<u>SUPREME COURT OF NOVA SCOTIA</u>
(Family Division)
Citation: Morris v. Gilbert, 2013 NSSC 200

Date: 20130626
Docket: SFHMCA 018307
Registry: Halifax

Between:

Debra Joanne Morris
Applicant

and

Charles Patrick Gilbert
Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Date of Hearing: October 3, 2012; January 16 and May 7, 2013

Counsel: Luke A. Craggs, counsel for Ms. Morris
Charles Gilbert, Self Represented

By the Court:

Introduction

[1] The parties lived together in New Brunswick. The parties were never married. They cohabited commencing April 1, 1996; they separated on November 18, 1998 and entered a separation agreement on December 15, 1998. They have a son, D.O.B. July 12, 1997. He has been in a shared parenting arrangement since 1998.

[2] They moved to Nova Scotia in 2002. It should be noted that for one and one half years (April 2010 to July 2011), Mr. Gilbert lived in Ottawa and was not available to exercise shared parenting as a consequence.

[3] Following Mr. Gilbert's return from Ottawa he purchased a home in Bedford. Ms. Morris continues to live on the Halifax peninsula; the parties' son attends Citadel High School and is completing grade 11.

Litigation History

[4] The matter was first before me on June 7, 2012 for a pre-trial. As a consequence of that appearance, a consent order issued requiring the parties to seek counselling between Mr. Gilbert and their son. In addition, a hearing was scheduled for October 3, 2012 to address parenting issues and Ms. Morris' claim for child support payable by Mr. Gilbert.

[5] On October 3, 2012, the parties next appeared in response to an application by Ms. Morris, who sought primary care of the parties' son. At the request of the parties, I interviewed the child on October 11, 2012. The decision to interview him was based on the costs of hiring someone to do so, the associated delay and the Court being satisfied of his level of maturity and that the parents would accept the spirit and terms of their son's position.

[6] The parties were unavailable for a report later the same week. For a variety of reasons, the report of his wishes was given to them on January 16, 2013. The parties agreed to accept them. The existing order was continued.

[7] The allocation of parenting time continued as directed by the parties outstanding order issued November 28, 2011, which order varied the 2002 order.

[8] Ms. Morris seeks the full table amount of child support from Mr. Gilbert. Mr. Gilbert wishes to continue to pay the set off amount.

[9] Ms. Morris is arguing that her son spends after school time and week end time in her home and she should be compensated for the associated cost, notwithstanding the parties' parenting order that provides for 50/50 parenting.

Issue

1. Is the full table amount of child support payable by Mr. Gilbert?

Discussion

[10] The parties offered evidence on January 16, 2013. The only issue remained a determination of child support payable by either party. Summation occurred May 7, 2013.

[11] The presumptive rule governing the payment of child support as mandated by s.3 of the **Child Maintenance Guidelines**, N.S. Reg 53/98 is not applicable because both parents have their son in their care for more than forty percent of the time.

[12] This circumstance is governed by s.9 of the **Guidelines** which provides:

> **Shared custody**
>
> 9. Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child maintenance order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the parents;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought.

[13] Justice Bastarache in *Contino v. Leonelli-Contino*, 2005 SCC 63 provides important guidance on the meaning of s.9 of the Federal Child Support Guidelines which text is almost identical to s.9 of the Nova Scotia Child Maintenance Guidelines.

[14] A number of Justice Bastarache's conclusions should be reproduced for purposes of the analysis herein:

> - s.9 provides a particular child support regime in cases of shared custody, independent of the presumptive rule of s.3 (para 23);

- the three factors of s.9 structure the exercise of discretion and they are conjunctive, none prevailing (para 27);

- in cases of shared parenting there is no automatic reduction in the amount of child support, only an automatic deviation from the method used under s.3, but not necessarily from the amount of child support, it being possible that after a review of the s.9 factors it would be determined that the guideline amount will remain the proper amount (para 30);

- the weight of each s.9 factor will vary according to the facts of the case (para 39), a contextual approach must be followed (para 82);

- the set-off amount is a useful starting point when calculating child support in a shared parenting arrangement but the “cliff effect”, a drastic change in support is a concern in cases of a variation order (para 41. para 44);

- simple set-off serves as a starting point but has no presumptive value (para. 49);

- not every dollar spent by a parent exercising access over the 40 percent threshold results in a dollar saved by the recipient parent and it is possible to presume, in the absence of evidence to the contrary, that the recipient parent’s fixed costs have remained unchanged and that his or her variable costs have been reduced only modestly by the increased access; irrespective of the residential arrangement (para 54);

[15] Justice Bastarache introduces his discussion of the meaning and application of the three factors of s.9 with the following:

> 49. Hence, the simple set-off serves as the starting point, but it cannot be the end of the inquiry. It has no presumptive value. Its true value is in bringing the court to focus first on the fact that both parents must make a contribution and that fixed and variable costs of each of them have to be measured before making adjustments to take into account increased costs attributable to joint custody and further adjustments needed to ensure that the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought. Full consideration must be given to these last two factors (see Payne, at p. 263). The cliff effect is only resolved if the court covers and regards the other criteria set out in paras. (b) and (c) as equally important elements to determine the child support.
>
> 50. It should be noted here that the Table amounts are an estimate of the amount that is notionally being paid by the non-custodial parent; where both parents are making an effective contribution, it is therefore necessary to verify how their actual contribution compares to the Table amount that is provided for each of them when considered payor parents. This will provide the judge with

> better insight when deciding whether the adjustments to be made to the set-off amount are based on the actual sharing of child-related expenses.
>
> 51. This is where discretion comes into play. The court retains the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to another, something which Parliament did not intend. As I said in Francis v. Baker, one of the overall objectives of the Guidelines is, to the extent possible, to avoid great disparities between households. It is also necessary to compare the situation of the parents while living under one roof with the situation that avails for each of them when the order pursuant to s. 9 is sought. As far as possible, the child should not suffer a noticeable decline in his or her standard of living. Still, it is not a discretion that is meant to set aside all rules and predictability. The court must not return to a time when there was no real method for determining child support (Paras v. Paras, [1971] 1 O.R. 130 (C.A.)).

[16] As stated, the Supreme Court of Canada in *Contino v. Leonelli-Contino* 2005 SCC 63 established guidelines for applying this section. All three factors of s.9 must be used to determine the amount of child support payable by a parent in a shared parenting arrangement.

[17] Ultimately, a Court can decide to order Mr. Gilbert to pay the table amount, a set off amount or some other amount. This section provides the Court with flexibility with a view to achieving fairness in the broader economic context of both parents.

[18] The Court requires evidence from the parties to support their positions if the Court is to be persuaded to that party's point of view.

[19] The November 28, 2011 order recognizes that the son's primary residence "shall be with Debra Morris" but also that the parties are in a shared parenting arrangement. These terms of the order are continued as a result of this proceeding.

[20] I must turn to the evidence and an application of the three factors of s.9 to determine the appropriate level of child support.

s.9(a) table amount of child support

[21] Currently Mr. Gilbert pays Ms. Morris child support of $225, a set off amount pursuant to the parties' consent variation order issued November 28, 2011.

[22] **s.9(b) increased costs of shared custody**

[23] Although the parties do have shared parenting and have as an objective, 50:50 parenting of their son, I am satisfied that each parent has increased costs because of this arrangement. Mr. Gilbert incurs additional costs because he is required to transport his son to and from the peninsula where his son attends school and frequently socializes with friends.

[24] The distance of Mr. Gilbert's home from his son's school also results in Ms. Morris incurring more than fifty percent of some costs because the son often visits her home, alone or with friends. Once there, their son and his friends are appropriately hosted with food and the like.

[25] Paragraphs 7, 8, 11 and 12 of Ms. Morris' affidavit, sworn January 2, 2013 outline the basis of her claim (Exhibit #5).

s.9(c) condition, means, needs and other circumstances of each parent and of any child for whom support is sought

[26] Ms. Morris lives with her son and no other person. Mr. Gilbert lives with a common law partner in a detached home.

[27] The parties did not focus much of their attention on comparing their respective standards of living. The Court does not have much evidence upon which to compare their household standards of income.

[28] Mr. Gilbert's affidavit evidence (Exhibit #6), sworn January 14, 2013 is that he incurs 50 percent of all costs associated with caring for his son; that he pays most, if not all the costs for his son's extracurricular activities; that he has

historically paid the full cost of his son's tuition at a private school; that for 14 years he and Ms. Morris have applied set off to determine child support.

[29] Mr. Gilbert says that litigation has been characteristic of his relationship with Ms. Morris. He says that after considering the subject application there have been 16 Court appearances in 14 years.

[30] Mr. Gilbert says he has purchased clothing and medication needed by his son and he has paid the uninsured portion of dental bills. He says his son has adequate toiletries at his house and the practice of taking clothing between houses has been in place for 14 years.

[31] Mr. Gilbert disputes Ms. Morris' claim that their son goes to her home most days and waits for Mr. Gilbert to pick him up on Mr. Gilbert's access days. He says his son most often visits at his office and does home work for an hour when there, until Mr. Gilbert is finished his work day. Mr. Gilbert works on the peninsula.

[32] Mr. Gilbert asks that Ms. Morris claim a proportionate share of orthodontic braces, now recommended by their son's dentist. He asks that his son's passport be made available when required.

Conclusion

[33] I am satisfied that the set off amount of child support should continue to be paid by Mr. Gilbert. It is to be adjusted to reflect the parties' 2012 incomes. The parties have lived with this arrangement for more than a decade and adjusted their life styles to reflect it. In my view, it is a fair recognition of the parties' circumstances and costs that each parent bear in parenting their son.

[34] Mr. Gilbert's higher income is fairly reflected in the requirement that he pay a set off amount of child support.

ACJ