IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Calder v. Purdy, 2005 NSSC 334

Date: 20051205
Docket: SAMMEA-063364
Registry: Amherst

Between:

Mabel Irene Calder

Petitioner

v.

Donald Allan Purdy

Respondent

DECISION

Judge:	The Honourable Justice John M. Davison
Heard:	November 18, 2005, Amherst, Nova Scotia
Counsel:	Anthony J. Morley, Q.C., counsel for the Applicant Terry Edward Farrell, counsel for the Respondent

Davison J.

[1] This is an application of Mabel Calder who seeks child support payments that are in arrears and payment of special or extraordinary expenses which relate to post secondary education expenses of the two children of the marriage who are Kayla Anne Purdy, born on February 18th, 1986 and Taylor Michael Purdy, born on September 18th, 1987. In addition to the special or extraordinary expenses the Applicant seeks child support set out in the basic tables for the children calculated according to the income of the Respondent.

[2] The parties were divorced in Ontario by judgment dated November 17th, 1988. The parties entered into a separation agreement which was amended on January 22nd, 2004. It stipulated that the Applicant shall have custody of the two children and the Respondent pay child support in the amount of $1,070.00 a month based on an annual income of $83,652. It is alleged the Respondent is in arrears of child support by $3594 up to September 2005. The evidence indicated the Respondent earned $98,336.18 in 2004.

[3] That portion of the Amended Separation Agreement on which the Applicant relies reads as follows:

2. Don acknowledges that as of the date of the execution of this Agreement, his annual income is the sum of $83,652.10, as set out in line 150 of his income tax return for the year 2002. Don has agreed to pay child support in accordance with the Child Support Guidelines for two children pursuant to the Guidelines. Based on Don's income of $83,652.10, he is obligated to pay the sum of $1,070.00 monthly in child support. Accordingly, Don will pay child support to Mabel in the amount of $1,070.00 monthly and such payment shall commence as of February 1st , 2004 and continue to be paid monthly until one of the following occurs:

(a) the child ceases to reside full time with Mabel, and "reside full time" includes the child living away from home to attend an educational institution, pursue summer employment or vacation, but otherwise maintaining a residence with Mabel;

(b) the child becomes eighteen (18) years of age and ceases to be in full time attendance at an educational institution;

(c) the child attains the age of twenty-one (21) years or obtains his/her first university or college degree, whichever is earlier;

(d) the child marries;

(e) Mabel dies; or

(f) Don dies.

The Respondent is referred to in the agreement as "Don" and the Applicant is referred to as "Mabel".

[4] The Respondent did not testify at the hearing. He resides in Ontario. The Applicant testified and she lives in Springhill, Nova Scotia. I was impressed by the manner in which the Applicant testified. She was definite in the evidence she presented and quite freely admitted facts which were favourable to the Respondent. I believed her evidence. Although I did not have the opportunity to hear the Respondent his actions establish that he has an interest in assisting his children to obtain an education.

[5] Photographs of the Applicant's home were introduced in evidence as representations of the comfortable bedrooms of Kayla and Taylor.

[6] The son Taylor lived with the Applicant and graduated from Springhill High School in June 2005. He started attending St. Francis Xavier University in September 2005. The Applicant testified during summer vacations Taylor will be living with her. She was also asked where do both children go when they want to go home and she replied "they come to me". For two years Taylor has been working with the militia and the Applicant said he will return to Springhill in the spring of 2006 to seek a job for the summer and will be living with his mother.

[7] I find that the evidence indicated Taylor's present role is consistent with the terms of Section 2(a) of the amended agreement in that he ceases to reside full time with his mother. He is attending an educational institution but otherwise maintains a residence with his mother. I find he comes within the definition of "child of the marriage" as set out in the *Divorce Act* as follows:

> 2.1 In this Act,
>
> "child of the marriage" means a child of two spouses or former spouses who at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (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;

[8] Age of majority is defined in the *Act* under subsection 2(1) as follows:

> "age of majority" in respect of a child, means the age of majority as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada, eighteen years of age;

[9] Both counsel suggest the position of Kayla was “more difficult” than that of Taylor. That observation stems from the fact that Kayla had several residences over the last number of years. Her mother had custody of Kayla and she lived with her mother in Ontario until her mother moved to Springhill in or about the month of July 1999. The Applicant stated in her testimony that Kayla stayed with the Respondent in Ontario for two and one half years until January 2004 when she moved back to her mother’s home in Springhill and resumed studies in grade twelve. This was the same month as the execution of the Amended Separation Agreement. The Applicant stated Kayla was living with her for about one month when the amended agreement was signed. By reason of the change of custody in the amended agreement I infer the two parties accepted the fact Kayla would be living with her mother.

[10] Kayla completed her high school education in Amherst and in July 2005 she moved back to London, Ontario where she moved into a townhouse with another woman and started studies at Fanshawe College. She moved to Springhill to live with her mother in the summer of 2005 and started to study at Dalhousie in September 2005.

[11] Mr. Morley submits the arrears should be paid to the Applicant and further submits the child support guideline amount should be increased to reflect the increase in the income of the Respondent to $98,336.18 according to his income tax return for 2004. To the extent they are applicable I agree with both of these submissions.

[12] The difficulty I have with the submissions of counsel for the Applicant is the third submission as stated in the pre-trial brief that the Respondent "should continue to pay the table amount for child support in respect to each child of the marriage as well as pay the university expenses of both children of the marriage."

[13] With respect to the decision of Justice Williams in *Myers v. Myers* (2000) 189 N.S.R.(2d) 214, where the child at university did not receive the table amount when she was away from home counsel for the applicant states the case does not apply because of the amended agreement dated January 22nd, 2004.

[14] With respect I cannot agree that the amended agreement provides the Respondent should pay the table amount and the expenses under s.7(1)(e). Although the amended agreement makes reference to the monthly payment

continuing until the child ceases to reside with the Applicant which residence is defined as living, inter alia, at an educational institution, the monthly payment only relates to the table amount. There is no reference to payment of educational costs in the amended agreement.

[15] Indeed, I suggest it would be unfair and unreasonable to require the Respondent to pay the basic table amount while Kayla is at university and also pay under s.7(1)(e) education costs including food and housing.

[16] In correspondence to the court and in his pre-trial brief Mr. Farrell, counsel for the Respondent, indicates the Respondent will pay "all of the costs which could reasonably be construed as special and extraordinary costs for both Kayla and Taylor's university educations." In his submission, however, he referred to the limitation of payment in *Corsano v. Simms* 2002 N.S.C.A. 125 and counsel states:

> "the Nova Scotia Court of Appeal upheld a ....decision that indicated ....special and extraordinary expenses should be 'limited to tuition, books and fees'."

[17] Mr. Farrell argues no further payment should be ordered by way of child support for Kayla because she is no longer a "child of the marriage". Mr. Farrell

refers to the *Myers* case with respect to the claim of child support and says guideline table amounts should not apply for the months the child is away from home.

[18] I find that Kayla is a child of the marriage. The parties do not dispute that Taylor is a child of the marriage. Child support is for the benefit of the child. I am convinced from the evidence of the Applicant that both the children are under the charge of their mother and are children of the marriage as defined in s.2(1) of the *Divorce Act.*

[19] In *Yaschuk v. Logan* (1991), 110 N.S.R. (2d) 278, Chipman, J.A. stated

> ...an education that will fit a child for a career can be properly regarded as a necessity.

[20] In *MacLennan v. MacLennan* (2003) 212 N.S.R. (2d) 116 Cromwell, J.A. makes reference to the words of Justice Freeman in *Martell v Height* (1991) 130 N.S.R. (2d) 318 which appear at page 320:

> It is clear from the various authorities cited by counsel that courts recognize jurisdiction under s.2(1) of the *Divorce Act* to hold parents responsible for

> children over sixteen during their period of dependency. How long that period continues is a question of fact for the trial judge in each case. There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of proving dependence grows heavier. As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field....

[21] In the course of his decision Justice Cromwell made reference to reasonable inferences and at page 128 stated:

> Judges are entitled to draw reasonable, common sense inferences from the proven facts and to take into account notorious facts such as that post secondary education is expensive, well paid part time employment for full time students is scarce and that the demands of full time course work limit the time available for part time work.

[22] I would suggest it is a reasonable inference that young people at this stage of their lives often have difficulty deciding the studies they wish to undertake and in concluding what would be a satisfactory career. Kayla took several courses before entering Dalhousie University but I find this period of indecision does not indicate she is not serious in pursuing her studies at Dalhousie.

[23] It was the evidence of the Applicant that Kayla returned to Springhill in January 2004 to live with her mother and complete grade twelve. Around this time custody was transferred to her mother. In August 2004 she returned to Ontario and

attended Fanshawe College and lived in a shared townhouse. She returned to her mother's home in May 2005 and returned to Ontario from a date in June 2005 to a date in August 2005 where she lived with a boyfriend.

[24] In August 2005 she returned to her mother's home in Springhill and started attending Dalhousie in September 2005 where she is studying respiratory therapy, a four year course. She has returned to the home of her mother on three weekends. The Applicant says Kayla intends to take clinical training in the Amherst hospital for eight weeks in the summer of 2006 and then hopes to obtain employment for the balance of the summer at the hospital and return to Dalhousie in September 2006. Kayla will be living with her mother in Springhill during the time she is connected with the Amherst hospital. In addition I find both children, Kayla Anne Purdy and Taylor Michael Purdy, to be children of the marriage as defined in the *Divorce Act.*

[25] In my view the Respondent should pay the arrears of child maintenance in the amount of $3594.00 which was the amount due on September lst, 2005. The payment of arrears should be made on or before January 31st, 2006. If the Respondent believed circumstances were such that he should not pay some of the child support he should have sought a variation in child support payments. He had

no right to change on his own the terms of the agreement. For the period from September 2005 to April 2006 the issue is whether payment should be made as a Special Expense under s.7(1)(e).

[26] With respect I cannot agree with the interpretation of the *Corsano* case given by counsel for the respondent. One of the issues before the Court of Appeal was the amount of the father's contribution to the child's post-secondary educational expenses. At the hearing for variation before the trial judge the mother sought the basic table amount of support plus a contribution of one-half of annual university expenses estimated to be $12,058.

[27] The Court of Appeal pointed out the hearing judge, under the statute, had to consider the reasonableness of such expenses in the context of the parents' means. The only reasonable inference from the decision is that the judge was not satisfied that such expenses were reasonable in these circumstances. The circumstances included the mother, in poor health, was not expected to earn income and the father earned about $47,000 a year. The father also had funded an educational plan and the son received $3019 toward his first year and about $1000 in subsequent years.

[28] The Court of Appeal noted:

> "The judge was satisfied that some amount of post-secondary educational expenses was reasonable and necessary". (emphasis added)

In considering what was reasonable the judge:

> "....noted that the basic table amount already includes provision for shelter, meals and miscellaneous expenses."

These were the circumstances in this case which rendered it reasonable to limit university expenses to tuition, books and fees. The Court of appeal was not directing this limitation applied to all cases.

[29] With respect to the application under s.7(1)(e) of the Guidelines I adopt the approach of Justice Williams in *Myers v. Myers* (supra) and refer to his comments on page 230:

> Where "children" are away at university there appears to be some discretion as to whether the table amount is paid to the "custodial" parent for the months the student is not away.
>
> Here, Sasha is not over the age of majority. She does not turn 19 until April 2001. She is, however, living independently from September through April, the

> university year. I conclude she is not under the ongoing care of either parent. I have interpreted s.7(1)(e) of the **Guidelines** (... expenses for post-secondary education ...) broadly (in a fashion consistent with the submissions of Ms. Myers) and included in Sasha's s. 7 expenses: apart from tuition, and books: housing, food, computer, internet service, and a spending allowance. Having taken that approach, I conclude it would be inappropriate to treat Sasha as a child to whom the table amount should be paid during the months she is away.

[30] With respect to the sharing of the educational expenses the Applicant's Statement of Financial Information for 2004 indicates she received monthly payments of $864.00 in Employment Insurance Benefits, $1136.00 in child support payments and $48.00 Child Tax Benefit. The Respondent earned $98,336.18 in 2004. Even with child support payments when Kayla lives at home for four months in 2006 it would be unreasonable to direct the Applicant to contribute to the education expenses and I find the Respondent should pay 100% of those expenses.

[31] The Respondent filed a list of estimated university expenses which is filed as Exhibit 5. The Applicant testified she thought the estimates were fair. Exhibit 5 sets out the following:

Kayla	Taylor
Dalhousie Xavier	St. Francis
Respiratory Therapist	Human Kentics
4 yr. BHSc program	4 yr. BSc program

Tuition:	$ 6500	$ 6325
Residence	8500	7000
Books	1500	1500
Travel	500	500
Allowance	1200	1200
	$ 18,200	$ 16,525

The document sets out the cost of the second, third, and fourth years by effecting on the first year figures at 5% increase each year.

[32] The term allowance refers to spending money and incidental expenses. It is $150 a month for eight months. There is a note at the bottom of Exhibit 5 which reads “1000 Computer Additional Items”.

[33] It would also be unreasonable to direct the Respondent to pay further basic child support while the children are at university. I would state the Respondent pay to the Applicant basic child support payments for the months of May, June, July and August commencing on May lst, 2006. The sum indicated in the Federal Child Support Guidelines for two children at the 2004 salary of the Respondent is $1223.00 per month.

[34] **SUMMARY**

1. I would order the Respondent pay to the Applicant the arrears of child support in the amount of $3594 on or before January 31st, 2006.

2. I would order the Respondent to pay to Dalhousie University and St. Francis Xavier University the tuition and residence fees of Kayla and Taylor. The Respondent should pay Kayla and Taylor a reasonable amount for books and travel. The Respondent is to pay an allowance to Kayla and Taylor of $150 each for the months they are attending university.

3. The Respondent shall pay to the Applicant by way of child support for the months May to August the sum of $1223 per month.

4. In the future while Kayla and Taylor attend university the Respondent will pay the cost of tuition, residence, books, travel and an allowance.

5. Counsel may want to submit written submissions to me on the question of costs.

J.