

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Pepin v. Bood*, 2004 NSSF 88

Date: 20041005
Docket: SFHMCA-032000
Registry: Halifax

Between:

Johanne Pepin

Applicant

v.

Timothy William Bood

Respondent

Judge: The Honourable Justice Moira C. Legere-Sers

Heard: September 13, 2004, in Halifax, Nova Scotia Final Written Submissions:
Applicant - September 28, 2004
Respondent - September 21, 2004

Counsel: Gilles Deveau, for the Applicant
Michael King, for the Respondent

By the Court:

[1] This is an interim application made by Johanne Pepin for an order for interim child support at the table amount pursuant to *Civil Procedure Rule* 70.13 and section 9 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. The Applicant seeks costs against the Respondent.

[2] The parties have a child, Matisse William Bood-Pepin, born [...], 2002.

This child resides with the mother.

[3] The April 11, 2004 interim application, amended April 30,2004, was brought forward rather quickly because the Applicant seeks to relocate to Quebec immediately.

[4] The amended application seeks child support pursuant to section 10(3) of the *Maintenance and Custody Act* different from an amount that would otherwise be determined in accordance with the guidelines, in consideration of the division of property provisions in the cohabitation agreement signed by the Applicant and the Respondent on May, 2003.

[5] The Applicant seeks custody and access pursuant to section 18 and relief pursuant to section 4 of the *Partition Act*. R.S., c. 333.

[6] The Respondent sought disclosure and costs.

[7] This interim application deals solely with the issue of child support.

Counsel for Dr. Bood indicates that they will contest an application for sole custody and they also object to the move of the Applicant from Halifax to Quebec removing the child from close proximity to the father. The father objected seriously to the removal of the child but the matter of mobility was not before the Court on the interim hearing and an order prohibiting her move was not requested as an interim measure.

[8] The mother is a community health nurse who was employed at the North End Community Health Centre. The father is a physician with the Capital Health

Authority.

[9] The parties lived together for approximately one and a half years from May 11, 2002 until November 30, 2003. There is a cohabitation agreement dated May 15, 2003 dealing with property issues.

[10] Defacto custody of the child remained with the mother since separation and she had been residing in Halifax. The father exercises liberal access with his child.

[11] The mother's income ending December 31, 2003 was \$21,893 and as of August 10, 2004 she claimed monthly income of \$2,448 with monthly expenses of \$3,341, resulting in a deficit of \$893.15.

[12] Dr. Bood has provided child support to the mother for the child in the amount of \$899.67 per month. In July, 2004 Dr. Bood paid \$800 and in December, 2003, January and February, 2004 he paid \$1,500.

[13] Dr. Bood's total income for the year 2003 is \$223,865.33 made up of employment income. He works at various locations for the health authority and receives his income by way of salary on a contractual basis. His income has increased steadily in the last number of years. In 2002 his income was \$201,867.23; in 2001 his income was \$175,000; and in 2000, \$177,885. Dr. Bood *projects* his income in 2004 to be approximately \$166,000.

[14] In the past he has worked at six different locations in the Halifax Regional Municipality. It may well be unrealistic to assume he can sustain the hours of work, this level of income and the varied locations indefinitely.

[15] The determination of his yearly income will have to be supported by verifying documentation on a regular basis in order to accurately assess his income and his income potential and account for any changes in income that reflect what he believes to be a downturn in his income earning ability. He may be correct but he has yet to prove his projections with a degree of reliability that is acceptable to the Court. The projections that Dr. Bood has tendered in the past have not been accurate.

[16] The information concerning his income was presented in this proceeding and is the subject matter of a decision issued on October 1, 2004 in the variation application relating to his former wife and two children.

[17] His income for the purposes of the previous decision was based on the average of his last three year's income. That is the most reliable evidence of his income. A reassessment of this can be done in December when Dr. Bood has the ability to document fully his yearly income. A review may take place at the application of either party to adjust the 2005 income, in accordance with his 2004 income.

[18] Dr. Bood is not in a position to claim undue hardship.

[19] The obligations of Dr. Bood with respect to the breakdown of his marriage in 1994 are set out fully in the decision of the divorce court in 1998 and by decision dated October 1, 2004.

[20] His obligation to pay spousal support has terminated. His obligation to pay

child support have increased significantly due to the change in his income and the base amount of support. He is obligated to make monthly payments of \$2,357 for the support of the two children of his marriage.

[21] Due to the current employment circumstances of his former wife, Dr. Bood currently absorbs 100 percent of the education costs and extraordinary expenses. His oldest child is in university and the extraordinary expenses relate to tuition, books and other necessary and associate fees. There are expenses related to his youngest child as well.

[22] The *Child Maintenance Guidelines* in this particular case between Johanne Pepin and Timothy Bood would result in a base payment of \$1,131 plus .72 percent of the difference of income over \$150,000. That equals an additional amount of \$362, for a total child support award of \$1,492. Dr. Bood asks the Court to vary the amount required under the *Guidelines* by reference to section 4(b)(ii) of the *Child Maintenance Guidelines*.

[23] Ms. Pepin is not currently seeking extraordinary expenses.

The consequences of mobility

[24] Ms. Pepin has moved, a unilateral decision of relatively recent origin. This will take the child away from the father. He has not consented to the move. It reduces her income arbitrarily. I have no information as to what efforts she will be making to place herself in an employable situation in order to supplement her income and assume a portion of the responsibility for any extraordinary expenses that may be incurred in future.

[25] Initially, when the parenting statement was filed on April 15, 2004, the Applicant set out that the contact between the father and child had commenced after separation by way of one night per week during regular days and one day on weekends. The Applicant was proposing one weekend every third weekend of each and every month commencing on Friday at 5 p.m. until Sunday at 5 p.m.. It was anticipated that the Applicant would be residing in Halifax and that the child would be picked up and delivered at the child's residence with the mother.

[26] The proposal was that Christmas holidays alternate between the Applicant and the Respondent as well as March break. She proposed that the Respondent have the child two weeks during the summer vacation and such other reasonable access at reasonable times.

[27] Dr. Bood must maintain employment at a relatively high level to satisfy his obligations to support his three children. He wishes to maintain appropriate contact with all three children. With two children in Halifax and now one in Quebec, his mobility and opportunity to relocate are limited.

[28] Given the nature of his employment when he does exercise access in Quebec, it will be at considerable loss of employment remuneration and it will have the incidental costs associated with access. Fortunately, he has a place to stay in Quebec in the event that he is able to fly to Quebec monthly to see his son.

[29] This is a child with whom he wishes to be significantly involved.

[30] The mother understood and knew of the obligations of Dr. Bood when she became involved with him. These were obvious preexisting obligations.

Access Costs

[31] The Respondent, Dr. Bood, asked the Court to impose the base amount at a level of \$1,131 and to exercise the Court's discretion by reference to section 4(b)(ii) of the *Nova Scotia Child Maintenance Guidelines* in recognizing the access costs that will incur as a result of monthly visits to Montreal.

[32] He wishes to be significantly connected to his child and in the short course of his child's life he has exhibited conduct that confirms that wish. He has not had advance notice of the move sufficient to arrange an appropriate schedule before departure.

[33] I know nothing about the reasons for the move or the circumstance of the mother's earning potential or the child's life. There is no indication that the move is for re-employment or for any other reason, for that matter. The move appears to be a unilateral decision on the mother's part.

[34] In a letter submitted after the fact, counsel for the Respondent confirmed that she intended to find employment.

[35] Dr. Bood determines the costs of access to be in excess of \$500 a month (inclusive of air fare and taxi transportation) without consideration of any hotel fees. He has a place to stay without cost to him.

[36] Connection with a child, particularly within the first years of the child's life, are critical to establish the basis for an appropriate attachment.

Agreement on custody and access

[37] The parties advise that, subsequent to the hearing before me, they settled the issue of custody and access such that they have entered into a joint custody arrangement, with the mother to have day-to-day care and control. They commenced access by indicating that for the period October 1, 2004 to December 31, 2005 the father shall have access as follows:

October 25 to October 29, 2004, five days.

November 22 to November 26, 2004, five days.

December 27 to December 31, 2004, five days.

[38] The schedule requires the first three visits to be five days in duration and to be in Montreal. The following six visits will take place in Halifax. The first three will be for 12 days and the July to August visit will be for 19 days; September 26 and November 14 visit will be 12 days each; and the final visit in Montreal for December, 2005 will be six days.

January 31 to Friday, February 11, 2005 in Halifax. The mother will bring the child to the father's residence in Halifax and the father will return the child to the mother's residence in Montreal.

April 4 to April 15, 2005, in Halifax. The mother will bring the child to the father's residence in Halifax and the father will return the child to the mother's residence in

Montreal.

May 23 to June 3, 2005, in Halifax. The mother will bring the child to the father's residence in Halifax and the father will return the child to the mother's residence in Montreal.

July 25 to August 12, 2005 the visit will take place both in Halifax and Montreal.

[39] The parties anticipate continuing this in accordance with the age and stage of development of the child, the schedule and their own ability. The schedule is obviously intended to ensure significant contact between the child and the father.

[40] The parties agreed that the Respondent shall be responsible for all air fares and associated costs of access. They agree that a reasonable estimate of air fare for one year is between \$8,000 and \$10,000. The father shall make the airline reservations for all airline flights to and from the cities of Halifax and Montreal including the flights taken by the Applicant and the child.

[41] He will then be responsible for transportation in Montreal and childcare while the child is living with him in Halifax. It is difficult to quantify all costs at this time. Clearly, this will be a costly venture.

[42] Seven of the visits planned in the 2005 year will require an air ticket for the mother return from Montreal to Halifax and an air ticket for the father to convey the child back to Montreal from Halifax to Montreal.

[43] There is projected at least \$100 transportation costs in Montreal. The father

will not currently be required to pay for hotel fees. The proposed figure, which is a ballpark estimate only, of \$9,000 divided by 12 would yield a monthly amount of \$750. In my estimation, the costs are yet to be quantified. Either way, if connection is to be maintained, they will have to be incurred.

[44] The Court has limited discretion generally when applying the guidelines.

However, counsel for the mother agrees that the Court exercise its discretion under s. 4(b) of the *Child Maintenance Guidelines* as well, although they seek \$169 in addition to the base amount of \$1,131. They have therefore allowed the Court by consent to consider and apply a variation from the guideline amount.

[45] The monthly amount for one child is set at \$1,131. The amount proposed for the amount in excess of \$150,000 is \$361.75. The Applicant's post hearing submission acknowledges that the Applicant will be absorbing some of the costs of airfare. The access costs as it relates to airfare will exceed \$650 per month. Should Dr. Bood wish to maintain appropriate contact with his son, the bulk of those costs will be borne by him.

[46] Standing alone, the application of the guideline amount in total plus extraordinary expenses and access costs would not be onerous to Dr. Bood given his income.

[47] However, he has two children of a previous marriage and he will be paying a minimum of \$2,857 monthly. There will be other necessary costs that he will have to absorb.

[48] Adding that award to an award of \$1,492, in this case Dr. Bood would be paying out as a minimum 48 to 49 percent of his gross salary set at \$200,224. That is an onerous responsibility which may not be achievable.

[49] The \$361(the addition to the base of \$1,131) likely will not cover the airfare.

[50] I have considered the needs of the three children that exist (their existence was pleaded in both cases); the changes in the tax consequences to Dr. Bood in the variation application for the two children and his former spouse; the needs of the third child and the ability of the parents to contribute to those needs including the right of the child to access a parent; the guidelines and their effect on the parties; the tax implications and consequences of the total child support awarded by the Court and the net disposable income of the Respondent. I have reviewed his budget thoroughly and I consider this a very difficult total award for the father.

[51] I conclude that any charitable work he does in the future will have to be on his time and cannot be used to support a reduction in income or used to justify a reduction in obligation.

[52] There should a sharing in some manner of the costs required to facilitate the child's contact with the father. Certainly, these matters can be renewed significantly and in detail at a final hearing.

[53] Should Dr. Bood be unable to facilitate the kind of access they currently propose the matter will be reviewable.

[54] The Respondent will pay to the Applicant for the maintenance and support of his son the sum of \$1,131 monthly commencing October 1, 2004 and continuing thereafter until further agreement of the parties or order of the Court.

[55] He shall contribute the balance as a minimum disbursement towards his agreed upon obligations to facilitate access.

[56] Hopefully, the parties will negotiate on the support issues to include a serious consideration for access and to determine an appropriate method of sharing the cost of access.

[57] There is the real consideration that in order to maintain his obligations and ensure that he visits the child he will have to scale down his weekend shifts which, apparently, are his most lucrative shifts. There is the possibility the parties could consider weekday access although, in the circumstances of Dr. Bood's professional duties, his absence means no pay. The costs of access then are not only the hard costs but the lost income for the days that Dr. Bood is unavailable to practice medicine. This affects all three children. Those costs can be much more significant.

[58] Historically, as brief as it has been, the Respondent was paying \$150 into the university fund as well as \$899 for child support, for a total of \$1,049. At this point, this is a voluntary payment and ought to be factored into the negotiations.

[59] Any request for retroactive maintenance may be dealt with at a full and final hearing of the matters.

[60] Each party shall bear their own costs.

J.