

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Provost v. Marsden, 2010 NSSC 162

Date: 20100421

Docket: 1201-057557

Registry: Halifax

Between:

M. Murielle Provost

Applicant

and

Steven Marsden

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: August 21, 2009, in Halifax, Nova Scotia
First Written Decision, December 11, 2009

Counsel: Diana M. Musgrave, for the Applicant
Kim A. Johnson, for the Respondent

By the Court:

Introduction

[1] The court released its decision in this matter on December 11, 2009. It is reported at 2009 NSSC 365. Counsel subsequently asked the court to assist in implementing the court's decision. Correspondence was received from counsel in December 2009 and January 2010.

Issues

[2] Issues raised on behalf of Ms. Provost in Ms. Musgrave's December 15, 2009 letter are:

1. Child support payable from June 1, 2009 to September 1, 2009 for three children and related to this determination is the second issue.
2. Arrears of support for June, July and August, 2009, if any.
3. Child support payable from September 1, 2009 to May 1, 2010 for two children.

Issues raised on behalf of Mr. Marsden in Ms. Johnson's letter dated January 4, 2010 (with an accompanying draft order) are:

4. The sharing of tax benefits and deductions available to the parties by way of a transfer of tax credits from the children.
5. Whether Ms. Provost is obliged to disclose the children's educational costs, etc. and there is disagreement as to what those costs are.
6. The percentage of a child's income that will be used to determine that child's contribution to university expenses.
7. The amount of life insurance Mr. Marsden must obtain to secure child support/university costs.
8. On the issue of costs, Ms. Johnson requests an opportunity to make submissions.

In response, it is argued by Ms. Musgrave that:

9. The court does not have jurisdiction to vary the existing corollary relief judgment on the issue of whether child support should be calculated on the basis of the payor's current, or the payor's previous year's income.

[3] In her follow up letter dated January 22, 2010, Ms. Johnson commented on the draft order provided by Ms. Musgrave with her January 11, 2010 letter.

[4] The responses to these questions is in large measure, determined by reference to the *Federal Child Support Guidelines*, S.O.R./97-175 as amended, made under the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) as amended.

[5] These enactments shall be referred to hereafter as the *Guidelines*, (or *Child Support Guidelines*) and the *Divorce Act*.

Position of the Parties

Issue 1, 2 and 3 - Bonus Income received in January 2008 and Child support payable over the summer of 2009 and through to May 1, 2010

[6] Section 17(1) of the *Child Support Guidelines* permits the court to deviate from the calculation of annual income prescribed by s.16 of the *Guidelines*. For ease of reference, those provisions are reproduced following:

Calculation of annual income

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III. SOR/2000-337, s. 3

Pattern of income

17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non recurring amount during those years. SOR/00-337, s. 4

[7] Ms. Johnson argues that Mr. Marsden's salary, effective January 2008 should be used. She says bonus income received in early 2008 was in fact earned in 2007 and should not be considered when determining child support payable commencing June 1, 2009. The bonus income is described as distorting Mr. Marsden's 2008 income.

[8] Ms. Johnson argues *inter alia* that the court has discretion to not consider the bonuses. She argues further that the court is not bound to follow Justice Gass' direction which based the calculation on the previous year's income.

[9] Ms. Musgrave responds that Justice Gass simply enforced the parties' Minutes of Settlement; she did not follow a "past pattern" of payment. She argues also that varying this term/practice is not before the court and the court therefore lacks jurisdiction to make the change.

[10] I am satisfied the court's jurisdiction when called upon to rule on child support encompasses jurisdiction to rule on attributes of child support, of which quantum and duration are two. Calculation of the payor's annual income is a necessary aspect of determining quantum.

[11] Mr. Marsden's child support obligation for the period June 1, 2009 is to be calculated on the basis of income earned in 2008. The bonus income received in 2008 but pertaining to work completed in 2007 is excluded. The bonus is non recurring. We know Mr. Marsden's pattern of earning bonuses is over. He is employed for a stable and predictable income that is significantly less than his earnings in those years when a bonus was payable to him.

[12] I exercise my discretion to not consider the bonus for purposes of calculating Mr. Marsden's child support obligation beginning June 1, 2009. Instead, it is to be based on his known 2008 salary of approximately \$137,500. I do so because:

1. Even after \$45,000 of the child support windfall is dedicated for the children's education, Ms. Provost will have benefited significantly and personally from payment of the windfall of child support over the previous years.
2. The children's ongoing and post secondary expenses and reasonable life style choices are provided for adequately.
3. Mr. Marsden's income level since January 2008 is stable. His known annual salary is a fairer reference in all of the circumstances.

Issue 4 - The sharing of tax benefits and deductions that may be transferred from the children

[13] Section 7(2) and (3) of the *Child Support Guidelines* provide as follows:

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.

Subsidies, tax deductions, etc.

(3) 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.

[14] The unused benefits/deductions are to be made available to the parents on a sharing that reflects their proportionate sharing of the children's post secondary education costs. The children will have the first opportunity to realize the benefits/deductions. As between the parents, any unused portion shall be proportionately shared. The parties are under an obligation to disclose whether he/she is claiming such a benefit. Such a claim would presumably be evident on the tax return of both parties and form part of the disclosure of tax returns. Should one parent be required to claim more than his/her share, then they are directed to compensate the other parent directly. The parties are free to agree on another arrangement, after considering the tax consequences of this direction.

Issue 5 - Obligation to disclose children's circumstances

[15] Ms. Provost is directed to provide Mr. Marsden with ongoing information about the children's circumstances. The evidence clearly established that she has access to this information and that the children will readily provide it to her. As their "agent" when seeking a contribution to post secondary education costs she bears this responsibility. Section 7 of the *Child Support Guidelines* contemplates the sharing of this information and mandates that the court consider *inter alia* subsidies and tax deductions when valuing an expense. Section 7(1) is triggered by either spouse's request. A spouse who makes the request for a contribution to special or extraordinary expenses of a child, presumably possesses the information that is necessary to make such a request. Typically, it is the primary care parent who triggers this section. To respond thoroughly to a request for a contribution to special or extraordinary expenses, the court and the responding spouse requires information about the circumstances of the child.

[16] In the event that the children do not cooperate in providing the information, they are at risk of not having their eligibility for s.7 (educational) assistance established.

[17] The disclosure of a child's Income Tax Return and Notice of Assessment is within the range of documents that should be available to the court and the parties.

[18] Section 25 of the *Child Support Guidelines* provides as follows:

Continuing obligation to provide income information

25. (1) Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with

(a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;

(b) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and

(c) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.

.....

Information requests

(4) Where a spouse or an order assignee requests information from the other spouse under any of subsections (1) to (3) and the income information of the requesting spouse is used to determine the amount of the child support order, the requesting spouse or order assignee must include the documents and information referred to in subsection (1) with the request. SOR/97-563, s. 3

Time Limit

(5) A spouse who receives a request made under any of subsections (1) to (3) must provide the required documents within 30 days after the request's receipt if the spouse resides in Canada or the United States and within 60 days after the request's receipt if the spouse resides elsewhere.

.....

Failure to comply

(7) A court may, on application by either spouse or an order assignee, where the other spouse has failed to comply with any of subsections (1) to (3)

(a) consider the other spouse to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings; or

(b) make an order requiring the other spouse to provide the required documents to the court, as well as to the spouse or order assignee, as the case may be.

Unenforceable provision

(8) A provision in a judgment, order or agreement purporting to limit a spouse's obligation to provide documents under this section is unenforceable.

Issue 6 - Child's contribution to s.7 expenses

[19] Section 7(2) of the *Guidelines* directs the court to deduct the contribution, if any, from the child before parents are called upon to share a child's post secondary expense.

[20] In the future, the children will be expected to retain 70% of their income earned over the year for the purpose of funding their education. This amount is arrived at after considering the children will have no living costs when instructing at Cadet Camp and will not be paying income tax. The court was told the older child would not be paying income tax, although it is unclear if what was being communicated was that she effectively did not pay income tax because she received a refund of all taxes paid. The amount of 70% is net of living costs/room and board, for the children while working and net of income taxes not refunded to the child.

Issue 7 - Life Insurance

[21] Section 15.1(4) of the *Divorce Act* and section 12 of the *Guidelines* permits the court to secure the amount payable under a child support order and permits the court a wide latitude in doing so. For ease of reference, the respective sections are reproduced following:

Terms and conditions

15.1(4) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just.

Security

12. The court may require in the child support order that the amount payable under the order be paid or secured, or paid and secured, in the manner specified in the order.

[22] Life insurance coverage should be sufficient to cover the anticipated child support and s.7 expense for all of the children as they exist from time to time. As the children lose their status as children of the marriage, the life insurance coverage may be decreased proportionately.

Issue 8 - Costs

[23] Both parties have requested an opportunity to make submissions on costs. They are requested to do so on or before Friday, May 14, 2010.

Issue 9 - Child Support to be based on previous year's income?

[24] The issue of the court's jurisdiction to move the child support calculation to one based on current income is addressed *supra*.