SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Lee v. Hebert*, 2017 NSSC 331

Date: 2017-12-21
Docket: *Halifax* No. SFHDVRO-106237
Registry: Halifax

Between:

Mary Elizabeth Lee

Applicant

v.

Peter Robert Hebert

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	October 4, 2017, in Halifax, Nova Scotia
Counsel:	Angela Walker for the Applicant

By the Court:

[1] Mary Lee and Peter Hebert are the parents of Liam and Sara. Liam is currently 18 years of age and is in his first year at Dalhousie University. The parties were divorced in September 2005. Sara is currently 22 years of age and is not the subject of this application. Child support for Sara was terminated by consent of both parties pursuant to a Consent Order issued June 25, 2014 ("Consent Order").

[2] Ms. Lee resides in Nova Scotia and Mr. Hebert lives in New Brunswick. As a result, this proceeding was commenced as a provisional hearing. The last order related to child support was the Consent Order of the New Brunswick Court of Queen's Bench issued June 25, 2014.

[3] Paragraph 7 of the Consent Order provided as follows:

> "Starting on September 1, 2014 and thereafter on the first day of each month, the Respondent Peter Hebert shall pay to the Applicant Mary Lee the sum of $1,300 in child support for the benefit of Liam Peter Hebert until the child Liam Peter Hebert reaches the age of 19 or begins post-secondary studies, whichever occurs first. When the child Liam Peter Hebert begins post-secondary studies, the parties shall contribute in proportion to their respective incomes to the child Liam's post-secondary expenses. The parties shall agree on the child Liam's post-secondary expenses on or before August 15th of each year and their respective contributions shall start on September 1st of each year."

ISSUES:

1) Is a provisional hearing the appropriate mechanism to deal with Ms. Lee's application?
2) If so, has Ms. Lee proven a material change in circumstance sufficient to warrant a variation of the Consent Order?
3) If a material change is proven, what is the appropriate child support payable by Mr. Hebert?

BACKGROUND

[4] In accordance with the Consent Order, Liam was to reside primarily with Ms. Lee. Both Ms. Lee and Liam relocated to Nova Scotia subsequent to the issuance of the Consent Order. Liam had been in attendance at Ecole Secondaire

du Sommet and commenced attending Dalhousie University in September 2017. He is taking computer science. Liam continues to reside with Ms. Lee.

[5] Liam has been diagnosed with dyslexia, dysgraphia and ADD. In November 2016, there was an updated psychoeducational assessment completed. Liam has received a $1,600 grant to assist with his educational costs given his diagnosis.

[6] Mr. Hebert paid child support in accordance with the Consent Order up to August 2017. Evidence provided by Ms. Lee indicates that in September 2017 Mr. Hebert paid Liam directly the sum of $800. Mr. Hebert paid 50% of Liam's costs of tuition and books. Mr. Hebert confirmed in correspondence dated September 27, 2017 (attached as tab 3 to Exhibit 5) that he was also prepared to share in Liam's costs of tutoring and the purchase of a computer.

[7] The last financial disclosure provided by Mr. Hebert was received prior to the Consent Order of June 2014, when his annual income was declared to be $165,000. The court has no current financial disclosure from Mr. Hebert.

[8] By correspondence dated September 27, 2017, Mr. Hebert indicated his intention to respond to the application of Ms. Lee via the court in Nova Scotia. The letter specifically indicates that Mr. Hebert does not attorn to the jurisdiction of the Supreme Court of Nova Scotia.

[9] Ms. Lee has provided updated financial disclosure. Her current Statement of Income declares her income to be $200,720.40. Her most recent Notice of Assessment for the tax year 2016 notes her income to be $201,982.

LEGAL ANALYSIS
ISSUE ONE- PROVISIONAL HEARING

[10] The statutory framework can be found in sections 18 and 19 of the *Divorce Act*, RSC 1985, C3 (2nd Supp) (as amended). Section 18(2) provides:

> "Notwithstanding paragraph 5(1)(a) and subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and
>
> (a) The respondent in the application is ordinarily resident in another province and has not accepted the jurisdiction of the court, or both former spouses have not consented to the application of section 17.1 in respect of the matter, and
>
> (b) In the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19,

> The court shall make a variation order with or without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and, where so confirmed, it has legal effect in accordance with the terms of the order confirming it."

[11] Section 19 sets out the manner in which the matter proceeds in the jurisdiction of the Respondent (in this case, New Brunswick).

[12] Mr. Hebert has confirmed his residency in New Brunswick and has confirmed that he has not accepted the jurisdiction of this court. I therefore turn to s.18(2)(b) to determine whether the issues can be adequately determined by proceeding as a provisional hearing. Based upon the evidence before me, I am satisfied that this matter should proceed as a provisional hearing.

[13] As noted in the case of *Bishop v. McKinney*, *supra*, the procedures in sections 18 and 19 of the *Divorce Act*:

> "permit the court to determine whether the evidence which Mr. Bishop has tendered raise a prima facie entitlement to variation. The court in New Brunswick can then determine, based on any evidence that Ms. McKinney tenders, whether the order can be confirmed or refused, or whether it should be remitted back to this court for the hearing of further evidence."

[14] As noted in the case of *Chree v. Chree* 2015 ONSC 6480, (SC), at paragraph 13:

> "These sections allow a bifurcated process whereby former spouses who reside in different provinces in Canada may file applications for variation of existing orders made pursuant to the Divorce Act in the province where they reside."

[15] Further at paragraph 17, the court discusses the limitations of these proceedings:

> "And with no one present to formally cross examine or challenge evidence at either hearing, the respective judges involved in the process are each placed in the difficult and conflicted position of not only weighing the evidence but also eliciting and testing it."

[16] Despite these limitations, the court should strive to make determinations on such questions balancing issues of equity, expediency and sufficiency of information.

ISSUE TWO- MATERIAL CHANGE IN CIRCUMSTANCES

[17] Having determined the first issue in the affirmative, I then turn to the second issue- has a material change of circumstance been proven? Ms. Lee submits that when the parties reached consensus on the terms of the Consent Order Liam was going to attend Memorial University in Newfoundland and would therefore be living in university residence. That assumption was not clearly stated in the terms of the Consent Order. Although I have no doubt as to Ms. Lee's indication of the underlying presumption of the Consent Order, I have no evidence whatsoever from Mr. Hebert. At the time of the confirmation hearing he may (or may not) dispute this as the basis for the Consent Order.

[18] Even if Mr. Hebert were to dispute the foundational basis of the Consent Order, I would find that there has been a material change in circumstance in this case. If the evidence proffered by Mr. Hebert indicates that there was no consensus ad idem as to Liam attending Memorial, I would find a change in the circumstances of the parties based on the following:

1) The inability of the parties to come to an agreement on Liam's post-secondary expenses. Ms. Lee indicates that the agreement was predicated on Liam's living expenses (accommodation costs and living expenses) being shared. Mr. Hebert wishes to share post secondary expenses and a contribution to accommodation costs and living expenses as though Liam were in residence in university. This ignores the reality that Liam remains living with Ms. Lee and has chosen not to go into university residence.
2) The Consent Order set August 15th as the deadline for the parties to agree upon Liam's post-secondary expenses. There was no such agreement. At the time of the application by Ms. Lee, there had been no agreement to contribute to expenses such as computer, tutoring, etc. In the absence of agreement, there is no alternative but to determine the appropriate financial responsibility of the parties to their son, Liam.
3) To unilaterally determine the amount payable and then to commence payments directly to Liam as opposed to Ms. Lee also constitutes a material change in circumstances.

ISSUE THREE- QUANTUM OF CHILD SUPPORT

[19] The third and final issue is the quantum of child support payable for Liam. Liam has not yet reached the age of majority. He is clearly a "child of the marriage" entitled to support pursuant to s.3 of the *Federal Child Support Guidelines*. Section 3(1) states:

> "Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) The amount set out in the applicable table, according to the number of children under the age of majority to who the order relates and the income of the spouse against whom the order is sought; and
>
> (b) The amount, if any, determined under section 7."

[20] There has been no evidence provided that Liam is in a shared parenting arrangement. There has been no evidence of an undue hardship application advanced on the part of Mr. Hebert. Given that the parties have not reached agreement on the financial arrangements for Liam, the court's ability to deviate from the table amount of support is negligible.

[21] There is a review of the court's obligations when considering the quantum of child support payable in the case of *Franke v. Franke* [2012] S.J. No. 328. In that decision, Justice Smith reviews the decisions from the Supreme Court of Canada of *Richardson v. Richardson* [1987] 1 S.C.R. 857, *Willick v. Willick* [1994] 3 S.C.R., and *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231. These cases have continually underlined the fact that child support is the right of the child.

[22] Although there is limited ability for the court to sanction some deviation from the *Guidelines*, such deviation must be by consent of the parties. Further, the agreement of the parties must address other special provisions which have been made for the benefit of a child such that the application of the Guidelines would be inequitable in the circumstances (reference section 15.1(5) of the *Divorce Act*). The court will only approve of such agreements between the parties if there are special provisions. In the present matter, there is no agreement between the parties. Further, there is no indication of what other "special provisions" there are in accordance with s.15.1(5) of the *Divorce Act*.

[23] Mr. Hebert will pay child support in accordance with his annual income based on the *Federal Child Support Guidelines*. The Provisional Order will

contain a provision obligating Mr. Hebert to provide his three most recent income tax returns and notices of assessment. Further he is to provide copies of his two most recent pay stubs and any further income information mandated by the court.

[24] Even if Liam were over the age of majority, I am mindful of the decision of *Ruck v. Ruck*, 2016 NSSC 45. That case also involved a provisional hearing. In the *Ruck* case, *supra*, the children were over the age of majority. Justice Jollimore stated at paragraph 20 of the decision:

> "In Weseman, 1999 CanLII 5873 (BC SC), at paragraph 30, Justice Martinson described the Guidelines as assuming the payor provides child support and the recipient parent "makes a significant contribution to the costs of that child's care because the child is residing with him or her." Her Ladyship continued at paragraph 31, that "[t]he closer the circumstances of the child are to those upon which the usual Guidelines approach is based, the less likely it is that the usual Guidelines calculations will be inappropriate." She said the opposite was also true: the usual approach may be inappropriate for a child over the age of majority who lives away from home or earns a significant income."

[25] In the present matter, the circumstances of Liam are very close to the circumstances upon which the usual *Guidelines* approach is based. He is living at home and earns minimal income. As such, monthly child support will be payable premised upon the appropriate table amount of support. Should Mr. Hebert refuse to provide such information, the amount of child support shall be set in accordance with a declared income of $165,000.

[26] I then turn to the appropriate quantification of contributions to section 7 expenses, if any, to be made by Mr. Hebert. Prior to apportioning the financial responsibility between the parents, I must consider the means, needs and circumstances of all the parties, including Liam.

[27] Liam received a $1600 grant to assist with the purchase of educational supports (such as a computer). In addition, Ms. Lee will have the benefit of the tuition tax credit. Ms. Lee has indicated that Mr. Hebert has contributed 50% towards tuition, books, and the purchase of a computer. She has indicated that he did not take issue with sharing these expenses equally and the court should accept this as appropriate in the circumstances.

[28] I am unable to accept that an equal division of these expenses is appropriate. The court must take into account the implications of tax credits and grants

available to Ms. Lee and to Liam. In viva voce testimony, Ms. Lee confirmed the following expenses in addition to tuition and books:

1) A lap top which cost $700;
2) A printer/ scanner which cost $120
3) Head phones at a cost of approximately $150-200
4) A large screen monitor which cost $120

[29] Even assuming that the head phones were $200, the total cost of all expenses total $1,140. Liam received a grant for $1,600. Even if I were to add the cost of the tutor from November, 2017 to April 2018 at a cost of $140 per month, this would increase the total expenses by another $840. This is not a known expense at this time as it is not yet known how much support Liam will need with tutoring.

[30] It is clear that the additional expenses to date, including the computer were fully funded by the $1,600 grant. Mr. Hebert will receive a credit for the $350 contribution to Liam's lap top that had already been paid by him.

[31] Liam also received a $750 scholarship. Prior to apportioning the liability for Liam's tuition, the sum of $750 must be deducted from the amount payable by each party. The balance of the expenses are to be shared proportional to income. As Mr. Hebert's income is unknown at the present time, the court is not prepared to assume that an equal division is appropriate in the circumstances.

[32] Mr. Hebert has commenced paying child support directly to Liam. Child support is payable to Ms. Lee directly and not to Liam.

CONCLUSION

[33] Mr. Hebert shall pay child support to Ms. Lee in accordance with the *Federal Child Support Guidelines*. He shall provide full and appropriate financial disclosure so that the appropriate determination of his income may be made. In addition, Mr. Hebert shall pay post secondary expenses related to Liam in proportion to his income. He will pay a proportionate contribution to Liam's tuition and books after taking into account the following:

1) Deduction of monies related to the tuition tax credit available to Ms. Lee
2) Deduction of $750 scholarship for the 2017/2018 school year

3) Deduction of contribution of $350 made towards the purchase of Liam's lap top (fully funded through an educational grant).

[34] On a prospective basis, Mr. Hebert shall pay the table amount of child support as well as contributing proportionally to Liam's tuition and books. His contribution shall be net of deductions related to tuition tax credit, scholarships and bursaries. He will not be required to contribute further to other educational aids related to Liam. It is unknown as to whether he will be eligible for further grant monies to assist with the cost of any such aids. His educational aids have been fully funded to this point in time through the grant. As well, I have not specified Liam's expected contribution to his post secondary expenses. If he is taking courses throughout the summer months as indicated by Ms. Lee, his earning potential would be nominal.

[35] Mr. Hebert will be provided the following information by Ms. Lee:

1) The status of Liam's enrolment at a post secondary institution
2) Copies of Liam's marks
3) Annual financial disclosure of Liam and Ms. Lee by June 1st including income tax returns and Notices of Assessment by June 1st of each year.

[36] Mr. Hebert will provide the following information on an annual basis by June 1st of each year: a copy of his income tax return and notice of assessment.

Chiasson, J.