

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Brown v. Brown, 2011 NSSC 148

Date: 20110420

Docket: 1201-058992 (SFHD-034489)

Registry: Halifax

Between:

John David Brown

Applicant

v.

Heather Ann Brown

Respondent

Judge:

The Honourable Justice Beryl A. MacDonald

Heard:

April 4, 2011, in Halifax, Nova Scotia

Counsel:

John D. Brown, Applicant, Self-Represented
Heather A. Brown, Respondent, Self-Represented

By the Court:

[1] On November 8, 2005, a Corollary Relief Judgment was granted in a divorce proceeding between Ms. Brown and Mr. Brown. There have been several variations to that Judgment since that time. The most recent variation was granted upon the consent of the parties on April 26, 2010, and it recognized the split custody of the parties' two children. The oldest child was, at the time, residing primarily with Ms. Brown and the youngest child was residing primarily with Mr. Brown. As a result of the parenting arrangement, neither party was required to pay child support to the other from January 1, 2010.

[2] On August 18, 2010, Mr. Brown filed an application to vary the Consent Variation Order, dated April 26, 2010. He alleged that both children were living with him and he, therefore, requested child support from Ms. Brown for two children, according to the table amount of the Child Support Guidelines. The father's initial information did not clarify the date when the oldest child returned to his care.

[3] On October 19, 2010, Ms. Brown filed a response to Mr. Brown's application, by way of her parenting statement, in which she alleged the oldest child, although living with Mr. Brown, was not attending school.

[4] The parties participated in a conciliation meeting on November 23, 2010. The conciliation record reveals at that time both parents acknowledged the two children were living with Mr. Brown, although the date this began was not clarified. What is clear is that Ms. Brown did not consider the oldest child to be a "dependent child" entitled to child support, because he was not in school. His school suspended him in April 2010 due to lack of attendance and poor performance in school work. He went back to school in September 2010, but was suspended in October due to his lack of attendance and poor performance in his classes. He was invited to re-register for his courses in February 2011. Ms. Brown was only prepared to pay child support for one child commencing July 1, 2010. This suggested Mr. Brown had care of both children from July 1, 2010.

[5] In her affidavit filed March 10, 2011, Ms. Brown did not want to pay child support for the oldest child from June 2010 until February 1, 2011 when he did return to school. She did not want to pay child support for the youngest child for

the month of July 2010 because he was residing with her for that entire month. She did not want to pay child support for the youngest child for the month of August 2011 because he will again be residing with her for that entire month. She also requested reimbursement for charges relating to a cell phone used by the oldest child and the cost of his Driver Education program. At the hearing she was informed she had made no application for Special Expenses. The cell phone debt would not be a Special Expense. The Driver Education cost may be a Special Expense, but she had not properly applied for consideration of that issue. No receipts were provided.

[6] In her affidavit Ms. Brown also alleged that the oldest child was working.

[7] The parties appeared before Justice Legere-Sers on February 14, 2011. At that time Mr. Brown informed the court he was seeking support for two children from June 2010, notwithstanding the fact that the oldest child had not attended school for periods of time. The oldest child's status after February 2011 would also be an issue.

[8] Justice Legere-Sers issued a Amended Consent Variation Order on March 14, 201, after the parties appeared before her and in it the following appears:

[2] From June 2010 to January 31, 2011 Heather Brown shall pay to John Brown the amount of \$128 per month (\$153 less \$25 for medical insurance), for the care of (the oldest child);

[3] From February 1, 2011 forward Heather Brown shall pay to John Brown the amount of \$256 per month (\$281 less \$25 for medical insurance) for the support of the two children,(the oldest child and the youngest child), provided (the youngest child) attend school;

[5] In the event of proof of non-attendance at school by (the oldest child), Heather Brown shall then pay to John Brown \$128.00 per month (\$153 less \$25 for medical insurance) for the support of one child, (the oldest child);

[9] Reference in paragraph 2 to the name of the oldest child appears in error.

Support was to be paid for the youngest child. What should be paid for the oldest child was still in dispute.

[10] Reference in paragraph 5 to the name of the oldest child appears to be in error. The youngest child would be the child who would continue to be entitled to receive child support.

[11] During the hearing before me the evidence is that the oldest child has been attending school since February 2011, although his attendance record is extremely poor and this is reflected in the results he is achieving in each of the courses he is taking. Nevertheless, he can still be considered to be attending and participating in school. Therefore, Mr. Brown is entitled to receive child support from February 1, 2011 ongoing for two children.

[12] The oldest child is 17 years old. A “child of the marriage” is defined in the *Divorce Act*, R.S.1985, c.3 as a child who:

- a) is under the age of majority and who has not withdrawn from their (the parents’) charge; or
- b) is the age of majority or over and under their (the parents) charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

[13] The oldest child is under the age of majority. Has he “withdrawn from his parents’ charge? Usually a child is considered to have withdrawn from a parent’s charge when he or she leaves home, obtains his or her own residence and has sufficient income to financially meet his or her basic needs. A child can lose and then regain the status of a “child of the marriage”.

[14] From June 1, 2010 until the present, the oldest child has been living with his father. There is insufficient evidence before me to support the allegation that he is or has been working. Even if he had some employment there is nothing to suggest it would have provided him with sufficient income to meet his basic needs.

[15] Ms. Brown's primary complaint is that the oldest child was not in regular attendance at school. The oldest child is an adolescent who is struggling. He is not seriously pursuing his opportunity to become educated. However, he does appear to have the ability to achieve academic success if somehow he can be convinced of its importance. It is too early to give up on him and declare that he no longer requires the financial support of both parents. Even children who are no longer in school, and who are not pursuing skills or job training, are given some transition time to find employment to become self supporting. During this transition child support may still be paid. A transition period will generally come to an end upon the child obtaining reasonable regular employment or when the evidence reveals the child has become a "lay about", disinterested in becoming self-supporting with an expectation his or her parents will continue to provide financial support. A parent

may chose to support such a child, but the court will rarely require child support to be paid under those circumstances.

[16] A parent is entitled to receive child support for any time when a child is primarily residing in his or her residence. As a result, when a child temporarily resides with the other parent during vacations, holidays, weekends, etcetera, child support is not suspended.

[17] Ms. Brown must pay child support for two children from June 1, 2010 and continuing on the 1st day of each month after June 1st. Child support is calculated according to the table amount required by the Child Support Guidelines. In her Statement of Income filed October 19, 2010, Ms. Brown calculated her total yearly income to be \$ 25,458.00, consisting of employment income of \$21,528.00 and tips of \$3, 900.00. Her 2010 Notice of Assessment reveals employment income of \$19,115.00 and “other income” of \$ 3,000.00. The “other income” are her tips. I have determined her annual income for child support purposes in 2010 was \$21,528.00 and I will use the same income amount for her continuing obligation to pay child support.

[18] The previous consent order suggested her income was approximately \$18,915.00. That was the employment income from line 150 of her 2009 Notice of Assessment. It was not her current 2010 income. It did not include any “other” income.

[19] The table amount required to be paid on an annual income of \$21,528.00 is \$313.00. Ms. Brown is to pay child support in the amount of \$288.00 (\$313.00 less \$25.00 for medical insurance). Payments Ms. Brown has made to support these children since June 1 will need to be considered. The Director of Maintenance Enforcement will complete these calculations if the Order has been enrolled with this service. If it is not, the parties will need to complete these calculations to determine what amount remains unpaid. To pay that unpaid amount, Ms. Brown is to add an additional \$25.00 per month to her monthly child support payment until that amount is paid in full. As a result, until the unpaid amount is paid in full, her monthly child support payment will be \$313.00 beginning June 1, 2011.

J.