifax.

[31] Since I have no evidence of the actual living expenses, except for pocket money, I cannot be satisfied that there is any special expense the father should be required to share. It is clear the mother deposited thousands of dollars into her daughter's account but little evidence of what it was used for, other than pocket money and approximately \$175.00 for cosmetology supplies.

[32] I conclude that since a portion of the regular child support was available for the daughter's living expenses it more than covered what I conclude would be a reasonable amount of pocket money for a student, considering her financial circumstances and those of her parents. The only expense I have evidence of and would consider to be a special expense is \$175 for cosmetology supplies. I must therefore determine how the only expenses of which I have any evidence are to be apportioned. For this I must determine the incomes of the parents.

4.) The Parents' Incomes

[33] The mother testified her income is \$36,854.44 and she provided a copy of her 2005 Income Tax Return. She said there is no significant change for 2006. Her 2004 income was \$40,420.

[34] Because she is a self-employed professional, the mother made deductions from her gross income of \$47,970.08. She claimed a deduction for car expenses of \$3,166 and use of a portion of her home for business purposes (including 1/8th of the heat, electricity, insurance, maintenance, property taxes and mortgage interest) totalling \$1,167. In my view these amounts should be included in her income for determining the apportionment of special expenses, which results in income of \$41,187.

[35] The father's income is based upon his 2006 income set out in Justice Boudreau's decision and order from earlier this year. The father's income is \$30,169.

[36] The apportionment of expenses accordingly is 57.7% (mother) and 42.3% (father). The father shall pay 42.3% of \$175.00 to the mother, that is \$74.03.

[37] The last issue properly before me is:

5.) Child Support Based on May 1, 2006 Federal Child Support Amounts

[38] The tables were amended effective May 1, 2006. The parties were before the court approximately one year ago; the latest order, which was not appealed, is dated July 24, 2007; this application was commenced on August 14, 2007 and heard on September 11.

[39] Since I have concluded above that the daughter is no longer a child of the marriage, child support based upon the amended tables is payable only for one child effective September 1, 2007 in the amount of \$268 per month, based upon the father's income of \$30,169. I decline to make a retroactive order beyond August 1, 2007 since the previous order was only issued on July 24, 2007. Child support for two children for the month of August 2007 only is \$455 based upon the father's income of \$30,169.

[40] I would note however that if the son continues to be a child of the marriage and attends post-secondary education, the parents will have to share the balance of the cost of his education if there are insufficient funds in the RESP's or from such sources as the son's employment and savings to pay these costs. Unless their incomes change, the balance of the cost of his education is to be shared based upon the above percentages. I say this only for the guidance of the parents and it does not form part of the my decision. The parties will have to deal with this in future if the situation arises.

[41] The parents are to exchange income tax information by June 15 annually.

COSTS:

[42] I would normally exercise my discretion to award no costs on this application because there has been mixed success. However, since the mother raised issues previously litigated and decided upon and brought an application for sharing of college expenses with little evidence of those costs beyond what was paid by RESP's, I order her to pay costs to the father of \$300. He had to travel from Halifax, received disclosure of substantial material only at the hearing and had to re-argue matters previously decided.

[43] I would also caution both parties that costs awards against the unsuccessful party should be expected in future if they make unsuccessful applications and/or applications without providing proper notice of, and copies of, material to be relied upon. For this reason, it is important that each have a current address to which such material can be sent and at which service can be effected upon them. This latter therefore forms part of my decision to be reflected in the order arising therefrom.

J.