

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Stewart v. Cartwright*, 2018 NSSC 132

**Date:** 2018-05-22

**Docket:** *Sydney* No. 1206-4174

**Registry:** Sydney

**Between:**

Christopher Cartwright

Applicant

v.

Michelle Stewart

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: October 3 and November 1, 2017; March 2 and May 22, 2018  
in Sydney, Nova Scotia

Oral Decision May 22, 2018, in Sydney, Nova Scotia

Written Release: June 4, 2018

Counsel: Mr. TJ McKeough for the Applicant  
Mr. David Iannetti for the Respondent

## **By the Court**

### **Introduction**

[1] Christopher Cartwright and Michelle Stewart are former spouses and are the parents of Christian Cartwright who was born in August 1996.

[2] Mr. Cartwright seeks to terminate child support because he states that Christian is no longer dependent.

[3] Ms. Stewart opposes the application for two reasons. First, she states that Christian was and is dependent. She notes that Christian has autism and will require additional time before he will be in a position to withdraw from her charge. Second, Ms. Stewart states Mr. Cartwright did not pay s.7 expenses as required. She seeks to quantify Mr. Cartwright's contribution towards Christian's post-secondary educational expenses. Ms. Stewart states that Mr. Cartwright has not contributed even though he was ordered to pay in the last court order.

[4] For his part, Mr. Cartwright disagrees with Ms. Stewart's request for contribution towards s. 7 expenses for two reasons. First, he disputes dependency for some of the period in question. Second, Mr. Cartwright questions some of the expenses advanced by Ms. Stewart.

### **Issues**

[5] In order to resolve the competing claims, I will answer the following questions:

- Does Christian remain a child of the marriage for the purposes of the *Divorce Act*?
- What are the appropriate s. 7 expenses?
- What is the appropriate child support order?

[6] Before addressing these issues, I will first provide an overview of relevant background information to provide context.

## **Background**

[7] In 2004, the parties consented to a Corollary Relief Judgement that included the following child support obligations on the part of Mr. Cartwright:

- He was to pay monthly child support of \$1,122.
- He was to pay ½ of hockey and baseball registrations.
- He was to contribute equally to the tuition costs of Christian's post-secondary education and he was to contribute to additional education costs associated with Christian's post-secondary education.
- He was to continue medical and dental coverage for Christian.
- He was to supply a copy of his annual income tax return.

[8] Twelve years later in January 2016, Mr. Cartwright filed an application to vary his child support obligations. Because Mr. Cartwright lives in Ontario and Ms. Stewart in Nova Scotia, Mr. Cartwright chose the provisional process offered in the *Divorce Act*.

[9] Mr. Cartwright initially asked to vary child support for three reasons. First, he said that he was unemployed and only earning \$27,000 per annum – substantially less than the \$148,818.99 that he was earning when the 2004 order issued. Second, he said that Christian was 19. Third, he said that Christian had worked all summer.

[10] On August 26, 2016, Mr. Cartwright filed a second variation application asking that the child support order be terminated effective April 30, 2016 and fixing arrears at \$4,000. In support of this application, Mr. Cartwright acknowledged that his annual income had “*for the most part*” increased between 2004 and 2015, but that he was unemployed for a period of time between 2015 and 2016. In addition, Mr. Cartwright stated that Christian graduated from college in April 2016 and was employed on a full time basis. He therefore concluded that Christian was no longer dependent.

[11] In conjunction with his application, Mr. Cartwright filed income tax print-outs and materials for five years. This information indicates line 150 income as follows:

- 2016            \$152,193

- 2015           \$139,560
- 2014           \$197,837
- 2013           \$70,578
- 2012           \$158,131

[12] In response, Ms. Stewart stated that Mr. Cartwright failed to disclose his income tax returns on an annual basis as required in the Corollary Relief Order. As a result, neither Ms. Stewart nor the court has income information from Mr. Cartwright for the years between 2004 and 2011.

[13] Further, Ms. Stewart noted that Mr. Cartwright also worked out of the country for a period of time. Therefore, she states, that his Canadian tax information is not necessarily reflective of Mr. Cartwright's actual income.

[14] Mr. Cartwright's variation application was heard in Ontario on August 31, 2016. An order from the Ontario Superior Court of Justice provisionally terminated child support and fixed arrears at \$4,000. Pursuant to the provisions of the *Divorce Act*, this order should not have had force or effect unless confirmed by this court. Instead, the Ontario maintenance enforcement agency treated the provisional order as a final one and stopped its collections of child support. Ms. Stewart struggled financially because of these decisions.

[15] Mr. Cartwright's provisional application eventually made its way to Nova Scotia. The confirmation hearing was held on October 3 and November 1, 2017. On November 7, 2017, a letter of request was sent to the court by Ontario counsel for Mr. Cartwright. No motion, no affidavit, no brief and no case law were filed in support of the request. Through his counsel, Mr. Cartwright sought to reopen the case and to submit evidence. Ms. Stewart objected.

[16] The court's decision was scheduled to be heard in December but was adjourned because a contested child protection hearing, which has statutory priority, had to be scheduled on that day. On January 17, 2018, this court denied Mr. Cartwright's motion to reopen, except in relation to the quantification and distribution of Christian's s.7 expenses. Costs of \$1,000 were awarded to Ms. Stewart.

[17] On March 2, 2018, the court reconvened to hear further evidence from the parties as to s. 7 expenses. Despite being given an opportunity to be heard, and

despite being now represented by Nova Scotia counsel, Mr. Cartwright elected not to present further evidence. Rather, Mr. Cartwright's counsel cross examined Ms. Stewart on the s. 7 expenses. Because Mr. Cartwright did not personally participate, he was able to strategically avoid cross examination. Written and oral submissions were also supplied.

[18] The court delivered its oral decision on May 22, 2018.

### **Analysis**

**[19] Does Christian remain a child of the marriage for the purposes of the *Divorce Act*?**

#### *Position of the Parties*

[20] In his application, Mr. Cartwright states that Christian was not a child of the marriage after April 2016 because Christian was 19; he had worked during the summer; and he had graduated from his course. During oral submissions, however, counsel for Mr. Cartwright acknowledged that Christian was dependent until July 2016 and that his dependent status would be reengaged when Christian was attending his block apprenticeship courses, for a period of five or six weeks, over the next two years.

[21] In contrast, Ms. Stewart argues that Christian continues to be dependent because he is not able to withdraw from her charge. She states that Christian would not have been able to achieve the level of success that he has, or to continue to navigate his way, without her financial and emotional support, and that of her husband. She notes that although Christian is making considerable progress, he remains dependent.

#### *The Law*

[22] Section 2(1)(b) of the *Divorce Act* states that a “child of the marriage” means a child who....

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

[23] In *Child Support Guidelines in Canada, 2015*, Julien and Marilyn Payne discussed the meaning of this provision at pages 80 and 81, wherein the following is noted, in part:

Whether a child remains in the charge of one or other parent and thus entitled to support is a question of fact and the court must draw the line where it thinks fit and proper having regard to the condition, means, needs, and other circumstances of the child and its parents. .... A child support order requires that the child for whom support is sought be in the “charge” of the applicant parent. This presupposes that the applicant parent has assumed a degree of responsibility for the care and support of a child. ...

*Decision*

[24] This fact based decision requires me to examine the unique conditions, means, needs and circumstances of both parents and Christian. In so doing, I make the following findings:

- Mr. Cartwright earns a healthy salary. I infer that his income was greater than \$148,820 for the years that he failed to supply his income tax returns in defiance of the Corollary Relief Judgement. I also infer that he earned income outside of the country during some years and thus his tax returns are not always reflective of his actual income. In such circumstances, I infer that Mr. Cartwright had and has the ability to support Christian and to meet his needs. I also infer that Mr. Cartwright underpaid child support for at least nine years.
- Ms. Stewart usually earns between \$39,000 and \$47,000 per year, although consistency of payments is problematic because her salary is distributed through the Phoenix pay system. Ms. Stewart’s 2017 income is less than usual because she underwent a spinal fusion and was unable to work for a period of time.
- Mr. Cartwright spends a negligible amount of time with Christian. He prefers to leave parenting tasks and responsibilities in Ms. Stewart’s capable hands.

- Christian is on the autism spectrum which means that his abilities and needs must be assessed differently than those who are not on the spectrum.
- Christian relies heavily on his mother and stepfather. Their support is tangible and intangible, financial and emotional. Ms. Stewart and her husband are exemplary parents consistently giving priority to Christian.
- Ms. Stewart is acutely aware of Christian's needs, abilities and challenges. Ms. Stewart, and her husband, have been able to mitigate the negative consequences associated with a loss of routine, the establishment of a new routine, and assisting Christian as he navigates life's challenges. Ms. Stewart and her husband spend much of their time and resources ensuring that everything is in order so Christian can succeed. Christian is able to succeed because of the efforts of his mother and step-father. Christian would not have been able to achieve what he has without their valuable input.
- Christian only applied for a student loan while attending the NSCC to access special services. If he did not apply, then the special services would not have been available, including the services of a tutor. The student loan proceeds were placed in an account and immediately repaid to the government upon graduation.
- Christian should not, in any event, be required to subsidize his post-secondary education by loans given the income and circumstances of his parents. A student loan is not income; it is money that must be repaid.
- Christian graduated from NSCC in June 2016. He continues to be enrolled in an apprenticeship program which requires his attendance in Halifax for two block periods – a six week program in 2018 and a five week program in 2019. Christian will be able to write his Red Seal examinations after the completion of these blocks and working the requisite hours.
- Christian became employed in July 2016 and eventually began to earn an income of \$17.50 per hour in 2018. His employment is partly funded by a government disability program. Ms. Stewart assisted in identifying and securing this funding for Christian's employer.

- Christian lives with his mother and step-father and they supply many of his basic needs.
- Christian is slowly developing independence and will, on a balance of probabilities, be able to achieve independence in the future.

[25] Given these facts, I find that Ms. Stewart has proven, on a balance of probabilities, that Christian remains a child of the marriage because he is unable to withdraw from her charge because of his disability, autism. Christian continues to rely heavily on his mother and stepfather. Christian is not yet in a position to live independent of them. The inability to withdraw is not because Ms. Stewart is overprotective or controlling. The inability to withdraw is because of Christian's unique circumstances.

[26] **What are the appropriate s.7 expenses?**

*Position of the Parties*

[27] The current court order requires Mr. Cartwright to equally contribute to Christian's tuition costs and to contribute to "additional education costs" associated with Christian's post-secondary education.

[28] Mr. Cartwright acknowledges that his obligation under this provision is outstanding. To remedy his delinquency, Mr. Cartwright proposes that he equally share in all appropriate post-secondary education costs incurred to date, and that all future post-secondary education costs be prorated based on parental income. In addition, Mr. Cartwright disputes several of the budgeted post-secondary expenses. He urges the following claw backs to the budget prepared by Ms. Stewart:

- Summer rental expenses are not appropriate because Christian did not live in the apartment in the summer. He lived at home.
- Vehicle maintenance is too high and should be reduced to \$300 - \$400 per year given the lack of evidence on point.
- Moving expenses should be no more than \$300 per move.

[29] Ms. Stewart asks that all expenses be paid on a proportionate basis and based on the budget that she prepared. In response to the questions surrounding the specific budgetary issues, Ms. Stewart noted as follows:

- The summer rental expenses were reasonable and necessary and in Christian's best interests. Christian's need for routine and consistency in a living space was a priority. Ms. Stewart was concerned that if she did not lease the apartment during the summer, the apartment may not have been available for the next semester. Ms. Stewart wanted Christian to focus on school and not new accommodations. Ms. Stewart said that she was unable to discuss this issue with Mr. Cartwright because he was working in Mexico at the time and his wife would not allow communication.
- The car Christian was driving was a 2007 and although Ms. Stewart couldn't recall exact repairs, she feels the figure is nevertheless appropriate.
- The moving expenses represent what she and her husband actually incurred and consisted of renting a trailer, staying in hotels and eating in restaurants while getting Christian settled.

### *The Law*

[30] Section 7(1)(e) of the *Child Support Guidelines* authorizes the court to make an order for the payment of post-secondary education expenses provided such expenses are necessary and reasonable in keeping with s. 7 (1). Before apportioning the expenses between parents, the court often will make various deductions, which deductions can include an amount for the child's contribution, or an amount representative of any other available subsidies, benefits, or income tax savings arising from either tax deductions or credits. In addition, further reductions are appropriate where some of the proposed s.7 expenses are already assumed in the table amount.

[31] The court's resolution of the s. 7 claims, must always be focused and framed by the issues raised by counsel. The court should not identify issues which are not raised by the parties.

### *My Decision*

[32] In my decision, and focusing on the issues framed by counsel, and I make the following findings:

- The budgeted post-secondary education expenses are for the most part necessary and reasonable.
- Christian's contribution is met by the disability allowance of \$3,492 which reduced tuition costs to **\$6,174**. No further contribution is reasonable given Mr. Cartwright's significant underpayment of child support in prior years.
- The rental expense is reasonable and necessary, including the summer portion. Christian lives in CBRM and the NSCC which offered the course is situate in the New Glasgow area. There are no campus residences. Given Christian's diagnosis, I accept Ms. Stewart's explanation as to the need to retain the same apartment. Given Mr. Cartwright's income, the expense is also reasonable. **\$13,900** is an appropriate rental expense.
- General expenses of \$20,607 are to be reduced by \$200 for the vehicle maintenance where there was limited evidence in support. **\$20,407** is an appropriate general expense.
- Furnishings of **\$2,500** is an appropriate expense.
- Moving expenses of **\$1,800** is an appropriate expense.
- I will not reduce the s.7 education expenses for tax savings because such an argument was not advanced, and neither party supplied the necessary tax calculations. The court should not act unilaterally where both parties were represented.
- The total post-secondary education expenses while Christian attended the NSCC in New Glasgow are **\$44,781**.
- In respect of the two block programs scheduled for 2018 and 2019, I find the following represents the reasonable and necessary expenses for each of the two terms:

➤ Rent	\$3,000
➤ Food	\$900
➤ Books	\$600
➤ Vehicle and General Expenses	\$500

Total Per Year     **\$5,000**

[33] In terms of parental contribution, I have determined that the 2014 – 2016 tuition costs will be equally shared given the express wording of the current court order. I am going to apply that. All other post-secondary expenses will be shared proportionally, such that Mr. Cartwright will be responsible for 77%, while Ms. Stewart will be responsible for 23%. The actual breakdown is thus as follows:

- New Glasgow NSCC Tuition:  $\$6,174 / 2 = \mathbf{\$3,087}$ .
- New Glasgow Balance of Post-secondary Expenses:  $\$38,607 \times 77\% = \mathbf{\$29,727}$ .
- Halifax Apprenticeship Expenses for 2018:  $\$5,000 \times 77\% = \mathbf{\$3,850}$
- Halifax Apprenticeship Expenses for 2019:  $\$5,000 \times 77\% = \mathbf{\$3,850}$

[34] Mr. Cartwright thus owes Ms. Stewart **\$36,664** for s. 7 expenses incurred up to and including **2018**; the sum of **\$3,850** for s. 7 expenses in **2019** will be owed upon confirmation from Ms. Stewart to Mr. Cartwright that Christian attended the program in 2019. The 2018 amounts are to be collected through the MEP immediately.

[35] **What is the appropriate child support order?**

*Position of the Parties*

[36] Mr. Cartwright initially asked for the table amount of child support to terminate in April 2016. In final submissions, his counsel appeared to acknowledge July 2016 as the appropriate date.

[37] In contrast, in addition to s.7 expenses, Ms. Stewart also claims periodic child support based on the table amount, on a go forward basis.

*The Law*

[38] Section 3(2) of the *Child Support Guidelines* provides authority for the court to order child support after a child is over the age of majority. Once a child reaches the age of majority, the court has two options. First, the court may apply the *Guidelines* and order the table amount as if the child were under the age of majority. Second, if the court considers that approach to be inappropriate, the court may order an amount that the court considers appropriate having regard to the

condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

*Decision*

[39] I will now decide what amount, if any, of child support should be payable after Christian found full time employment in July 2016. In making my decision, I am cognizant of the following facts:

- Christian could not and cannot yet withdraw from his mother's charge because of his disability.
- Ms. Stewart and her husband expend considerable time and resources ensuring that Christian's needs are met. Ms. Stewart estimates that she spends about \$848 per month on Christian's direct expenses.
- Mr. Cartwright does not voluntarily expend any time or resources on Christian.
- Mr. Cartwright has the ability to pay child support.
- Christian, however, earns a robust salary. His income is currently \$17.50 per hour. In 2016, when he started working full-time, he earned \$15,764 in employment income and that was for a 6 month period. He now earns about \$36,000 per year.

[40] Given these circumstances, I find that Christian's income is sufficient to meet his financial needs. No further child support is payable. I have no authority to award child support to compensate Ms. Stewart and her husband for the countless hours and resources they provide in meeting Christian's needs.

[41] I have determined that the table amount of child support, as stated in the 2004 court order, will be paid up to and including June 2016 at which time Mr. Cartwright will not be required to pay maintenance other than the lump sums due and owing for s.7 expenses. This decision does not rule out a future variation application should there be a material change in circumstances.

**Conclusion**

[42] In conclusion and summary, the following relief is ordered:

- The table amount of child support will be paid until and including June 2016 at which time no further table amount will be paid subject to a material change in circumstances arising in the future.
- Mr. Cartwright must pay lump sum maintenance to Ms. Stewart which represents his share of reasonable and necessary s. 7 expenses. Mr. Cartwright thus owes Ms. Stewart \$36,664 for s. 7 expenses incurred up to and including March 2018; and the sum of \$3,850 for s. 7 expenses in March 2019 upon confirmation that Christian has undertaken the second block of courses. MEP is directed to immediately commence the collection process.

[43] As the parties wish to submit written submissions, I will not provide a cost decision at this time. Mr. Iannetti will prepare the order once costs are determined.

Forgeron, J.