IN THE SUPREME COURT OF NOVA SCOTIA
Citation: M.J.H. v. B.E.N., 2008 NSSC 298

Date: 20081009
Docket: SARD 041160
Registry: Annapolis Royal

Between:

M.J.H.

Applicant (Petitioner)

and

B.E.N.

Respondent (Respondent)

Judge: The Honourable Justice Glen G. McDougall

Heard: September 23, 2008 in Annapolis Royal, Nova Scotia

Counsel: Both parties are self-represented

By the Court:

[1] The parties to this application are self-represented.

[2] The Applicant, M.J.H, seeks to vary the provisions of a Corollary Relief Judgment granted by the Honourable Justice C.E. Haliburton on the 23rd day of August, 1994. A separation agreement that the parties had entered into earlier was made part of the Corollary Relief Judgment.

[3] Since first issued in 1994, the Corollary Relief Judgment has been varied sixteen times. The last application to vary was heard on September 11, 2007. It resulted in an Order which was issued on the 5th day of February, 2008.

[4] The current application seeks the following relief:

> 1. To adjust child support payments for June 1st, 2008 up to and including June 1st, 2009 using the table amount plus special or extraordinary expenses with the appropriate income tax information.
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> 2. To establish as Special Expenses, college and living expenses for B.W.H.N. as per Federal Child Support Guidelines.
>
> 3. To claim undue hardship.

[5] In support of the application M.J.H. provided her own affidavit. Later filings included certain financial information respecting her income and expenses along with income and expenses pertaining to the parties' 19 year old son who is in full-time attendance at a post-secondary education institution in Charlottetown, Prince Edward Island.

[6] The Respondent, B.E.N. filed a counter-application asking the Court to terminate child support altogether. He later offered an explanation for why he took this step. He indicated that it was the result of not having received any confirmation of his sons actual enrollment in school nor any information related to the actual or anticipated costs of attending. He did not receive this information until a few days before the hearing. Some of it was only made available to him when it was offered in evidence at the hearing. Despite this late disclosure the Respondent asked that the matter proceed instead of seeking an adjournment.

[7] When this matter was last in Court on September 11, 2007 the Honourable Justice Suzanne J. Hood made the following comment at paragraph 43 of her decision:

> [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.

[8] Paragraph five of Justice Hood's order contained such a provision. In addition, paragraph six gave the parties' respective address at that time. Neither party has

moved in the interim. As such neither of them would have had any difficulty tracking down the other side.

[9] The Court is aware that some information was not available to the Applicant until a few weeks or so before the hearing. Nonetheless what she had should have been attached to her affidavit which was filed along with the notice of this application on September 3, 2008. The Respondent was entitled to this information and should have received it in a more timely fashion.

[10] Justice Hood also attempted to provide some guidance to the parties with respect to the apportionment of any future post-secondary education costs associated with their son. At paragraph 40, Justice Hood wrote:

> [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 my decision. The parties will have to deal with this in future if the situation arises.

[11] The Applicant, to her credit, attempted to reach an agreement with the Respondent on the apportionment of their son's anticipated expenses for the upcoming academic year. Using the 2006 "line 150" income for both herself and the Respondent and based on the estimated cost of the first year of the two-year program the Applicant wrote to the Respondent on April 14, 2008 requesting that he pay $8,262.28 by July 31st, 2008. She, in turn, agreed to be responsible for the balance of $11,889.62. She made no allowance for any contribution from their son. The evidence offered at the hearing indicated that B.W.H.N. had summer earnings in the past three years as follows:

2006 – $2,432.00
2007 – $3,555.00
2008 – $4,465.00

[12] According to the Applicant, B.W.H.N. has not applied for a student loan to help defray the cost of his education. She testified that based on her daughter's prior experience it would be a waste of time to even apply. The Court does not share her

pessimism. I encourage the Applicant to impress upon her son the importance of exploring this potential source of financing and to offer him assistance in making the necessary application. I am not promoting the indiscriminate use of debt financing to pursue higher education but if the parents are unable to cover the entire cost themselves (which is the case here) there might be no other recourse.

[13] In addition to this, it is incumbent on the student himself, if he is able, to contribute towards his own education from summer earnings and part-time employment when it is available and practicable. B.W.H.N. resided with his mother until he left for Charlottetown. He was unable to get a room in residence and thus had to find off-campus accommodations.

[14] He and his mother co-signed a 12-month lease for an apartment located approximately 30-minutes walking distance of the campus. The monthly rent is $525.00.

[15] Well before this, on March 18, 2008, the Applicant borrowed $5,869.58 from Valley Credit Union Limited to buy a 1995 Volkswagen Jetta for her son. The vehicle is registered in his name. She testified that this was done to provide B.W.H.N. with transportation for work during the summer. It was also done in anticipation of his future attendance at an out-of-province college. It will no doubt come in handy for that purpose but it is perhaps a luxury that this young man and his family cannot afford. And for certain it is an expense that the Respondent should not be asked to contribute to given the fact that he was not consulted or even made aware of its planned purchase before the expenditure was made. This, unfortunately, typifies the relationship that has developed between the parties since separation and, lamentably, one that it is not likely to change in the foreseeable future.

[16] In a letter dated April 30, 2008 the Applicant re-calculated the parties' respective contributions to reflect her slightly higher 2006 income of $46,474.52. She also used a lower estimate of education expenses for their son of $15,751.90. This latter figure included a total of $5,336.90 to cover the remaining balance owed for the purchase of the V.W. Jetta ($4,000.00) along with vehicle registration and insurance ($1,186.90) and parking ($150.00).

[17] If $5,336.90 is deducted from $15,751.90 it leaves a balance of $10,415.00. This latter figure does not include any allowance for apartment rental, food, household supplies, clothing, recreation or other incidental expenses. It is presumed that the

Applicant anticipates that the Respondent will contribute towards these costs by continuing to make regular monthly child support payments based on his annual income in accordance with the **Child Support Guidelines**.

[18] According to the most recent Variation Order of Justice Hood the Respondent must pay $268.00 per month based on 2006 income of $30,169.00. According to the Respondent's income tax return, he earned $29,807.75 in 2007. The **Guidelines** suggest that he should pay child support of $266.00 for one dependent child based on this income. According to his Financial Statement he expects to earn $31,000.00 in 2008. Based on this annual income projection he would normally be required to pay $276.00 per month for one dependent child.

[19] In order for the Court to determine the appropriate contribution each parent should pay towards the cost of post-secondary education, it must first establish what the total costs are likely to be. The Court should also determine the amount, if any, the student should be expected to contribute towards his own education. The balance can then be shared by the parents in proportion to their respective incomes provided they have the ability to pay. Once this exercise has been completed the Court can then decide the appropriate amount of regular child support to order.

LAW

[20] The starting point in this discussion is Section 2, sub-section (1) of the *Divorce Act* which defines "child of the marriage" to mean "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 necessaries of life;

[21] The **Federal Child Support Guidelines**, SOR/97-175 provide:

> Child the age of majority or over
>
> 3. (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it 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.
>
> Special or extraordinary expenses
>
> 7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> (e) expenses for post-secondary education;
>
> Sharing of expense
>
> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[22] In the case of **A.W.H.** v. **C.G.S.**, 2007 NSSC 181, the Honourable Justice Beryl MacDonald of our Court stated at para 15:

> [15] Section 7(1) directs a court to examine the "reasonableness" of the child's educational expense "in relation to the means of the spouses and those of the child". I consider it therefore appropriate to look first at the amount of the expense inclusive

> of the child's living expenses, next at the means of the child to determine what he or she should contribute from sources other than debt instruments, and finally at the ability of the parents or a parent to contribute either in whole or in part to the remaining expense. In conducting this review I am mindful of the comment of Justice Rogers in **R.J.C. v. R.J.J.**, [2006] B.C.J. No. 2150, 2006 BCSC 1422 (S.C.) at para 20:...

[23] In another case decided by the Manitoba Court of Appeal, Chief Justice Scott, in the case of **Rebenchuk** v. **Rebenchuk**, 2007 MBCA 22, wrote:

> [53] Most courts seem to accept that it is reasonable for a child to be able to obtain one degree with the support of a non-custodial parent, with entitlement to subsequent degrees being very much a fact-driven issue. There is no set pre-determined cut-off for support, although I have been unable to find a case that required support past the age of 26 or 27. I agree with the view that, ordinarily, student loans ought to be required only when the means of the child combined with the means of the parents leave shortfall. [emphasis added] It is to be remembered that student debt delays the cost of education. It is not a reduction. In his annotation to **Mabey v. Mabey**, 2005 NSCA 35 (CanLII), 2005 NSCA 35, 12 R.F.L. (6th) 403, Professor McLeod notes (at p. 407):
>
> > Most courts are reluctant to allow a payor to avoid child support by insisting the child maximize his or her contribution by student loans, since student loans are just cost deferrals. When the child is finished school, the loans must be paid.
>
> [54] Most courts assume a child will earn income during the summer and this is usually taken into account one way or another in determining the amount of the child's contribution. While the authorities are not consistent on the subject, I much prefer a simple requirement that adult children contribute a "reasonable amount" of their total earnings to their education rather than placing a more onerous burden upon them, leaving the precise determination to the exercise of the trial judge's discretion.

[24] The Nova Scotia Court of Appeal, in the case of **Selig** v. **Smith**, [2008] N.S.J. No. 250, [2008] NSCA 54 also dealt with this issue. The Honourable Justice Elizabeth A. Rosco, at para 20 stated:

> 20 However, there is no hard and fast rule that student loans should be the last resort. In other cases, for example, **Everill v. Everill**, [2005] N.S.J. No. 37, 2005 NSSF 8, and **Houston v. Houston**, [2007] N.S.J. No. 393, 2007 NSSC 277, the child was expected to contribute the full amount of any available student loans. Each case depends on its own particular facts and although the trend seems to be leaning

> towards determining the parents' ability to contribute before resorting to student loans, it cannot be said that it is an error in principle or a palpable and overriding error of fact in a case where the divorced parents' total income approximates $100,000 for a judge to assume that an adult child will be expected to borrow to finance post secondary education. The higher the parents' income, the less the student should be required to contribute. There is no exact right answer in these cases. So long as the amount ordered is reasonable in the circumstances, this court should be slow to intervene. Here the trial judge deducted one-half of the loans. If the trial judge had deducted one-quarter of the student loans or none of them, that would likely have been seen as reasonable as well. The same can be said of the income from employment of the student. There is a wide range of possibilities that fit within the reasonable standard. Given the highly deferential standard of review required in cases of child support for adult children, I am not persuaded that we should interfere with the decision under appeal.

DISCUSSION

[25] With this as an overlay the Court must consider the facts that will ultimately determine the outcome. The Respondent's income has not changed appreciably in the past few years. In 2006 it was $30,169.00. In 2007 it amounted to $29,807.75. He estimates that in 2008 it will be $31,000.00. I accept this estimate and will use it in determining the amount of child support he should pay and also in apportioning his share of education expenses.

[26] The Applicant has not yet filed an income tax return for 2007. Her last reporting year was 2006. She had earnings of $46,474.52. In order to arrive at a reasonable estimate of her current income I must impute an amount which I am entitled to do under Section 19 of the **Federal Child Support Guidelines**. The Applicant estimated her gross monthly income before expenses at $4,565.00. This equates to $54,780.00 on an annual basis. She works as an independent pharmacist. She works three days each week at one store and three days a month at another. She is entitled to deduct certain amounts for transportation, a home office and other such expenses incurred in performing her work-related duties. Taking all this into consideration I impute income to her of $47,000.00 per annum.

[27] The combined income of the parties is:

Applicant	–	$47,000.00
Respondent	–	$31,000.00
		$78,000.00

[28] As a percentage the Applicant has 60% and the Respondent 40% (in rounded figures) of the total combined income. Before applying these percentages I must determine what the extraordinary expenses are. I find them to be:

EXTRAORDINARY EXPENSES	**AMOUNT**
Application Fee (tuition)	$ 40.00
Application Fee (residence)	$ 25.00
Tuition Confirmation Fee	$ 500.00
Tuition (includes leased and purchased books, lab fee, Student Union fee, laundry/uniforms and utensils)	$ 9,350.00
*Apartment Rental ($525.00 x 8 months from September to April inclusive)	$ 4,200.00
Transportation ($150.00 per trip x 4 trips)	$ 600.00
Food and other incidentals ($250.00/month x 8 months)	$ 2000.00
Total	$ 16,715.00

(* The $500.00 security deposit is not factored in. This should be reimbursed when the lease ends.)

[29] Based on the historical summer earnings of the dependent child along with the availability of student loan assistance he should be expected to contribute at least 50% of the total cost of his education. This also takes into consideration the rather modest means of his parents. Even if they were still married and living together it is not likely that they could have paid the entire costs of their son's education.

[30] The remaining 50% will be apportioned to the two parents based on the percentage each have of the combined incomes. The Respondent's 40% share of $8,357.40 is $3,343.00. When spread over an eight month period beginning on

September 1, 2008 and continuing until April 1, 2009, this amounts to $417.88 per month.

[31] The Respondent should also be required to pay regular monthly child support but not the entire **Guideline** amount of $276.00 per month. B.W.H.N. will likely make visits home during the course of the year (I have allowed for four such visits in determining his overall expenses for education) and as a consequence the Applicant will still have to maintain adequate accommodations for him. And, no doubt, she will incur additional expenses while he is home.

[32] I therefore order the Respondent to continue to pay 50% of the normal monthly child support for the period from September 1, 2008 up to April 30, 2009 (i.e., 8 months). This amounts to $138.00 per month. The monthly child support shall increase to $276.00 effective May 1, 2009 and continue throughout the four-month summer break. Assuming the dependent child returns to school in 2009 in order to complete the two-year program, the Respondent's regular monthly payment will once again be reduced by 50%. Added to this will be his pro-rata share of the extra-ordinary expenses associated with his son's second year of studies based on the formula used herein.

DECISION

[33] Effective September 1, 2008 the Respondent shall pay $138.00 per month. This represents 50% of the regular child support based on his annual income of $31,000.00 as determined by the **Child Support Guidelines**. These payments are to be made payable to the Applicant and forwarded to the Office of the Director of Maintenance Enforcement. These payments shall continue at the 50% level until April 1, 2009. Thereafter, for the four month period beginning on May 1, 2009 and continuing up to and including August 1, 2009, the monthly payments shall increase to $276.00.

[34] In addition to these regular monthly payments, the Respondent shall contribute a total of $3,343.00 towards the education costs of his dependent child. On a monthly basis, extended over the 8-month school term, this amounts to $417.88 per month. These payments are to go directly to the student. The first payment shall be made no later than November 1, 2008 and shall be as follows: payment for three months (September/October/November) – $417.88 x 3 = $1,253.64. In order to give the Respondent credit for the $260.00 overpayment of child support paid to the Applicant in September and October of this year, his monthly payment of $138.00 (i.e., 50% of

the regular amount) shall be suspended for the month of November and reduced to $16.00 in December. Commencing on January 1, 2009 it will increase to $138.00 per month and continue at that level until May 1, 2009 when it increases to the full monthly amount of $276.00.

[35] This will hopefully serve as a guide in determining contributions and regular child support payments for the next school term beginning on or about September 1, 2009 and ending on or about April 30, 2010. By then the couples' son should have completed his studies and be able to provide for his own needs.

[36] Each party is to bear their own costs of this application. The Applicant is however reminded that she is still obligated to pay the costs previously awarded by Justice Hood. She is also urged to provide the Respondent with all relevant financial information in a more timely fashion than she has in the past. This might go a long way in alleviating the need for any further Court applications.

McDougall, J.