IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Currie v. Currie*, 2016 NSSC 175

Date: 20160704
Docket: 1201-065396
Registry: Halifax

Between:

Angela Gail Currie

Petitioner

and

Michael Shane Currie

Respondent

Judge: Justice Beryl A. MacDonald

Heard: May 24, 2016 at Halifax, Nova Scotia

Counsel: Christine J. Doucet, Counsel for Angela Currie
Janet M. Stevenson, Counsel for Michael Currie

By the Court:

Background

[1] The parents involved in this proceeding married in September 2008. Their child was born August 20, 2009. They separated on March 4, 2011. Since that time, notwithstanding detailed separation agreements that were attached to a Corollary Relief Order issued September 23, 2013, they have been unable to resolve their differences in respect to parenting and monetary issues.

[2] The Mother has filed a variation application that complains about the parties' differing interpretations about the terms of Corollary Relief Order. She alleges a failure by the Father to "obey" the terms of that Order. Because neither the *Divorce Act* nor our rules have provided a specific procedure for enforcement of our orders, other than contempt, which is generally of little use, these issues have almost always been heard as part of a variation application. These issues are sometimes difficult to squeeze into the definition of "material change of circumstances", the threshold requirement for a variation application. However, continuing disagreement about interpretation and failure to apply the terms of the Order can lead to conflict. If the conflict has a demonstrable negative effect on a child that conflict may meet the "material change of circumstances" test in *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

[3] Because of the parties changed incomes there has been a material change in the circumstances of these parties sufficient to justify a change to their order in respect to the dollar amounts that must be paid for child support. The Father initially refused to recalculate what he was to pay because he did not understand that severance pay must be included in a child support calculation. That issue has been resolved. Their disagreement about this does not suggest a material change of circumstances justifying a change to the provisions of the Corollary Relief Order that direct how his yearly income is to be calculated. Because that calculation does not rely solely on line 150, the administrative recalculation program cannot provide this service to the parties, a request the Mother made in this proceeding.

[4] I am not satisfied the parties disagreement about how to interpret their responsibilities for payment of section 7 extracurricular expenses constitutes a "material change of circumstances" justifying my interference with the provisions of the Corollary Relief Order.

Table Guideline Child Support

[5] The Mother's variation application was successful in respect to the calculation of table guideline child support based upon the Father's change in annual income. That issue was resolved shortly before the hearing. The Father acknowledges that, as a result of a change in his income, the retroactive recalculation of child support requires him to pay the Mother $1,536.00. He wants to pay this over time by adding an additional $100.00 per month to his ongoing child support payment. The Mother wants immediate payment.

[6] The financial information filed by the Father indicates his present annual income is $88,000.00. His child support will require him to pay $742.00 per month which is $8,904.00 per year. His Income Tax is approximately 28,000.00 per year. His mandatory pension contribution will cost him yearly approximately $8,700.00, his CPP $2,500.00, his EI $930.00, his Medical Plan $625.00, and his Union Dues $800.00. This leaves him a net income of $37,541.00 from which to pay his living expenses, section 7 expenses and the recalculated child support. I have no calculation of the Father's living expenses but I will give him some time to pay the recalculated child support. He is to pay $500.00 on or before August 12, 2016, $500.00 on or before October 12, 2016 and the balance on or before December 12, 2016.

Section 7 Expenses

Child Care

[7] The evidence from the parties about their sharing of the child care expense is unclear. They appear to have resolved that issue but were arguing about how many weeks the Father is to share payment for summer child care. He suggested the calculations should be based upon an expectation that seven weeks of care will be required. Each parent is entitled to one week exclusive parenting time with the child in the summer. The Father's suggestion appears reasonable but if this remains

as an issue I retain jurisdiction to resolve it after receiving further submissions from the parties.

Extra-Curricular Activities/Medical Plan

[8] The Mother requests a recalculation of Section 7 expenses she has already paid for the child's extra-curricular activities. She also requests proportional sharing of her cost to pay for a medical plan that is a "family plan".

[9] The Father has not paid some of the child's extra-curricular expenses because he did not agree to the expense and in any event considers those to be included in the table guideline child support amount he must pay. He refuses to pay any proportional share of the Mother's medical plan because he has a plan that covers the child. The Corollary Relief Order does not require him to share this expense. If I do order him to proportionally share the cost of her plan he asks that the Mother share the cost of his plan.

Medical Plan

[10] The Corollary Relief Order issued September 23, 2013 incorporated and attached as Schedule "A" an "Agreement to Vary Agreement and Minutes of Settlement (Custody/Parenting)". That document, in paragraph 26, provided as follows:

> "The Husband and Wife each agree to maintain their existing medical and dental plan through employment for the benefit of the child of the marriage for as long as they are legally able to do so under the terms of the plan and for so long as the child remains a child of the marriage as defined by the Divorce Act of Canada."

[11] The Mother has not provided any information about the plan that existed at the time she agreed to this provision. The implication in paragraph 26 is that they both would have had a "family plan". I do not know the cost of her plan, as it then existed, or how it may be different from the cost of her present "family plan". I do not know the cost of that plan relating only to the expense differential between a "family plan" and a single beneficiary plan. I do not know the "net cost" of that portion of her plan. As a result I cannot determine whether there has been a "material change in circumstances" justifying a change to paragraph 26. I dismiss the Mother's claim for a change to this provision.

[12] The Mother has not had any "health expenses" other than the cost of her medical plan.

Extra-curricular Expenses

[13] The Corollary Relief Order issued September 23, 2016 contains the following provision:

> "The parties shall share special or extraordinary expenses, including childcare, health expenses and extra-curricular activities to which they both agree, in proportion to their incomes.....
>
> Paragraph 22 of Schedule "A" to the Agreement to Vary Agreement and Minutes of Settlement (Custody/Parenting) shall govern the calculation of child support and special or extraordinary expenses after November 3, 2014."

[14] Paragraph 22 of Schedule "A" to the Agreement to Vary Agreement and Minutes of Settlement (Custody/Parenting) requires the Father to pay special expenses as follows:

> 22 (a) ... (the sum of) $192.88 (per month) contribution towards child care expense...
>
> (c) The parties agree that the Husband's contribution to section 7 expenses shall be adjusted each year on June 1st based on his actual income from the prior year as reflected on Line 150 of his tax return.
>
> (f) The parties agree to proportionately share the cost of any agreed upon extra-curricular activities for (the child).

[15] The Corollary Relief Order does not make it clear whether its provisions will apply to all the expenses that can be claimed pursuant to section 7 or only to those specifically mentioned. The use of the words "includes" is problematic. Why is it required? Section 7 itself includes childcare, health expenses and extra-curricular activities. Perhaps the intent was to make it clear that only childcare, health expenses and extra-curricular activities "to which they both agree" are to be shared. Paragraph 22 (f) suggests that provision would only apply to extra-curricular activities. However parents often want the choice of a child care provider to be agreed upon to ensure affordability and proximity to a parent's residence. In this

proceeding it appears that both parties interpreted the consent requirement to apply only to the extra-curricular activities. However, as joint custodial parents, the choice of a child care provider should be a joint decision that, once made, requires both to proportionally share the cost.

[16] The Consent Variation Order issued September 3, 2014 states:

> "This variation is only for the purpose of updating the Guideline child support and childcare contribution...."

[17] The child care portion to be paid by the Father was to be $100.00 per month commencing September 1, 2014.

[18] The Order then provides:

> 2. The parties shall share special or extraordinary expenses, including childcare, health expenses and extra-curricular activities to which they both agree, in proportion to their incomes, with (the Father) paying 56 per cent of the net cost and (the Mother) paying 44 per cent of the net cost.

[19] The only change reflected in this Consent Variation Order is the change to the percentages and the reference to the net cost of the stated expenses.

[20] The parties have not provided their own definition of "expenses for extra-curricular activities" other than to limit those expenses to those to which "both parties agree". Paragraph 2 of the Consent Variation Order issued September 3, 2014 does make reference to "special and extraordinary expenses". Presumably this is a reference to the use of those words in Section 7 of the Child Support Guidelines. Those guidelines only provide for proportional sharing of necessary expenses and, if the expense is a "necessary extra-curricular expense", sharing is not required unless the expense is "extraordinary".

[21] An amendment was made to the Child Support Guidelines to clarify what an extraordinary extra-curricular expense may be. Section 7 (1)(1.1) (a) indicates an expense is extraordinary when it exceeds what the parent, who seeks sharing of the expense, can reasonably pay taking into account that parent's income and the amount of child support he or she will receive. If the parent cannot "reasonably pay" the expense, it is extraordinary and the court may order the other parent to contribute. However, if it is determined that a parent can reasonably pay the

expense claimed it may still be an extraordinary expense. Section 7(1) (1.1) (b) indicates that an expense a parent can reasonably pay may still be an extraordinary expense after consideration of a number of factors. Those are the relationship of the expense to the requesting parent's income including the amount of child support he or she will receive, the nature and number of the extracurricular activities in which the children participate, the children special needs or talents, the overall cost of the programs and activities and any other similar factors considered relevant.

[22] Perhaps these parents hoped that, by confining sharing for extra-curricular activities to those they agreed upon, they were removing any required consideration about the necessity of the expense and whether the cost is extraordinary. The Guidelines may assist a parent in deciding whether the expense of a particular activity should be shared but parents are free to decide that activities they can agree upon will be subject to a sharing of the cost whether or not the activity is "necessary" or the expense "extraordinary". This is the interpretation I place upon the parties' agreement that was incorporated into and became their consent order. There are many reasons why a parent may want to make it clear that his or her consent is required before a child is enrolled in an extra-curricular activity. For example, the activity may unduly interfere with a parent's parenting time; the cost of enrollment and outfitting may be difficult for a parent to manage; transportation requirements may be onerous or expensive or both.

[23] To ensure that an extra-curricular activity has been agreed upon a parent who wishes to enroll a child in that activity must clearly inform the other parent about the activity, the expected schedule for the activity and the potential cost for registration fees, participatory events such as tournaments, summer training camps, and any equipment, clothing or footwear that may be required to engage in the activity. A parent should not rely on the fact that the other parent shared the cost of an activity in a previous year as consent for an upcoming year. One of the reasons why no reliance should be placed upon previous consent is that, depending upon the nature of the expense and the parents' changes in income, it may be considered to be included in the table guideline child support or it may be unaffordable.

[24] The Father has expressed a willingness to share the cost of expensive activities, such as Hockey, but not for the less expensive activities. He was prepared to pay for less expensive activities at one time but, after examining his

own financial position, the child care costs and the amount of table guideline child support he is paying, he is no longer prepared to share payment of those lesser expenses. That is not an unreasonable position to take given that some consideration about the cost of extracurricular expenses has generally been assumed to have been incorporated in the table guideline amounts to be paid. This has been given as the reason why, in Section 7, proportional sharing of extra-curricular expenses is limited to extraordinary expenses.

[25] In this case the Mother made the assumption that what was shared in the past would be shared in the future. She has also suggested that because the Father took the child to the activities in which she had enrolled the child, this indicated his consent to the activity thus requiring him to share in the activity expense. By taking this child to the activities, the Father was behaving appropriately and in the best interest of the child. His action in doing so cannot be taken as consent to pay the expenses associated with that activity nor should it.

[26] The parties' agreement was very clear that both must agree to the child being enrolled in an extracurricular activity before both can be burdened with the proportional sharing of the expense of that activity. The Father was not being unreasonable in refusing to proportionally share the expense of activities to which he had not consented and his refusal to consent was not a "failure to obey the terms of the Corollary Relief Orders".

[27] The Mother is concerned the Father will, to avoid the necessity of sharing extra-curricular expenses, refuse to agree to her enrollment of the child in any extracurricular activities. His evidence does not suggest that he will do so. If this occurs and the Mother can satisfy a court that his refusal does fit the criteria for material change, a court in a subsequent variation application may make an order different from this order.

[28] The Mother requested reimbursement for the following expenses she paid between July 1, 2015 and June 30, 2016:

a. Hockey tournament (Sackville):$35.00

b. Hockey tournament (Eastern Shore: $25.00

c. Youth Running Series (summer 2016:$28.75

d. Baseball: $123.60

e. Bluenose Marathon: $10.00

[29] She wanted the Father to pay 59% of these expenses. It appears the Mother received $$908.00 per month table guideline support in 2015 and will receive $742.00 per month in 2016. The Father may have been consulted about some of these activities but he did not agree to pay the expense. The expenses are of an amount one could reasonably conclude are included in the table guideline child support payment. I dismiss the Mother's application for an order requiring the Father to share payment of those expenses.

[30] The Father has indicated he is prepared to consider proportionally sharing the expense of Hockey, if the child is to be enrolled in Hockey. That expense often is an extraordinary expense but not always. It usually includes not only the cost of registration but also the cost of equipment, clothing, skates, tournament, hockey camps and schools. The Mother must provide the Father with, at the very least, an estimate of the cost for this activity. He will decide whether to agree to share the required expense. I will not order him to share this expense. I will not change the terms of the parties' Corollary Relief Order. They must agree to share extra-curricular expenses. If they do not agree the parent who wants the child in the activity may enroll the child at his or her expense.

[31] If the parties continue to disagree about what expenses should be shared, perhaps they should mediate this dispute to change the terms of the Corollary Relief Order. Some parents choose to limit activities to one or two activities per year or per season. Some impose a dollar amount as a ceiling. Others choose to specify exactly the activities that will be shared. I am not here to negotiate the best solution to the parties' dilemma. I have no idea what would be best for their child. The only change I could make to their arrangement would be to decide their continuing disagreement requires the court to have the parties revert to the provisions of the child support guidelines in respect to shared expenses for "necessary and extraordinary extra-curricular expenses". This would require the parties to consider the complex directions in Section 7 (1) (1.1) (a) and if they could not determine what should be shared to resort to a court application to have a judge determine whether a particular expense for an extracurricular activity was a necessary and extraordinary expense. I decline to change the order to require this

of the parties because there is no material change in circumstances to justify that change.

Beryl A. MacDonald, J.