IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Murphy v. Hancock, 2011 NSSC 247

Date: 20110706
Docket: SFHMCA-055370
Registry: Halifax

Between:

Lindsay Jamie Murphy

Applicant

v.

Dion Ray Hancock

Respondent

Judge:	The Honourable Associate Chief Justice Lawrence I. O'Neil
Heard:	February 14, 15 and 21, 2011, in Halifax, Nova Scotia
Written Decision:	July 6, 2011
Counsel:	Tanya Jones, for the Applicant Peter D. Crowther, for the Respondent

By the Court:

[1] This is a ruling on the parties' request to have Mr. Hancock's past child support obligation reassessed. The order was agreed to in November 2008 and issued December 2008. It took effect December 1, 2008.

[2] Ms. Murphy filed a variation application in November 2009 seeking to vary the December 2008 order. She wanted changes to the parenting arrangement and to have the sharing of special expenses of the children to move to proportional sharing from equal sharing.

[3] In response, Mr. Hancock, in early 2010, sought to reduce his child support obligation but to maintain the parenting arrangement which he described as shared parenting. He sought to have his child support reduced to reflect the shared parenting arrangement in place since December 2009. The 2008 order required him to pay $851.00 per month as child support. He wanted the obligation to reflect a set off of the parties' child support obligation, as is often the case in a shared parenting arrangement. He formally responded to the variation application in February 2011, on the eve of the hearing of the application.

[4] In May 2011, the court issued a decision that addressed the parenting arrangement, ongoing child support and the parties' ongoing contribution to special expenses for the parties' children. It is reported as *Murphy v. Hancock*, 2011 NSSC 197. The arguments pertaining to the parties' past child support obligations was deferred for further consideration.

[5] Mr. Hancock is arguing that he has overpaid child support since December 2009 by $11,114.00. He argues that, since then, he has been in a shared parenting arrangement with Ms. Murphy. Consequently, the effective child support obligation of $851.00 in the consent order issued December 17, 2008, should be varied downward effective December 2009. I say "effective" child support obligation because he wishes to have the parties' child support obligations since December 2009 set off because, in his view, the parties have been in a shared parenting arrangement since then.

[6] He sets the parties' incomes at the following levels over the period 2008 - 2010 inclusive:

	2008	2009	2010
Mr. Hancock	$49,268.51	$84,577.71	$41,659.18
Ms. Murphy	$22,332.00	$35,390.00	$32,398.46

[7] Ms. Murphy argues that the child support obligation should not be varied effective December 2009 because:

a) no change in circumstances has been demonstrated as effective since then;

b) Mr. Hancock has not established that the children were in his care not less than 40 percent of the time;

c) Mr. Hancock agreed to pay child support of $851.00 per month in November 2008 based on the parenting arrangement that remains in place and, therefore, he should be bound by that commitment.

[8] I am satisfied that a significant change in Mr. Hancock's employment had been effected by December 2009 and this represents a change in circumstances as contemplated by s. 37 of the *Maintenance and Custody Act*, R.S.N.S. 1989 c. 160. He began working locally at that time and discontinued his search for more lucrative employment outside the province.

[9] The 2008 consent order provided for a child support obligation of $851.00 based on a parenting arrangement that Mr. Hancock essentially followed since December 2009. For the period December 2008 to November 2009 the same parenting schedule was in place but Mr. Hancock was unavailable to parent on that basis. In other words, the child support obligation in place in December 2008 was based solely on the child support table – not set off. Mr. Hancock's scheduled parenting time did not change in December 2009. His availability to take advantage of his parenting time did. Independently of his parenting time, Mr. Hancock had agreed to pay child support based solely on the tables. Ms. Murphy argues that the child support obligation agreed upon in December 2008 was coincidental with the parenting arrangements since then. She argues that there is,

therefore, no basis to argue that a change in the parenting arrangement justifies a reassessment of the child support obligation.

[10] Ms. Murphy asks that the child support obligation of Mr. Hancock for the period July 1, 2010, to June 1, 2011, be based on his 2009 income. In addition, she argues that his line 150 income should not be accepted as his income because he is self-employed and some business expenses have a personal component that effectively increase Mr. Hancock's income. She offers the following as examples of these types of expenses: home office expenses, motor vehicle expenses, telephone and capital cost allowance on his vehicle.

[11] Ms. Murphy points to the December 2008 consent order as an example of when this "grossing up" was employed. She argues that Mr. Hancock's 2007 line 150 income was $49,877.00. However, the parties agreed his income for child maintenance purposes was $60,000.00.

[12] I am satisfied that the use of Mr. Hancock's "line 150" income is a fair way of determining his income for child support purposes as provided for by s. 16 and s. 19 of the Provincial *Child Maintenance Guidelines*, N.S. Reg. 53/98.

[13] At the pre-trial conference on July 21, 2010, Ms. Murphy agreed that any variation of the child support order would not pre-date July 1, 2010. Her variation application was filed November 6, 2009. Mr. Hancock first gave notice that he was seeking a recalculation of the child support obligation in early 2009.

- Conclusion

Issue One

[14] Given that Mr. Hancock had agreed upon the child support obligation based on a parenting arrangement reflected in the December 2008 order, I am satisfied that he remains bound by that obligation until the current order. That parenting order remained in effect and was followed. I am not prepared to recalculate the child support obligation only because Mr. Hancock began exercising his access.

[15] To order the repayment of child support by Ms. Murphy would place a hardship on her and is not in the interests of the parties' children. I apply the principles outlined by Justice Bastarache in *D.B.S. v. S.R.G.* [2006] S.C.J. No. 37.

[16] There has not been an overpayment of child support.

Issue Two

[17] I am satisfied that accepting Mr. Hancock's line 150 income is a fair and accurate method of determining his obligation for child support purposes. His previous year's income shall be used for this purpose.

[18] Mr. Hancock's child support obligation to July 1, 2011, is to be based on the terms of the December 2008 order by reference to his previous year's line 150 income from time to time.

[19] The use of the previous year's line 150 income for determining set off of the parties' child support obligations shall commence July 1, 2011. The parties' new shared parenting arrangement has only recently been confirmed. The commencement of the new child support regime will generally coincide with this change.

ACJ