

IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *St. Hilaire v. St. Hilaire*, 2003 NSSF 48

Date: 20031110
Docket: 1201-45458
Registry: Halifax

Between:

Luc St. Hilaire

Applicant/ Respondent by

Counter Application

v.

Melinda Darlene St. Hilaire

Respondent/ Applicant by

Counter Application

Judge: The Honourable Justice John M. Davison

Heard: November 3, 2003, in Halifax, Nova Scotia

Counsel: D. Brian Newton, Q.C., for the Applicant/Respondent by Counter Application

D. Timothy Gabriel, for the Respondent/Applicant by Counter Application

Davison, J.:

[1] This is an application to vary the terms of a Corollary Relief Judgment, dated November 27, 1992, insofar as that judgment relates to child support. The application is made under s. 17 of the *Divorce Act*, 1985.

[2] I will refer to the father of the child as the applicant. There was a further application advanced by the respondent to "review and assess child support". As there is no authority in the *Divorce Act* for the court to deal with this type of application, the court will consider the application to be one requesting variation of child support as set in the Corollary Relief Judgment.

[3] Section 17.(1) and 17.(4) read as follows:

17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

17.(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[4] The marriage took place on July 12, 1986 and there was one child of the marriage Michael Thomas St. Hilaire who was born on [...], 1989 and is now 14 years of age. The parties separated in 1990 and the child has been in the care of the respondent since that time.

CALCULATION OF INCOME

[5] The applicant retired from the armed services on July 10, 2003. He is 40 years of age and earned \$48,258 in 2002. He has been paying child support in the amount of \$600 pursuant to an order of the Family Court in 1992 and has been faithful in making every payment. The respondent has claimed the monthly payment of \$600 as income in her tax return. The applicant was part of a health plan in the armed services and continues to benefit from the plan during retirement. He agrees to submit to this plan the medical expenses for Michael for payment of 80% of those expenses. Michael suffers from Attention Deficit Hyperactivity Disorder and requires a drug known as Ritalin⁷.

[6] Both parties have remarried and the respondent has been claiming some medical expenses from her second husband's medical plan which covers dental expenses but not the cost of braces.

[7] The respondent works fifteen to twenty-five hours a week as a waitress. She agreed with counsel for the applicant, Mr. Newton, that she earns about \$18,756 per year.

[8] The applicant received severance pay of \$19,595.10 and receives a pension of \$19,794.60 a year. He has started a woodworking business named French Woodwork By Design. He has built a garage from which to operate this business. He invested \$15,000 in the garage and his second wife invested \$3,500 in the venture. He purchased an RRSP with his severance pay.

[9] From January 1st, 2003 to August 23rd, 2003, this woodworking business earned a gross profit of \$19,928.59, with expenses of \$10,689.16, for a net income for the period of about seven and two-third months of \$6,843.15. This represents a monthly net income of \$893 or an annual profit of \$10,716.

[10] The respondent's position is the applicant's income includes severance pay, pension benefits and the net profit from French Woodwork By Design for a total annual income of \$50,111-a sum close to the applicant's annual income in 2002. Mr. Gabriel, counsel for the respondent argues there is no material change in circumstances and this application should not take place but may take place in the latter part of 2004 when the severance pay is not part of income and the woodworking profit is proved.

[11] The applicant says the severance pay should not be a part of income because he took \$18,500 from his savings to build the garage in order to earn income and eventually benefit the child by an increase in support payments. It is said the court has a discretion under s. 17 of the *Divorce Act* to prevent the applicant from paying more than required for child support under the guidelines in view of the applicant's investment in a business.

[12] To be successful with respect to applications to vary, the applicant must prove a material and unforeseen change in the circumstances. See *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370 and *Hickey v. Hickey*, [1999] 2 S.C.R. 58.

[13] As stated, the severance pay was used to purchase an RRSP and I considered the status of severance pay in *Valis v. Valis* (1998), 170 N.S.R. (2d) 116 and found the severance pay on termination of employment was income for the purpose of ascertaining appropriate child support. Reference is made to p. 119:

[15] In my view, the respondent's total payment of \$63,621.65 should be considered income for the purposes of ascertaining appropriate child support. Prior to his termination, the applicant was earning \$40,123 per year. The court is going to have to deem a period of time over which the income based on the severance package should be calculated. Doing the best I can on the evidence before me, it is to be noted that the estimated salary of \$20,000 from his present

employment plus the \$63,621.65 represents approximately two years' salary the applicant would have received if he had continued in the Coast Guard. The income of \$20,000 added to the termination package would render a deemed two year income at \$83,621.65. In Nova Scotia, for two children, child support at that income amounts to \$577 per month.

[14] In the *Valis* case reference was made to a decision of the Alberta Court of Appeal, *MacDonald v. MacDonald* (1997), 209 A.R. 178 where the husband, as here, used his severance pay to purchase an RRSP and the court said at p. 200 in speaking of the severance pay and vacation pay of the father:

All these items enhanced the respondent's ability to pay child support, either as direct income or, to the extent the income could have been used to purchase assets or increase their value, as property to which income should be attributed.

Again, at p. 201:

The amount payable for a severance package is generally calculated by considering such factors as the amount of compensation to the employee, the number of years of service, and the level of experience. While it may be argued that the number of months of notice to which an employee is entitled on termination reflective of past service, it cannot be denied that the monies payable are a direct income replacement. The fact that the respondent receives the severance in a lump sum or receives preferential tax treatment by transferring a large amount to his RRSP does not change its original characterization as income. In fact, the respondent's ability to pay is enhanced because of this tax treatment since, had he worked the 21 month period, he would have continued to pay tax at the highest rate leaving less money in his hands for support. These monies are intended to be an ongoing income stream as if the respondent would be working throughout this period. It should be added to any other income he earns during the period to determine his ability to pay ... [emphasis added]

[15] I find the severance pay's original characterization is income and regardless of the fact it was spent on an RRSP (as occurred in the *MacDonald* case) does not change that characterization. Monies spent on the garage may enter calculation of income from the woodworking business. I find the total income for the purpose of calculating child support includes severance pay, pension benefits and the profit from French Woodwork By Design. The sum is \$50,111 which is very close to the applicant's income in 2002. The monthly payment for child support is \$407 which should commence December 1st, 2003 and continue to November Pt, 2004, at which date the income figure of the applicant will probably change. The amount ascribed to severance pay will no longer be a factor and the

income received from the woodworking business may change.

[16] The respondent's argument for dismissal of the application has no merit because the child support is changed from \$600 a month to \$407 a month. Notwithstanding differences in income tax considerations, there is a material change in circumstances.

[17] In an effort to avoid the expense of further applications in the future, I approve of the suggestion of Mr. Newton that the parties assume the income of the applicant beginning December 1st, 2004 is \$30,516, which is the total of his pension payments, a constant figure until the applicant is 63 years of age and this sum I have found of his net income from French Woodwork By Design. I will order the exchange of the relevant documents on income and delivery of these documents should render the ability to calculate the unknown figure of net income from the woodworking business which should facilitate agreement on any change in the monthly child support figure.

[18] The order should require the parties to exchange, on or before the first day of June each year, income tax return forms, all T3, T4 and T5 slips, Notices of Assessment from Revenue Canada and a statement listing items of income and expenses from the woodworking business.

SPECIAL AND EXTRAORDINARY EXPENSES

[19] Section 7 of the Child Support Guidelines reads in part as follows:
Special and Extraordinary Expenses

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) ...
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

- (d) ...
- (e) ...
- (f) ...

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[20] The claims for extraordinary expenses up to November 30th, 2004 should be proportioned with the income of the respondent set at \$18,756 and the income of the applicant set at \$50,111. Undoubtedly these figures will change in December 2004.

[21] Both the applicant and the respondent's second husband are beneficiaries of a health plan. Although the plan to which the second husband belongs covers dental work, it does not cover the expense of braces. In the past, the applicant has not contributed to these expenses, claiming he requires a receipt and the respondent has claimed on her present husband's plan which provides coverage to the extent of 80% of the insured expenses.

[22] It is my understanding the applicant will pay the respondent \$300 for his share of the cost of the drug Ritalin⁷ and \$50.00 for his share of the cost of eye glasses.

[23] The other expense claimed by the respondent is the cost of braces. The orthodontist charged \$4,900 for treatment to Michael with respect to braces and the applicant's health plan has a limit of \$2,500 on this item. The applicant agrees to claim \$2,500 from his health plan and pay this to the respondent together with his proportion, based on income, of the balance on the invoice of \$2,400.

[24] Counsel could submit written submissions on costs.

J.