SUPREME COURT OF NOVA SCOTIA
Citation: Blackburn v. Pace, 2013 NSSC 201

Date: 20130626
Docket: SFHF 012802
Registry: Halifax

Between:

Theresa Michelle Elizabeth Blackburn

Applicants

and

Andrew David Pace, Melissa Pace

Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Date of Hearing: May 17, 2013

Counsel: Theresa Blackburn, Self Represented
Andrew Pace, Self Represented
Samira Zayid, Counsel for Melissa Pace

By the Court :

Introduction

[1] Theresa Blackburn is the Applicant and biological mother of the 13 year old child 'C' born in May 1999 (hereinafter referred to simply as 'the child'). The Respondent, Andrew Pace is the biological father of 'the child'. These parties separated in 2000. The second Respondent, Melissa Pace is the subsequent partner (and now the estranged spouse of Mr. Pace). She stood in *loco parentis* to 'the child' while she and Mr. Pace were together. Melissa Pace and Andrew Pace were married in 2005 and separated in 2008. Following her separation from Mr. Pace, Melissa Pace continued to have time with 'the child', including overnight

weekend time. Ms. Blackburn and Ms. Pace both supported the Court's decision to make Ms. Pace a party to these proceedings, as provided by s.18(2) of the *Maintenance and Custody Act*, R.S.N.S. 1989 c.160.

[2] All issues in this proceeding pertain to the parenting and support of 'the child'.

Issues(s)

[3] The Court was asked to determine (1) the access arrangement for Mr. Pace and Ms. Pace, his estranged wife; (2) whether Ms. Blackburn should have sole custody of 'the child'; (3) ongoing child support; and (4) retroactive child support.

[4] Evidence commenced the morning of April 10, 2012 as scheduled. Proceedings were stopped in the afternoon because of health concerns of one of the parties. The matter was scheduled to recommence on July 4, 2012. It did not. A number of subsequent appearances followed but the trial did not resume.

Consent Order

[5] When the parties appeared on April 17, 2013, Ms. Melissa Pace was represented by Samira Zayid and Mr. Andrew Pace and Ms. Theresa Blackburn remained self represented. The Court was prepared to schedule time for the completion of the trial.

[6] However, discussions resulted in a request from all parties that as an alternative to continuing the trial, the Court consider presiding at a binding settlement conference. I agreed to do so.

[7] That conference was held May 17, 2013. Parenting issues were resolved and are reflected in an order dated and issued June 11, 2013. Mr. Andrew Pace then calculated that his parenting time would now be in excess of forty percent. He wants to pay less than the table amount of child support as a result. This decision flowing from the binding settlement conference focuses solely on the issue of the proper amount of child support to be paid by Mr. Pace.

Child Support: Shared parenting

[8] The parties agree that primary care of 'the child' will remain with Theresa Blackburn, her mother and Melissa Pace will have 'parenting' time as well. For the purpose of this analysis, Mr. Andrew Pace will have a right of access or physical custody of the child for not less than forty percent of the time.

[9] 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 biological parents have 'the child' in their care for more than forty percent of the time.

[10] Mr. Andrew Pace's submissions require a consideration of s.9 of the Child Maintenance Guidelines, N.S. Reg. 53/98.

> **Shared custody**
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> 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
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> (a) the amounts set out in the applicable tables for each of the parents;
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> (b) the increased costs of shared custody arrangements; and
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> (c) the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought.

[11] 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 the same as s.9 of the Nova Scotia Child Maintenance Guidelines. The Provincial guidelines refer to 'a parent' and the Federal guidelines refer to 'a spouse'.

[12] A number of Justice Bastarache's conclusions should be reproduced as part 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);

[13] 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.
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> 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.
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> 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.)).

[14] 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.

[15] Ultimately, a Court can decide to order Mr. Pace 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.

[16] 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.

[17] I must turn to the evidence and an application of the three factors of s.9 to determine the appropriate level of child support payable by Mr. Pace.

s.9(a) table amount of child support

[18] Mr. Pace's line 150 income in 2011 was $49,626. In 2010 it was $57,117. He has been paying $326 per month, pursuant to the existing order dated August 30, 2006.

[19] Melissa Pace is disabled and unable to work. She relies on public assistance to meet her financial needs. Theresa Blackburn and her husband are not employed and rely on Canada pension benefits to meet their financial needs.

[20] Melissa Pace's income is $764 per month. Ms. Theresa Blackburn and her husband have a combined income of slightly more than $30,000. Ms. Blackburn's income was $7,660.92 in 2007, as Long Term Disability Benefits. She is unable to work for health reasons. She was required to access funds from an RRSP in 2012 in the amount of $6,140. She also received Canada Pension benefits of $7,986 in 2012.

[21] The appropriate level of child support to be paid by Mr. Pace is the table amount given the modest means of Theresa Blackburn, the other biological parent. Ms. Melissa Pace also has a very low income, and does not have a statutory duty to pay child support (assuming the pleadings permitted me to order child support to be paid by her). I am also assigning Ms. Pace's "parenting time" to Ms. Blackburn when calculating Ms. Blackburn's parenting time. In my view, the time the child spends with Ms. Pace is time when Ms. Blackburn is exercising physical care and control as that language is used in s.9 of the Child Maintenance Guidelines.

[22] The table amount payable by Mr. Andrew Pace is $420.

[23] Even if I found that Theresa Blackburn and/or Melissa Pace had incomes that would give rise to a child support obligation, I would nevertheless order that Andrew Pace pay the table amount of child support to Theresa Blackburn, the primary care parent. I would do so for the reasons that follow and enunciated in my discussion of the meaning and effect of s.9(b) and s.9(c) of the Provincial Chid Maintenance Guidelines.

s.9(b) increased costs of shared custody

[24] I conclude that there are minimal increased costs of parenting the child herein as a result of shared parenting. Theresa Blackburn continues to have primary care of the child and the lessening of her expenses is minimal. Each parent has a need to maintain the fixed costs that currently exist. I am satisfied

that Theresa Blackburn will continue to be the person first approached by the child to make discretionary expenditures for the child.

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

[25] Mr. Pace's income and means are superior to those available to Theresa Pace. His standard of living is higher and any reduction or elimination of his child support obligation will negatively impact on the child's home environment with Theresa Blackburn. Ms. Blackburn and her husband have special health needs that require her to incur expenses. Their standard of living can not be deduced clearly from her income level.

[26] The economic reality of the respective homes weighs strongly in favour of maintaining Mr. Pace's obligation to pay the table amount of child support to Ms. Blackburn.

[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 living and income.

[28] Justice Bastarache directs that a Court adjourn proceedings to permit evidence to be offered on the impact of shared parenting on a parent's costs associated with that parenting (para. 57). The parties are anxious for a conclusion to this litigation. That is why they sought a binding settlement conference. Adjournment of these proceedings is not in the best interest of 'the child', all agree on that.

[29] I have therefore ruled based on the material on file, evidence tendered at trial and submissions of the parties throughout the trial process and within the settlement conference context.

[30] Ms. Blackburn has abandoned her claim for arrears of child support due from Mr. Pace. This has resulted in a significant saving for Mr. Pace.

Conclusion

[31] Mr. Andrew Pace will pay the full table amount of child support. This obligation is effective June 1, 2013 and this amount shall be paid on the first of every month. No arrears of child support are owing.

[32] Mr. Pace is directed to adjust his child support on or before June 1st of each year to reflect his previous year's income. This adjustment must first be made June 1, 2013 to reflect his 2012 income.

[33] No arrears of child support or retroactive amount is found to exist to June 1, 2013.

[34] Ms. Zayid is asked to prepare the Child Support Order.

ACJ