SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: ***J.E.N. v. M.J.S.N.***, 2018 NSSC 33

Date: 2018 - 02 - 21
Docket: 1201-068928; SFH-97500
Registry: Halifax

Between:

J.E.N.

Petitioner

v.

M.J.S.N.

Respondent

ADDENDUM

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	January 24 - 25, June 28 - 29, 2017
Submissions:	December 14, 2017 by J.E.N December 20, 2017 by M.N.
Counsel:	Jocelyn M. Campbell, Q.C. for J.E.N. M.N. self-represented

By the Court:

Introduction

[1] Following the release of my reasons for decision in the parties' divorce (reported at 2017 NSSC 314), Ms. N drew my attention to a term in Justice Legere-Sers' interim order which provided that the issue of arrears of child support would "be dealt with at a future hearing." Ms. N argues that the divorce and corollary relief proceeding was that future hearing and I must deal with the claim.

[2] Mr. N says that Ms. N's position is "unfounded and unfair" and the trial is done. He says that if Ms. N can "go back piece by piece and dig through the terms" of the decision that he'll "be asking for a few changes".

[3] If I accept Mr. N's position, the parties must return to court for a hearing on child support arrears.

Should I address Ms. N's claim?

[4] I should only address the child support arrears claim if Mr. N has had sufficient notice of the claim that he could lead evidence, cross-examine and make submissions on it. Procedural fairness demands no less.

[5] Mr. N was present when Justice Legere-Sers ordered that arrears be dealt with at a "future hearing".

[6] There was a pre-trial conference on October 27, 2016. The memorandum from that conference outlined the trial issues. It did not mention child support arrears.

[7] The memorandum directed that either party should contact me immediately if he or she thought there were any mistakes in the memorandum, or if something was missing.

[8] Ms. N did not contact me to say that the issue of child support arrears had been missed.

[9] Ms. N specifically identified arrears as an issue for trial in her pre-hearing brief. However, she cited the Supreme Court of Canada's decision in *DBS v. SRG*, 2006 SCC 37 and applied its analysis.

[10] In her affidavits of February 16, 2016, March 31, 2016 and December 6, 2016, Ms. N gave evidence about Mr. N's failure to pay the child support payments that he owed under their separation agreement. She also identified other amounts she wanted him to pay for their son.

[11] Mr. N has had sufficient notice of the arrears claim that he could lead evidence, cross-examine and make submissions. Mr. N was present when Justice Legere-Sers ordered arrears be dealt with at a future hearing and when he filed his affidavit on January 20, 2017 he would have

seen all Ms. N's affidavits and her pre-trial brief, which identified the issue.

[12] I conclude that I may address the child support arrears claim where it was made with sufficient notice to Mr. N so as not to deprive him of fundamental fairness.

What is the nature of Ms. N's claim?

[13] Ms. N's written submissions, before and after trial, cited *DBS v. SRG*, 2006 SCC 37 in her claim for arrears of child support.

[14] *DBS v. SRG*, 2006 SCC 37 does not deal with arrears. It deals with retroactive child support claims.

[15] Arrears of child support are different from retroactive child support.

[16] Arrears of child support exist where there is an order compelling the payment of child support or an agreement to pay child support, and the child support is not paid. Any unpaid amounts are arrears.

[17] A retroactive child support award changes the child support obligation contained in an agreement or order, or imposes an obligation where there was no agreement or order. *DBS v. SRG*, 2006 SCC 37 outlines the analysis a judge must undertake in deciding how to exercise the discretion whether to award retroactive child support. This analysis is not the same as the analysis required to deal with a claim for child support arrears. Moreover, the evidence to be lead in defending a claim for child support arrears is different from the evidence to be lead in defending a retroactive child support claim.

[18] The child support terms of the parties' separation agreement were replaced by Justice Legere-Sers' interim order compelling Mr. N to pay child support of $853.00 each month, starting on April 1, 2016.

[19] Mr. N's income is being garnished to pay arrears. I assume, because of Ms. N's request that I deal with arrears, that the garnishment only deals with arrears that have accrued under Justice Legere-Sers' order. So, I consider the period from April 16, 2014 until March 31, 2016 in determining arrears. During this period arrears would be calculated under the parties' separation agreement.

[20] I am not addressing a claim for retroactive child support. While I found there was sufficient notice to Mr. N of the arrears claim so as not to deprive him of fundamental fairness regarding that claim, I do not make a similar finding if Ms. N is asking me to decide a retroactive child support claim.

The arrears claim

[21] The parents signed a separation agreement on April 16, 2014 where Mr. N agreed to pay child support of $650.00 biweekly.

[22] In their agreement, the parties also agreed that Ms. N would pay the cost of daycare and special or extraordinary expenses, such as swimming, soccer and skating. Mr. N was to pay for any daycare sessions the child missed when the child spent time with him, and for any additional daycare the child might need during that time. The parents agreed that as the child's activities and their costs changed, they would negotiate payment of those amounts. Similarly, if there were school fees approved by both parties, the fees would be paid in proportion to each parent's salary.

[23] Ms. N offered no evidence of daycare sessions the child missed while with his father or of additional daycare that the child needed while with his father. There was no evidence of negotiations about activities or school fees between April 16, 2014 and April 1, 2016. Any claim Ms. N now makes for these expenses is a retroactive claim and not one I am addressing.

[24] Mr. N testified that he missed his first child support payment within three months of signing the separation agreement because Ms. N took their child away and he wasn't going to pay child support for her vacation when he was available to spend time with the child. Mr. N later withheld child support because he was not having Facetime access with the child. Support was withheld when she travelled with the child.

[25] Child support is the child's right. It is not dependent upon the existence or exercise of access. It is not dependent on the conduct of the recipient parent.

[26] Mr. N failed to pay $650.00 of the child support he owed in 2014: paragraph 147 and exhibit 79 of Ms. N's affidavit of December 6, 2016 [Exhibit 15].

[27] Mr. N failed to pay $10,750.00 of the child support he owed in 2015: paragraph 147 and exhibit 79 of Ms. N's affidavit of December 6, 2016 [Exhibit 15]. This amount is also supported at paragraph 27 and exhibit 2 of Ms. N's February 16, 2016 affidavit [Exhibit 16] (though Ms. N's addition is incorrect).

[28] Mr. N failed to pay $4,050.00 of the child support he owed in 2016: paragraphs 8 – 11 of Ms. N's affidavit of March 31, 2016 [Exhibit 17] and paragraph 147 and exhibit 79 of Ms. N's affidavit of December 6, 2016 [Exhibit 15]. This is the child support owed under the separation agreement, prior to Justice Leger-Sers' interim order.

[29] Mr. N didn't dispute Ms. N's evidence about the accumulated arrears. I find that he owes child support arrears of $15,450.00. I order him to pay this amount immediately.

[30] After receiving Ms. N's letter, I suspended the deadline for costs submissions. Written submissions on costs must be filed by March 16, 2018 and copied to the other party at the same time they are filed.

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

Halifax, Nova Scotia