SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Gagnon v. Gagnon, 2012 NSSC 407

Date: 20121127
Docket: 1210-001057, SATD-067304
Registry: Halifax

Between:

Stephen Joseph Gagnon

Applicant/Petitioner

v.

Sheila Ann Gagnon

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: November 13, 2012, in Halifax, Nova Scotia

Counsel: Stephen J. Gagnon, self-represented
Sheila A. Gagnon,, self-represented

By the Court:

[1] On March 26, 2012 the Father filed a Notice of Variation Application requesting changes to the child support amounts he is required to pay pursuant to the terms of the Corollary Relief Judgment issued by the court on June 2, 2011. He requested those changes because he had a change in income, because he no longer considered the eldest child to be a dependent child, and because he did not accept that his youngest child still required childcare. He requested the changes to take effect on July 1, 2011. As this matter progressed it appeared he also wanted enforcement of life insurance provisions contained in a Consent Variation Order issued by the court on September 8, 2009 pursuant to the *Maintenance and Custody Act*.

[2] On May 7, 2012 the Mother filed a Response to the Variation Application. The Mother considered the eldest child continued to be a dependent child and she alleged her youngest daughter continued to require childcare. She believed the Father failed to disclose all of the income he is entitled to receive. She wanted the Father to pay his proportional share of her health and dental insurance premium, her after insurance cost of the children's medical and dental expenses, and the expenses their eldest daughter will be required to pay to attend Nova Scotia Community College. The Mother did not want the Father to be a beneficiary of her life insurance. She requested direct reimbursement of medical and dental expenses she has paid on behalf of the children because (she says) the Father removed her as a recipient under his medical and dental insurance plan. She has asked the court to order the Father to participate in providing his medical and dental insurance plan details so both his insurance and hers can be used to fund the cost of orthodontic treatment for their youngest daughter and she wants him to contribute proportionally to all amounts not covered by those insurance plans.

Agreements and Orders

[3] On May 30, 2003 the parties entered into a Separation Agreement. Each was represented by a lawyer at the time. The parties were to have joint custody of their two children. The oldest child is now 20 and the youngest will soon be 13. On March 26, 2009 the Separation Agreement was registered with the court pursuant to section 52 of the *Maintenance and Custody Act,* R.S.N.S. 1989, c. 160. On September 8, 2009 the court issued a Consent Variation Order varying the provisions of the Separation Agreement. The parties agreed to revise the amount of child support to be paid both retroactively and ongoing, to annually disclose their income tax returns, to enforce payment of the child support through the Maintenance Enforcement Program and to name the other party as a beneficiary of his and her life insurance. On June 2, 2011 a Corollary Relief Order was granted in the divorce proceeding between the parties. Each was represented at the time. That Order continued the parties joint custody of the children, adjusted access time between the Father and one of the children, adjusted the amount of child support to be paid, and incorporated the Consent Variation Order issued on September 8, 2009 except to the extent it was itself varied by the Corollary Relief Order. Because the Consent Variation Order is based upon the original Separation Agreement I concluded the terms of that Agreement, not varied by

the Consent Variation Order or the Corollary Relief Order, still applied. When questioned about this the parties acknowledged this was their understanding.

CHILD SUPPORT

Dependent Child

[4] The *Divorce Act,* R.S. , 1985, c.3 requires a parent to pay child support for "any or all children of the marriage". "Child of the marriage" is defined in the *Divorce Act.* The relevant definition for the purpose of this proceeding is a child who:

> 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.

[5] 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.

[6] Whether a child who is over 19 years of age is still a dependent is to be decided on a case-by-case basis. There is no arbitrary cutoff point based on age or scholastic attainment, although proving dependency becomes more difficult as a child grows older and/or obtains a first degree or other advanced level of education or training. As a general rule, parents of students 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. In making this determination the trial judge cannot be blind to prevailing social and economic conditions and it is recognized that a bachelors degree no longer assures self-sufficiency. (*Martell v. Height,* (1994) 130 N.S.R. (2d) 318)

[7] The party claiming support for a dependent child has the burden of establishing that child's entitlement.

[8] The Mother has provided information describing the oldest child's learning disabilities. She faces significant challenges and has not yet been accepted into any Nova Scotia Community College program. She has not found any educational or training program that might permit her to work elsewhere than in retail or fast food outlets likely earning minimum wage. This young lady wants something better for herself but has not yet discovered the means to do so. Her search is complicated by the fact she is now pregnant.

[9] The Father does not accept the impact of his daughter's disabilities in respect to her dependency. She has obtained and sustained part time employment and he expects her to find full time employment based upon her present skill level. While that may mean a life earning

minimum wage that is her reality and she will need to adjust her expectations accordingly. He should no longer be required to support her.

[10] The problem with the Father's argument is that his daughter cannot withdraw from her Mother's charge. Her part time employment is insufficient to permit her to obtain the necessaries of life. Her continuing employment and pursuit of educational opportunities will be compromised by her pregnancy. The full burden of supporting her will fall upon the Mother unless she moves out and obtains social assistance. Perhaps that is what she should do but at the moment her Mother wants to give her additional time to find an educational opportunity that may provide her more remunerative employment. This cannot continue indefinitely but at the present time I have decided she remains a dependent child and the Father must continue to contribute towards her financial support.

Father's Income

[11] Paragraph 5(a) of the Separation Agreement states:

> Both parties acknowledge the difficulty in determining the Father's present annual income because of the fact that the income varies from year to year and that the Father accumulates overtime and vacation time which he then uses to continue his income during the winter season in order to keep his earnings consistent. For that reason the Father and the Mother agree that, commencing in 2002 and continuing in each and every year thereafter, child support shall be calculated pursuant to the Federal Child Support Guidelines based on line 150 of each party's previous year's income tax return. Neither party will be free to make an application to increase or decrease child support based on their income for the current year...

[12] The Mother does not dispute the fact that this clause continues to apply to the calculation of child support. What the Mother does say is that the Father's line 150 does not include all the money available to him as income in each year.

[13] The Father is employed with the Department of Fisheries and Oceans. He is a seasonal employee who works in a sea-going position aboard a particular vessel. His seasonal employment is from April 1st until December 31st. He has a standard rate of pay for this seasonal work. However, he can occasionally be employed in acting positions that provide him a higher rate of pay. In addition, if he is assigned to other vessels, he will may have additional hours of work if the assignments are during the months from January 1st until March 31st. Whether he will be offered acting positions or be assigned to vessels during the months from January 1st until March 31st is not something over which he has any control. He is available and willing to work if offers are made.

[14] Because he is a seasonal worker, the Father has taken advantage of a system that permits him to "bank" certain of his earnings - overtime, acting position pay increases, comp leave, lay

days, and annual leave. As a result he does not receive these payments when he earns them. He receives them either on a regular basis to provide him with income when he is not working from January until March and/or when the system that permits "banking" requires payment because a cap has been imposed on the amount he can accumulate. As a result it is difficult for him to predict with any degree of accuracy what his likely yearly income will be. This was the very problem paragraph 5(a) of the Separation Agreement was meant to address. It relied on the only accurate record the Father could produce to calculate his total income which was his line 150 on his previous year's Income Tax Return as confirmed by his Notice of Assessment. The means by which the Father earns and "banks" his income has not changed since the date the Separation Agreement was signed. He continues to "bank" pay to ensure he has a steady stream of income throughout the year. Also he receives income from this "bank" when the caps apply.

[15] What the Mother wants is an order requiring the Father to stop banking his pay so he will receive whatever he earns immediately. The Mother knew the Father was banking his pay when she signed the Separation Agreement. She therefore knew that his Income Tax Return would not include any "banked" pay. She chose to agree to paragraph 5(a) of the Separation Agreement knowing these facts. The Corollary Relief Order did not change this paragraph of the Separation Agreement. Her present request is for a change to that provision.

[16] When a court is considering a change to an order (the Separation Agreement has been incorporated into an order) the court must find, since the date when the last order was made, a material change in the circumstances of the parties or the children that was either not foreseen or could not have been reasonably contemplated when the order was granted. *(Willick v. Willick,* [1994] 3 S.C.R. 670). If there have been material changes the court must then decide whether those changes require a variation to the provisions of the order.

[17] Changes to the calculation of table guideline support are to occur as directed by Section 17 (4) and (6.1) of the *Divorce Act*:

> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect to that order.
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[18] Section of 14 of the *Federal Child Support Guidelines* provides:

> For the purposes of subsection 17 (4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

As a result even minor increases or decreases in total yearly income can require a variation to the amount of child support to be paid because payment is based upon a table tied to the amount of income earned by the payor.

[19] The wording of section 14 (b) of the *Federal Child Support Guidelines* suggests the requirement for a material change may still apply to other calculations of child support:

> In the case where the amount of child support does not include a determination made in accordance with the table, any change in the condition, means, needs or other circumstances of a either spouse or all of any child who is entitled to support;

[20] None of these sections use the word "material change" . In subsection (a) any increase or decrease in income that would result in a different payment for child support pursuant to the table justifies a variation. However subsection (b) does have the same wording that was considered in *Willick*. Subsection (b) refers to child support guideline provisions requiring the exercise of discretion such as those for Special and Extraordinary Expenses.

[21] While section 14 of the *Federal Child Support Guidelines* assists in determining how and when to adjust the amount of child support to be paid, it does not inform the court about how and when it is to make changes to the means of calculating the Father's income. This is a discretionary decision. I have concluded the Mother must satisfy me there has been a material change in relevant circumstances since the date of the Corollary Relief Order that justifies a change to the calculation of the Father's income. What are relevant circumstances? Those would be changes to the Father's employment or changes affecting how he is paid. There have been no such changes since the date the Corollary Relief Order was granted nor indeed since the date the Mother signed the Separation Agreement.

[22] The Mother must understand (as I believe the Father does) there is to be a change to child support payment amounts whenever there is a change in income whether income has increased or decreased. This means she cannot rely on receiving the same amount of child support every year. However she would have been subject to this uncertainty even if she had not agreed to the provisions of paragraph 5 of the Separation Agreement because the *Federal Child Support Guidelines* provide for these adjustments. There is some disadvantage to the Father under the present arrangement because in some periods of time he will pay, from a current decreased income, child support based upon a higher income earned the year before. The present arrangement means the parties must, once yearly, on or before May 31st review changes in their income and do the necessary calculations to set the child support amounts for the upcoming June

1st to May 31st period. The Maintenance Enforcement Program will not do these calculations and it will continue to collect the amounts required in the last Order registered with the Program. The parties need either to engage lawyers, or conciliators, (if available to them) to do the calculations so they can submit a Consent Variation Order to the court. There is no other way to resolve this problem. In addition, the Maintenance Enforcement Program will not collect money to pay expenses the parties are to share proportional to their income without a designated amount reflected in the Order. A party who has not paid his or her share may later face a court application to have the unpaid amounts confirmed and placed in an Order which then can be enforced by the Program.

Table Guideline and Special and Extraordinary Expenses

[23] There are two components to the child support the Father has been ordered to pay. The first is a table guideline amount pursuant to the *Federal Child Support Guidelines* and the second is for Special and Extraordinary Expenses. The only Special and Extraordinary Expense listed in the Separation Agreement and the Corollary Relief Order is for "childcare". Neither party was required to pay the other a proportional share of the cost of the medical and dental insurance premiums. The Corollary Relief Order contains the following sentence in paragraph 4:

> (the Mother) has waived her claim for extraordinary expenses as it relates to health insurance premiums.

The Mother now wants to assert a claim for this expense and have the payment applied retroactively. Nothing has changed from the date the Order was signed. I will not add this as an expense for either party.

[24] Although the Mother suggested otherwise, it does appear, from records the Father provided, his medical and dental insurance plan has been covering expenses relating to the children. However, the Father has not been co-operative in recognizing his youngest daughter's need for orthodontic treatment and he may not have been as co-operative as he should have been in processing claims on his plan. As I understand it, claims must be completed by the Mother and then given to the Father for submission to his insurers. This appears to have been the system in place since the separation and so the Father has not "removed" the Mother from his plan in respect to the reimbursement she can receive for payments made on behalf of the children. He may have delayed forwarding reimbursement to her. Often insurers will, on consent of the policy owner, arrange for direct submission of these claims by the other parent. This should be explored by these parties. They will need to co-ordinate their plans in order to obtain the maximum benefits available to cover the orthodontic treatments their youngest daughter requires. The amounts not covered by the policies are to be shared in proportion to their income. The Maintenance Enforcement Program cannot collect this payment until it is expressed as a dollar amount. If the Father does not pay his share of the non insurable expenses to the orthodontist, further court proceedings may be required. However, under these circumstances it is unlikely the

orthodontist will commence this treatment until arrangements have been made directly by each parent for the required contribution to the non insured expense.

[25] The Mother has not provided sufficient information to quantify her claim for a proportional sharing of medical and dental expenses she paid on behalf of the children that were not covered by insurance reimbursement.

[26] During the hearing the Father acknowledged his youngest child still required childcare because the Mother frequently worked at night and he acknowledged the past and present net cost is $3,026.40 per year upon which he has been paying a proportional share of 60% amounting to $151.32 per month.

[27] The Mother requested proportional sharing of the oldest daughter's educational expense. This daughter is not yet attending any educational program that has an associated expense. Should she do so in the future that may form the basis of a future claim for contribution.

Recalculation of Child Support

[28] The Father has requested recalculation of the child support he was to pay since July 1, 2011. His payments for the period July 1, 2011 until May 31, 2012 are to be based upon his 2010 line 150 amount revealed in his 2010 Income Tax Return as confirmed by his Notice of Assessment for that year. His income for that period was $ 76,202.00. For the period from June 1, 2012 (the date when payments were to be adjusted in the Separation Agreement) until May 31, 2013 he is to pay child support based upon his 2011 line 150 income which was $50,740.56. He has been paying, and continues to pay table guideline child support based upon an income of $72,200.00.

[29] I am now faced with a request for a retroactive recalculation that can involve the considerations outlined by the Supreme Court of Canada in *S.(D.B.) v. G.(S.R.)* 2006 SCC 37, (D.B.S.) In doing so I note the following:

- the present order requires child support to be paid on the previous year's income and I have not changed that provision
- there has been no delay by the Father in requesting the proper calculation of child support
- both children still are dependent children

[30] One aspect of the DBS analysis may argue against a retroactive recalculation - the hardship the Mother may suffer as a result of the recalculation. She will suffer no hardship if child support for July 1, 2011 until May 31, 2012 is recalculated because the Father would pay almost the same amount as was calculated in the Corollary Relief Order. The hardship may arise

as a result of a recalculation of child support from June 1, 2012. However, had the order been followed, this would have already occurred and she would have no recourse to request the court to order more ongoing support based on a different income. The Father certainly is entitled to have ongoing child support adjusted based on his previous income. The period requiring retroactive recalculation is five months. I am not satisfied this recalculation will cause hardship justifying a dismissal of the Father's request.

[31] I will recalculate the amount the Father is required to pay. However, whether there will be a credit on the Father's account with the Maintenance Enforcement Program depends upon whether he has continued to pay the amounts required by the previous order. I will require the Program to complete the final adjustments following this decision. As a result the calculations appearing below are my estimates based upon compliance with the previous Order until November 30, 2012.

[32] The amount the Father was to pay from July 1, 2011 until May 31, 2012 for two children based upon the table and taking into account the change in the table amounts in December 2011 (which the Corollary Relief Order did not take into account because it was granted before the changes were known) is $1,060.00 per month until December 31, 2011 and $1,052.00 per month until May 31, 2012. The total yearly amount is $11,620.00. The Father has been paying a table amount of $1,060.00 per month since the Corollary Relief Order was granted. He has paid it although the actual table guideline amount required on an income of $72, 200.00 is $1,010.00. Since he never did have an income of $72,200.00 I can only conclude this amount was typed into the Order in error because by that time the parties would have known that the Father's line 150 income for 2010 was $76,202.00. Taking into account the change to the table amounts to be paid commencing January 1, 2012 the Father has overpaid $ 40.00 during this period.

[33] On June 1, 2012 the Father's income, based upon the previous year, is $50,740.00 (rounded). The table guideline child support amount for two children on this income is $711.00 per month. The total amount that should have been paid from June 1, 2012 until November 30, 2012 was $4,266.00. The Father in fact may have paid $6,360.00, an overpayment of $2,094.00.

[34] The Father also is to pay a proportional to income share of the child care expense. This also is calculated according to the provisions of paragraph 5 (a) of the Separation Agreement. The Mother's income in 2010 was $48,350.00; in 2011 it was $48,225.00. The Father's percentages are 61% for 2010 ($154.00 per month - rounded) and 51% for 2011($ 129.00 per month - rounded). From July 1, 2011 until May 31, 2012 the Father was to pay and did pay $151.32 per month. His underpayment is insignificant and I have not adjusted for it. From June 1, 2012 until November 30, 2012 the payment at $129.00 per month amounts to a total of $774.00. The amount of the overpayment during this period is $134.00.

[35] The total credit due to the Father is $2,268.00 if he has paid the required table guideline and child care expense as I have calculated. The Maintenance Enforcement Program is to adjust these figures if he has not paid as expected. In addition there may be additional overpayments or

under payments because of the amount of time it may take for the program to make necessary adjustments.

[36] Commencing December 1, 2012 the ongoing payment for table guideline child support is $711.00 per month, the proportional payment for the child care expense is $129.00 per month for a total monthly payment of $840.00. If the Father has a credit on the account with the Maintenance Enforcement Program he is to deduct $100.00 per month from the child support payment until the credit is reimbursed. If he has arrears he is to pay an additional amount of $100.00 until those are paid in full.

Life Insurance

[37] In the Consent Variation Order incorporated into the Corollary Relief Order the following two paragraphs appear:

> 10 (a) (The Father) shall maintain life insurance coverage, in the amount of $290,000.00, naming (the Mother) as the primary beneficiary, for so long as child support remains payable. (The Father) shall provide proof of insurance coverage to (the Mother), annually on or before June 1.
>
> (b) (The Mother) shall maintain life insurance coverage, in the amount of $150,000.00, naming (the Father) as the primary beneficiary, for so long as child support remains payable. (The Mother) shall provide proof of insurance coverage to (the Father), annually on or before June 1.

[38] It became apparent during the preceding that the Mother may not be in compliance with the provisions of 10 (b). She did ask that I relieve her of the obligation imposed by this provision. Given that child support remains payable there are no discernible changes in circumstances that could justify any change to this provision. The Father has requested enforcement of this provision. I decline to do so as part of this proceeding. The Father is advised to obtain legal advice in respect to the means by which he might pursue an enforcement proceeding and the type of order that may result. The Mother is on notice that the Father expects her compliance with the provisions of 10 (b).

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Beryl MacDonald, J.S.C.