2002NSSC165
S.AR. No: 1204-002452

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as O'Neil v. Brown, 2002 NSSC 165

BETWEEN:

KAREN DARLENE O'NEIL

APPLICANT

- and -

LORNE DARRELL PAUL BROWN

RESPONDENT

HEARD: At Annapolis Royal, Nova Scotia the 18th day of June, 2002

BEFORE: The Honourable Justice Charles E. Haliburton

SUBJECT: Application to Vary Child Support

DECISION: Application allowed

ATTENDING: Ronald Richter, Solicitor for the Applicant
Caroll Daniels, Solicitor for the Respondent

D E C I S I O N

[1] On April 9, 2002 the Applicant, Darlene O'Neil (mother) filed an Interlocutory Notice seeking a variation of a Collorary Relief Judgment, insofar as it provided for child maintenance, to vary the amount payable to comply with the Child Support Guidelines table amount plus extraordinary expenses. On April 30th, Lorne D. Brown (father) brought his own Application to Vary.

[2] Both parties have filed the necessary financial information together with supporting affidavits.

[3] Both parties appeared on the hearing of these applications at the Court House at Annapolis Royal June 18th when both were represented by counsel.

[4] These people were married June 4, 1982. They separated in October of 1998 and the Divorce Judgment and Corollary Judgment were issued in May of 2000. There are two children of the marriage, Nicole, now sixteen and a half years old, was born in December of 1985 and Nathan, now thirteen and a half, was born in January of 1989. The father lives in Middleton and is employed at the Michelin Tire plant in Waterville. The mother lives at an address on the Fitch Road near Lawrencetown, a few miles from Middleton. She is currently employed at a car dealership in Middleton as a salesperson.

[5] The existing arrangements with respect to the children were part of a comprehensive settlement made by the parties entered into during the course of the divorce proceedings and incorporated in the Collorary Relief Judgment. That arrangement provided that the parties would have "joint custody" of the children but added that the father "shall parent the children as set out in the Separation Agreement and Minutes of Settlement attached hereto and forming part of this Judgement..."

[6] The father's access was to be as follows:

> i) both children every second weekend from after school on Friday until after suppertime on Sunday;
>
> ii) both children daily after school (subject to the father's work obligation)...;

> iii) both children on the Petitioner's days off work...;
>
> iv) (shared Christmases);
>
> v) (one half of school breaks).

[7] I consider the following clause to be a significant aspect of the arrangement:

> 2 e Both children shall continue to attend school in the Middleton school system regardless of the residential location of the Wife and if the Wife relocates to a catchment area for a different school the Wife shall remain responsible for ensuring that both children continue to attend classes in the Middleton schools.

[8] And of course, relevant to the particular issue before the Court on these Applications:

> 4 **The Petitioner shall pay for the support of the children of the marriage as follows, which is not in accordance with the Federal Child Support Guidelines as a result of the parenting plan providing for the children to spend approximately equal amounts of time in the care of the respective parents:**
>
> (A) Monthly support in accordance in the amount of **$600.00** payable in two equal installments on the first and fifteenth day of each month directly to the Respondent until such time as a party may request that payments be made through the Nova Scotia Maintenance Enforcement Program.
>
> (B) There are no add-on amounts for the purposes of this order, but the parents will share equally in all reasonable expenses relating to the extra curricular activities of the children.
>
> (emphasis from original)

[9] Simply for the sake of reference, the file contains the father's 1999 Income Tax returns showing line 150 income of $50,960 which, in the absence of the parties arrangement, would have required a payment of $692 a month for the children.

[10] Great care and careful calculation apparently went into developing the arrangement between the parties with respect to the financial arrangements for the children. The documentation reflects an agreement that the father's income

for child support purposes was $49,600 and the mother's $19,045 with the mother's income representing 28% of their joint earnings. It was in this context then that it was agreed that the support to be provided by the father would be $600 a month plus one half of the **"reasonable expenses relating to the extra-curricular activities of the children"**. In spite of the obvious care taken in drafting the documents, there was ample room for disagreement about what was "reasonable" and what was "extra curricular".

[11] The mother has said that it was because of disagreements over these shared "expenses" that she started this present process, to have the Court make specific recommendation as to the particular amounts allowed. Faced with the father's application in response, she has abandoned any claim for the sharing of any such expenses. The nature of these disputed expenses is illustrated by the father's assertion that the mother did not bear the expense of a golf club purchased for Nathan and for which she claimed reimbursement. The mother has refused to contribute to travel and accommodation expenses for the father and son when they have travelled to hockey tournaments.

[12] I am persuaded that an attempt to "share" expenses in the future would be both futile and disruptive.

[13] From the agreement that the mother would keep the children in the Middleton school system, I draw the inference that the parties had in mind the need to ensure maximum access to both parents for the children. When the mother relocated to the country a few miles away, and obtained employment which required her to be present at her place of work from 8:00 or 8:30 in the morning to 5:00 in the afternoon it would clearly be convenient, and maximize access, for the children to be dropped off at their father's home before school and be picked up from there, after school. This indeed is the arrangement as it was incorporated into the Collorary Relief Judgment. Until these applications were commenced, I find that both children followed the intended pattern with an occasional overnight at the father's residence in addition to the alternating weekends.

[14] For some reason which has not been explained, the father maintained a calendar on which he recorded daily, the times which the children spent at this residence. At some point, as the present dispute was developing, the daughter, Nicole, discovered the record which her father had been maintaining. She also discovered a copy of the mother's application to vary which had been left by the father on his refrigerator. Apparently as a result of seeing these documents and then obtaining from her mother a copy of her father's abrasive and argumentative affidavit in response, she has declined to visit her father since mid-April. The son continues the same visitation arrangement as before.

[15] Whether or not it is reflected in the Applications before the Court, I understand the positions of the parties at this time to be as follows: the mother proposes that child support, in accordance with the table amount, be paid by the father. Because of difficulties in agreeing with respect to what are special expenses under Section 7 and/or "reasonable extra-curricular expenses", she abandons any such claim. The father proposes child support in the amount of $300 a month plus Section 7 add-on expenses.

[16] I find the proposition presently advanced by the mother to be very clearly the more appropriate solution, and the solution least likely to promote acrimony between the parties.

[17] The father has advanced his proposition on the basis of "shared" parenting which, as defined in the Child Support Guidelines legislation, requires the children to spend not less than 40% of their time with him. The extent of his parenting time does not satisfy that qualification. It is not disputed that both children spend virtually every night at their mother's home. She is, quite apparently, the parent primarily responsible for their day-to-day welfare. In addition, the daughter Nicole, now sixteen and a half years old, is not seeing her father at all.

[18] The father's income in 2001 was $53,477. His three year average was $50,481. The required table amount, for one child only, would be $419.

[19] In consideration of the care with which the parties calculated their respective incomes and responsibilities at the time of the original Collorary Relief

Judgment, I should add that the mother's 2001 income tax return reflects income of $23,637 or 31% of the parents joint income during that year. Her three-year average is $21,934 or 30% of the total joint income, not far removed from the 28% which was apparently a consideration when the original arrangements were made.

[20] Where there are factual issues in dispute between the parties, bringing credibility into question, I accept the evidence offered by the mother and reject the evidence offered by the father.

[21] Some argument was made with respect to a change of employment status and/or the level of income of the mother. There is a practice of some counsel to produce recent pay stubs to indicate some recent variations in income levels and therefore seeking adjustments in the child support obligations on that basis. That is not a helpful practice. Unless there is some dramatic, or at least significant change, in regular earnings and/or job status, the most reliable indicator for gauging the ability of a parent to provide financial support is their pattern of annual earnings. It is this pattern which the Child Support Guidelines requires, and this is the basis for demanding that the parties provide their previous three annual income tax returns.

[22] I would grant the variation application of Karen O'Neil and order child support payments to be made on the basis of Mr. Brown's average income for the last three years as reflected on line 150 of his tax return. I calculate this figure to be $50,481 requiring child support of $686 per month. Ms. O'Neil's application for add-ons is dismissed at her request.

[23] Lorne Brown's application for a variation is dismissed.

[24] Counsel for Mr. Brown raised the issue of Section 9 of the Child Support Guidelines relating to "shared" custody and sought to have the Court exercise discretion with respect to the amounts ordered on that basis. It is apparent that I have concluded that Section 9 is not applicable in the circumstances.

Dated at Digby this 24th day of June, 2002.

J.