

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacDonald v. Seguin, 2011 NSSC 337

Date: 20110906
Docket: SFHF-13113
Registry: Halifax

Between:

Ricky MacDonald and Angela MacDonald

Applicant

v.

Tabitha Seguin

Respondents

Judge: The Honourable Justice Elizabeth Jollimore

Heard: August 31, 2011

Decision: September 6, 2011

Counsel: All parties were self-represented

By the Court:

Introduction

[1] Ricky and Angela MacDonald have applied to vary Tabitha Seguin's child maintenance payment for Jewel MacDonald. As well, they ask that Ms. Seguin be ordered to pay a proportionate share of the cost of the Jewel's braces. Ricky MacDonald is Jewel's father and Angela MacDonald is Jewel's stepmother. Tabitha Seguin is Jewel's mother.

[2] Ms. Seguin did not file the pleadings necessary to apply, pursuant to section 10 of the *Nova Scotia Child Maintenance Guidelines* NS Reg 53/98, for a finding of undue hardship, so that I might order her to pay an amount of child maintenance different from that prescribed by the *Guidelines*. Regardless, she did make this argument. The parties participated in a shuttle conciliation session on May 25, 2011 and she raised this claim in the letter she sent to the conciliator and the MacDonalds on June 9, 2011 where she stated her position in response to the MacDonalds' application. At the August 9, 2011 conference held to prepare this case for hearing, Ms. Seguin again raised the claim. She has filed the financial information from her cohabiting partner necessary to support the application.

[3] Mr. MacDonald testified that he expected an undue hardship application from Ms. Seguin "right off the hop" and that he and Angela MacDonald had filed all the materials needed to respond to it. In fact, the MacDonalds filed affidavits on August 4, 2011 (prior to the conference) in which they adduced the evidence necessary to address the undue hardship claim, including preliminary calculations comparing the households' standard of living. On this basis, I will deal with the undue hardship claim as if it had been properly made, rather than requiring Ms. Seguin to file the appropriate notice and compelling the parties to return for another hearing in a few months' time.

[4] None of the parties was represented by counsel.

Applications

[5] The parties participated in conciliation. The conciliation process can be particularly beneficial for those who represent themselves because it identifies the issues in their dispute and the documents and information necessary to address those issues. For some, conciliation can identify areas of agreement. For others, conciliation assists in ensuring they are ready for trial. In addition to the court officers who oversee the conciliation process, staff in the Family Law Information Centre can provide legal information and direct litigants to the forms that they are required to complete in relation to the application they have made. In applications like this, I strongly recommend parties pay careful attention to the directions given by the court officer conducting the conciliation and comply with Directions to Disclose.

[6] While I am without all of the exact documents our Rules require to address the applications, the parties have managed to provide me with the information I need. For example, while Ms. Seguin didn't provide me with a Statement of Expenses, she did include a budget in her affidavit which shows her costs. As well, Mr. MacDonald estimated a calculation and

comparison of the household standards of living using income figures for Ms. Seguin and her partner which were provided at the last child maintenance hearing in 2009. I greatly appreciate his effort in doing the calculations. Mr. MacDonald used the “step-by-step” worksheets provided on the Department of Justice Canada website (<http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/pub/guide/index.html>) to calculate the household standards of living and to compare them. I’m pleased to see that these resources are used and are useful to self-represented litigants.

Applying to vary a maintenance order

[7] This is an application under section 37 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. The section provides that where there’s been a change in circumstances since the last order or variation order, I may vary that order.

[8] Ms. Seguin argues that her income has changed only modestly since the 2009 maintenance order, so there shouldn’t be a variation to that order. She says she receives only \$50.00 more per pay and since she is paid bi-monthly the increase in her net income is \$1,200.00 annually.

[9] The last order addressing Jewel’s maintenance was granted by then-Justice O’Neil on September 15, 2009. At that time, Ms. Seguin’s annual income was \$19,016.00 and she was ordered to pay monthly child maintenance of \$145.00. There was no direction with regard to special or extraordinary expenses. Ms. Seguin’s current annual income is \$23,400.00. Her income has increased by more than four thousand dollars. With that increase, her income taxes and source deductions of Canada Pension Plan and Employment Insurance premiums have increased. As well, she has opted to purchase additional health insurance. While Ms. Seguin does not believe this increase in her income is sufficient to re-visit her child maintenance obligation, I disagree.

[10] On its face, this change in her income would result in a monthly increase of \$53.00 to her child maintenance payments. One fundamental principle of child maintenance is that it is “the specific amount of child support owed will vary based upon the income of the payor parent”, according to Justice Bastarache at paragraph 38 of the unanimous reasons in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37. It is appropriate to review Ms. Seguin’s child maintenance obligation.

[11] As Justice Bateman said at paragraph 10 in *Atwood v. Stoddard*, 2001 NSCA 69, “There is a presumption that the amount of maintenance payable is the table amount”. The table amount is found in the table that relates to the number of children being supported and the paying parent’s income. According to the applicable table, a parent earning \$23,400.00 should pay monthly child maintenance of \$198.00.

Undue hardship applications, generally

[12] Ms. Seguin argues that this is a case where she would experience undue hardship if she was required to pay child maintenance for Jewel based on the application of the tables to her income. She asks me to make this finding and reduce the amount of child maintenance she

should pay for Jewel so that she may continue to pay \$145.00 each month. She says she can afford this amount.

[13] In *Atwood v. Stoddard*, 2001 NSCA 69, at paragraph 11, Justice Bateman made clear that “There is no discretion to depart from the *Guidelines* amount, where the payor is a parent, save in a case of undue hardship.”

[14] The Court of Appeal outlined how I can depart from the *Guidelines* amount in *Gaetz*, 2001 NSCA 57 at paragraphs 15- 16. That case dealt with the *Federal Child Support Guidelines*, SOR/97-175, but the language of the section relevant to the Gaetz application is the same language used in the *Nova Scotia Child Maintenance Guidelines*. Justice Freeman described a two-step test in *Gaetz*, 2001 NSCA 57. First, some circumstance capable of creating undue hardship must be found to exist. Only when this circumstance is found to exist does the second step become relevant. The second step involves comparing the standard of living in the custodial parent’s household with the standard of living in the other parent’s household.

[15] Specifically, undue hardship applications are governed by section 10 of the *Nova Scotia Child Maintenance Guidelines*. Section 10(1) provides that I may award an amount of child maintenance that is different from the amount determined under section 3 if I find that the parent making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

Do circumstances exist that might cause undue hardship?

[16] In section 10(2) of the *Guidelines* there is a non-exhaustive list of circumstances that may cause a parent or child to suffer undue hardship. I have summarized these below, modifying their language to reflect the circumstances of Jewel’s parents. They include the following:

- (a) Ms. Seguin is responsible for an unusually high level of debts reasonably incurred to maintain herself, Mr. MacDonald and Jewel prior to the separation or to earn a living;
- (b) Ms. Seguin has unusually high expenses for exercising access to Jewel;
- (c) Ms. Seguin has a legal duty to maintain any person;
- (d) Ms. Seguin has a legal duty to maintain a child, other than Jewel, and that child is either
 - (i) under the age of majority, or
 - (ii) the age of majority or over but is still a dependent child within the meaning of clause 2(c) of the *Maintenance and Custody Act*; and

(e) Ms. Seguin has a legal duty to maintain any person who is unable to obtain the necessities of life due to an illness or disability. This person may include a dependent parent (as defined by clause 2(d) of the *Maintenance and Custody Act*).

[17] According to Ms. Seguin's evidence, some of the circumstances listed in section 10(2) do not apply to her. There is no evidence that she has responsibility for an unusually high level of debts reasonably incurred to maintain herself, Mr. MacDonald and Jewel prior to the separation, or to earn a living. There's no suggestion that she has a legal duty to maintain anyone other than Jewel.

[18] Ms. Seguin explained that she simply can't afford to pay the amount of child maintenance dictated by section 3 of the *Guidelines*. She said that her raise was exhausted by purchasing health insurance coverage for Jewel. This coverage costs \$48.29 each month. She said that she needed a car and a cell phone to have access to Jewel and these expenses make increased child maintenance unaffordable.

[19] Ms. Seguin did not purchase her car so that she could exercise access. Ms. Seguin had a car in the past. It was an older car and she said it became too expensive to operate because it needed a lot of repairs. Ms. Seguin said that she had to replace the car, which meant incurring a car loan: her earlier car was debt-free. She uses her car travelling to work, running errands, getting groceries, visiting to her family and exercising her access with Jewel. She said she uses her car for "everything". Ms. Seguin's car payment is \$346.14 and she pays insurance of \$145.00 each month. I have no evidence of any other costs for her car or that her insurance cost has increased with the purchase of her current car. I have only been told that it is more expensive to have this car than her older car, because the older car was subject to a loan. I do not accept that the expense for the purchase of the car is a cost of her access to Jewel. Ms. Seguin has many uses for her car and just one of them is exercising access to Jewel.

[20] Ms. Seguin's cell phone is a similar expense. Historically, Ms. Seguin used the cell phone belonging to her partner, Ian Pemberton. There were difficulties with this arrangement when it came to communicating with the MacDonalds, so Ms. Seguin got her own cell phone. She says she uses this for "everything" and doesn't use Mr. Pemberton's cell phone any longer. Ms. Seguin's cell phone expense is \$75.00 each month. This expense could be lower if Ms. Seguin continued to use Mr. Pemberton's cell phone for most of her needs and used her own cell phone only to communicate with the MacDonalds. Ms. Seguin has many uses for her cell phone and just one of them is communicating with the MacDonalds about her access with Jewel.

[21] I don't accept that Ms. Seguin's expenses for her car and cell phone are unusually high expenses for exercising access to Jewel because they aren't, to my mind, expenses for exercising access. So, Ms. Seguin's claim doesn't fall in this category.

[22] The categories in section 10(2) aren't exhaustive. There may be some other circumstance that causes undue hardship. From the examples given in section 10(2), I understand that the sort of circumstance that is relevant is one of a necessary expense that relates to others. The categories listed in section 10(2) relate to financial obligations the parent has to others, whether other children or to adults. Specifically, the *Child Maintenance Regulations* refers to legal

obligations to support others pursuant to agreements or court orders. As well, the *Guidelines* refer to historic obligations for supporting a child and the current obligation to pay access costs. (Both with regard to past debts and current access costs, the *Guidelines* expect the costs to be “unusually high”: merely paying past debts or access costs is not enough.)

[23] The list in section 10(2) doesn't include the affordability of maintenance. Parents commonly appear in court saying they can't afford to pay the amount dictated by the *Guidelines*, but this isn't enough to come within section 10(2). If it was, then it would be possible for all parents to arrange their spending so that all their money was spent before the time came to pay child maintenance.

[24] The budget in Ms. Seguin's affidavit shows no expenses analogous to the expenses listed in section 10(2). The expenses are for her needs: rent, car loan and insurance, cable, power, phone and the like. I understand that Ms. Seguin finds her income is limited, however, this is not a circumstance where undue hardship exists as the *Nova Scotia Child Maintenance Guidelines* determine undue hardship.

[25] As a result of reaching this conclusion, it isn't necessary for me to consider and compare the standard of living in the MacDonalds' home and the standard of living Ms. Seguin's home. Section 10(3) of the *Regulations* requires that this comparison must be done where it has been determined that there is undue hardship. Since I have determined there is no undue hardship, this step isn't required.

[26] I dismiss Ms. Seguin's undue hardship application and order that she pay monthly child maintenance of \$198.00 for Jewel. I order that this be paid in equal bi-monthly installments of \$99.00, with payments due on the fifteenth and last day of each month, starting on the fifteenth of October, 2011.

Jewel's braces

[27] The MacDonalds want Ms. Seguin to contribute to the cost of Jewel's braces.

[28] According to section 7(1) of the *Child Maintenance Guidelines*, one parent can ask that I order the other pay all or any portion of certain types of expenses. The amount of the expense claimed may be estimated. In making an order under section 7, I am to consider the necessity of the expense as it relates to the child's best interests and the reasonableness of the expense in relation to the parents' and child's means and the family's pre-separation spending pattern.

[29] Mr. MacDonald has estimated the after-tax cost of the braces to be \$5,494.00 based on paying the expense over two years. This calculation failed to consider section 7(1)(c) of the *Guidelines*, which provides that the expense to be shared is the expense “that exceed[s] insurance reimbursement by at least \$100 annually”. Subtracting the \$100.00 annual amount reduces the expense for the braces to \$5,294.00. The MacDonalds propose that Ms. Seguin would pay twenty-six percent of this expense based on her income of \$23,400.00 and Mr. MacDonald's

employment income of \$63,000.00. I note that the calculation of proportionate sharing ignored \$6,000.00 in rental income the MacDonalds receive from a basement apartment in their home.

[30] Ms. Seguin opposes this request. She says that Jewel, who is eleven, is too young for braces. I heard testimony that the MacDonalds wanted the braces to wait, as well, but the orthodontist felt they should be provided now. Dr. Barnard, the orthodontist, provided a written opinion about the need for braces and a series of photographs showing the displacement of Jewel's teeth and the intended correction. Based on Dr. Barnard's materials, I have no doubt that the expense is a necessary one.

[31] Mr. MacDonald offered evidence that he and his wife investigated the cost being charged for Jewel's braces. They called several orthodontists to ask about the average cost of braces. None would provide a specific quote without reviewing Jewel's file, so they called the Nova Scotia Dental Association and learned the average cost of braces is \$900.00 higher than the price they are being charged. The question under section 7(1) is not whether the expense is reasonable, but whether it is reasonable *in relation to the parents' means and Jewel's means*. Since Jewel has no means, I am left to consider only the means of her parents to pay the expense.

[32] Ms. Seguin's annual income is \$23,400.00. After her statutory deductions and health insurance premiums are paid, she has disposable income of \$1,509.36 each month. From this, she will pay her child maintenance (\$198.00), her rent (\$460.00), her car payment (\$346.14), her car insurance (\$145.00), her cell phone bill (\$75.00), her cable bill (\$35.00), her power bill (\$70.00) and for her medicine (\$59.00). After these payments are made, she is left with \$121.00 with which to pay for food, clothing, laundry, gas and personal items each month. Her expenses are modest.

[33] In contrast with Ms. Seguin's situation, the MacDonalds spend \$2,156.00 on their accommodations and are able to budget for gifts and savings. The expense for Jewel's braces is a reasonable one, in the context of the income available to the MacDonalds', but not in the context of Ms. Seguin's income. I dismiss the application for a contribution to the expense of Jewel's braces.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia