SUPREME COURT OF NOVA SCOTIA

Citation: *DeGuerre* v *McMahon*, 2020 NSSC 180

Date: 20200630
Docket: 1204-004482
Registry: Kentville

Between:

Kelly Skinner DeGuerre

Applicant

v.

Rodney Lane McMahon

Respondent

Judge:	The Honourable Justice John Keith
Heard:	January 9, 2020, in Kentville, Nova Scotia
Final Written Submissions:	February 10, 2020
Counsel:	Kate Seaman, counsel for Rodney McMahon Kelly Skinner DeGuerre, Applicant not present, not represented

BY THE COURT:

THE APPLICATION AND OVERVIEW

[1] Kelly Skinner DeGuerre (the "**Applicant**" or "**Ms. DeGuerre"**) and Rodney Lane McMahon (the "**Respondent**" or "**Mr. McMahon**") were married on February 5, 2000. They separated in the spring of 2004 and were divorced on May 16, 2007.

[2] The parties have two children of the marriage: "OKM" born April 28, 2001 (age 19) and "IM" born December 21, 2004 (age 15).

[3] On April 2, 2019 Ms. DeGuerre filed a Family Law Application – Provisional Application to Change Child Support in the Court of Queen's Bench of Alberta.

[4] Following a hearing on April 4, 2019, the Court of Queen's Bench of Alberta issued a Provisional Order on April 4, 2019, which was sent to the Supreme Court of Nova Scotia, Kentville Law Courts, for a Confirmation Hearing.

[5] The Court issued a Notice of Hearing Concerning Provisional Order on August 14, 2019, which was served on Mr. McMahon as Respondent on August 23, 2019.

[6] The matter was ultimately scheduled for January 9, 2020 with the Respondent filing Affidavit materials.

[7] During the January 9, 2020 hearing, Mr. McMahon made oral representations that the youngest child of the marriage had returned to Nova Scotia for Christmas and was not intending to return to Alberta. At Mr. McMahon's request, I agreed to adjourn the matter until February 19, 2020 to provide an additional opportunity to file evidence regarding this change of circumstance. I imposed a deadline of February 10, 2020 to file any such additional material.

[8] Mr. McMahon filed additional material on February 10, 2020. The February 19, 2020 hearing was adjourned due to personal circumstances; however, Mr. McMahon agreed that I may render a written determination based on the materials filed – without the need for further oral argument.

[9] In the interim period and as I was preparing this decision, Ms. DeGuerre contacted the Prothonotary, Kristina Reid Boudreau, and attached a T4 from her present employer and asked if a judge required this additional information. The T4

was not filed as a sworn affidavit although it appears to suggest that Ms. DeGuerre was earning beyond what was available to her when the Provisional Order was issued.

[10] That said, the information I have regarding Ms. DeGuerre's income in 2019 remains incomplete and insufficient. For example, and setting aside the need for sworn evidence, I do not have a complete picture of Ms. DeGuerre's Employment Insurance benefits.

[11] I am not prepared to confirm the Provisional Order. Instead, I am returning it with a request for additional information from Ms. DeGuerre under Section 19(8) – Further evidence, of the *Divorce Act*, R.S.C. 1985, c. 3, as amended (the "***Act***"). In doing so, I have allowed for interim relief under Sections 19(7) and 19(9) of the *Act*. My reasons are below.

BACKGROUND

[12] A summary of the current, relevant clauses regarding parenting and child support may be found in Justice Gregory Warner's Variation Order, issued on December 4, 2018. The Order confirms that as of December 4, 2018:

1. The parties have joint custody of the two children of the marriage: IM (then 13) and OKM (then 17).

2. The Applicant had primary care of IM and the Respondent had primary care of OKM.

3. The Applicant had an income of $131,040.00 and the Respondent had an income of $51,632.00. After a full consideration of the circumstances, the Applicant was ordered to pay $600.00 per month commencing October 1, 2018.

4. The Applicant owed $5,500.00 in arrears of support for the period April 15, 2015 to August 28, 2018, which was to be paid on or before February 28, 2019.

5. The Applicant would be responsible for all Section 7 expenses for IM and the Respondent would be responsible for all Section 7 expenses for OKM.

6. Each party is to provide their income tax return by June 1st of each year.

[13] Shortly thereafter, the Applicant commenced a proceeding in the Court of Queen's Bench of Alberta for a provisional decision under Section 18 of the *Act*. In particular, the Applicant sought to vary child support. As is permitted under the *Act*, the Respondent did not have notice of the proceeding in Alberta.

[14] The Applicant's request for a provisional decision was heard on April 4, 2019 before the Honourable Justice C. L. Kenny. The Applicant was represented by a C. Le Quere, described in the transcript as a friend of the Court.

[15] I have reviewed the materials that were filed in the Court of Queen's Bench of Alberta in support of Kenny, J's Provisional Order. Those materials included:

1. The Family Law Application – Provisional Application to Change Child Support, filed March 29, 2019

2. Disclosure Statement of Kelly Skinner DeGuerre filed March 29, 2019

3. Affidavit – Provisional Order Changing Child Support filed March 29, 2019

4. The Variation Order of Justice Gregory Warner, issued December 4, 2018

5. Consent Variation to the Corollary Relief Judgment, issued November 1, 2010

6. The Transcript of the April 4, 2019 hearing

7. The Provisional Order, filed April 4, 2019

[16] There were two central submissions made by the Applicant during the course of oral argument before Justice Kenny:

1. The Respondent's business income was significantly understated; and

2. The Applicant was laid off as of January 1, 2019 and her only source of income in 2019 was Employment Insurance. As such, at the hearing before Justice Kenny, she expected her annual income in 2019 would total only $25,844.00. That said, the Applicant did file a disclosure statement and affidavit sworn March 29, 2019. In both documents, the Applicant stated that she expected her gross annual income in 2019 would be $80,000.00. In her affidavit, the Applicant offered the following additional evidence regarding her income potential:

i. "An RN salary in AB starting with a new company would be between 80K – 100K yearly";

ii. The Applicant "had a possible job offer as a care manager. The salary is $80,000/year without medical benefits".

[17] The transcript from the April 4, 2019 hearing before Justice Kenny (pages 10 – 11) contains a discussion about potentially imputing income to the Applicant in the amount of $70,000.00. However, the Applicant resisted this suggestion on the basis that she was still on Employment Insurance at the time. In addition, the Applicant stated that her potential for new employment in Edmonton remained in doubt.

[18] On April 4, 2019 and having considered the evidence before her, Justice C. L. Kenny issued a Provisional Order that ordered:

1. The Applicant's annual income for the year 2019 is declared to be $25,844.00.

2. The Respondent shall pay to the Applicant an offset amount of Section 3 child support in the amount of $213.00 per month, commencing January 15, 2019 and continuing on the 15th day of each month thereafter and shall be applied against the existing arrears of child support owed by the Applicant.

3. The Order shall not be recalculated by the Alberta Child Support Recalculation Program.

4. The amounts owing under this Order shall be paid to the Director of Maintenance Enforcement ("MEP") … and shall be enforced by MEP on the filing of the Order with MEP by the creditor (recipient of support) or debtor (payor of support). The amounts owing shall continue to be enforced by MEP until the party who filed this Order gives MEP notice in writing withdrawing this Order from filing in accordance with Section 9 of the *Maintenance Enforcement Order*.

5. Each party shall provide the other with a complete copy of his or her income tax return and any notices of assessment and reassessment issued to him or her by the Canada Customs and Revenue Agency on an annual basis, on or before June 30 of each year, as long as there is a child of the marriage as defined by the *Divorce Act* (Canada). In the event that a party has not filed an income tax return for the previous year, he or she shall provide the other party with copies of his or her T4, T4A, and all other relevant tax slips and

statements disclosing any and all sources of income, including self-employment income.

6. This Provisional Order is of no force and effect until confirmed by a court of competent jurisdiction where the Respondent lives.

[19] Pausing here, I make the following additional observations in respect of Justice Kenny's Provisional Order:

1. Justice Kenny did not forgive or reduce arrears prior to January 1, 2019;

2. Justice Kenny accepted that the Applicant was unemployed since January 15, 2019 and recalculated the parties' respective child support obligations from January 1, 2019;

3. Justice Kenny concluded that the Applicant's income for 2019 was $25,844.00 which was the total Employment Insurance benefits the Applicant expected to receive in 2019. Although the Applicant expected her income to rise to $80,000.00, the job opportunity that would increase her income (and terminate her Employment Insurance benefits) was merely pending;

4. Notwithstanding the Applicant's concern that the Respondent's business income was understated, Justice Kenny specifically left the Respondent's declared income at $51,632.00 in accordance with his tax returns. She neither increased nor altered the Respondent's declared income when recalculating child support;

5. At the time Justice Warner issued his Variation Order and at the time Justice Kenny issued her Variation Order, the Applicant had primary care of IM in Alberta while the Respondent had primary care of OKM in Nova Scotia. I emphasize this point because these ongoing custody arrangements would change during the course of this confirmation hearing in Nova Scotia. I return to this issue below.

[20] Kenny, J's Provisional Order was returned to Nova Scotia for a confirmation hearing. At that time, and as required under the *Act*, the Respondent was provided with notice of the confirmation hearing and an opportunity to respond.

[21] As the confirmation process unfolded, the evidence filed by the Respondent revealed that the circumstances within the parties' family were changing quite significantly. In particular:

1. In September, 2019, OKM began his post-secondary education at Saint Mary's University in Halifax, Nova Scotia;
2. On December 26, 2019, IM returned to Nova Scotia and is currently living full-time with the Respondent. In January 2020, she was enrolled in Grade 10 at Northeast Kings Educational Centre in Canning, Nova Scotia.

[22] In her submissions, counsel for the Respondent, Ms. Seaman, requested the following relief:

1. Reject the Provisional Order and allow the December 4, 2018 Variation Order to remain in effect from December 4, 2018 until IM returned to Nova Scotia on December 26, 2019; or
2. Alternatively, vary the Provisional Order and impute an income of $130,440.21 to Ms. DeGuerre, unless Ms. DeGuerre can give accurate financial disclosure of 2018 and 2019

[23] The Respondent, Mr. McMahon, also requested the opportunity to speak to costs should this Honourable Court reject the provisional order.

[24] Finally, during the course of this confirmation process, Ms. DeGuerre wrote to the Prothonotary of the Kentville Court attaching a T4 form for 2019 and asked if the judge required this information. The T4 form confirmed employment income of $39,617.82. The information was not provided in the form of a sworn affidavit. As mentioned, the picture regarding Ms. DeGuerre's 2019 income remains incomplete. For example, I neither have details regarding the Employment Insurance benefits she received, nor do I have her completed tax returns for 2019.

ANALYSIS

[25] Sections 18 and 19 of the *Act* establish the jurisdiction and procedural guidelines for provisional orders with respect to support (child support and spousal support.

[26] Section 18(2) confirms that where an application is made in a Canadian province to vary a support order then, subject to certain preconditions being met:

> 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…

[27] The Applicant applied in Alberta for a provisional order varying child support. She did so without notice to the Respondent, as is expressly permitted under Section 18(2).

[28] On April 4, 2019, Kenny, J. issued a provisional variation order under Section 18(2) changing child support.

[29] The provisional order and the record of the proceedings before Kenny, J. was then transmitted to the Supreme Court of Nova Scotia to determine whether that provisional order should be confirmed under Section 19 of the *Act*.

[30] Section 19(7) confirms my obligation to render a decision and, as well, the limits of my statutory options. The language is mandatory. It states:

> (7) Subject to subsection (7.1), at the conclusion of a proceeding under this section, the court shall make an order
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> (a) confirming the provisional order without variation;
>
> (b) confirming the provisional order with variation; or
>
> (c) refusing confirmation of the provisional order.[1]

[31] A Court is not required to either confirm or reject a provisional order based on evidence deemed to be insufficient or incomplete. Section 19(8) of the Act provides for another option. It states that:

> The court, before making an order confirming the provisional order with variation or an order refusing confirmation of the provisional order, shall decide whether to remit the matter back for further evidence to the court that made the provisional order.

[32] Moreover, Section 19(6) states that:

> Where, in a proceeding under this section, the respondent satisfies the court that for the purpose of taking further evidence or for any other purpose it is necessary to remit the matter back to the court that made the provisional order, the court may so remit the matter and adjourn the proceeding for that purpose.

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[1] Section 7.1 deals specifically with child support and confirms that "A court making an order under subsection (7) in respect of a child support order shall do so in accordance with the applicable guidelines."

[33] Based on the record before me, I require further sworn evidence from the Applicant and am compelled to remit this matter back and adjourn pending receipt of this additional evidence.

[34] More specifically, I require sworn evidence as to the Applicant's actual income (including any Employment Insurance benefits) in 2019, as well as year-to-date income for 2020 so that the Court considering confirmation of a provisional order might properly establish child support obligations beginning January 1, 2019. In confirming this requirement, I ask that Ms. DeGuerre provides all available supporting documentation. This would include statements regarding Employment Insurance Benefits received; proof of any and all employment income earned from January 1, 2019 forward from every source; and her completed tax returns filed for 2019.

[35] Having made that determination, a question arises in respect of interim child support. Section 19(9) of the *Act* states that:

> Where a court remits a matter pursuant to this section in relation to a child support order, the court may, pending the making of an order under subsection (7), make an interim order in accordance with the applicable guidelines requiring a spouse to pay for the support of any or all children of the marriage.

[36] As to the Applicant's income and based on the record before me and pending receipt of the specific further evidence described in paragraph 33, I would impute an annual income of $50,000 to the Applicant for 2019. My reasons include:

1. The Applicant has yet to provide sworn evidence confirming either the amount of Employment Insurance benefits received or the dates upon which those benefits were paid. I also do not have sworn, updated financial information regarding the Applicant's current employment situation – including her full tax returns for 2019. This is relevant given a recent email from the Applicant indicating that she was actually employed for most of 2019;

2. The Applicant is an R.N. who has the education, experience, and skill to be employed. Indeed, her affidavit sworn in connection with the provisional determination confirms an expected annual income of $50,000.00 for 2019. In the circumstances, if the Applicant remained on Unemployment Benefits for the entirety of 2019, she would have been underemployed in my view (*Smith* v *Smith*, 2012 ONSC 1116). For clarity, I do not find that the Applicant did remain underemployed in

2019 based on the evidence before me. Indeed, as indicated, an email sent to the Court by the Applicant suggests that she was employed for most of 2019. I note that this information could not have been before Justice Kenny when she issued the Provisional Order as the Applicant's most recent employment appears to have begun after the hearing before Justice Kenny;

3. The affidavit of the Respondent sworn February 7, 2020 includes evidence that:

    i. The Applicant was not unemployed throughout 2019 and actually works (or worked) for a business known as "The Botox Clinic";

    ii. The Applicant retained health insurance coverage for her children as of May, 2019 - again suggesting that she was in receipt of employment benefits at that time; and

    iii. The Applicant moved from Calgary to Edmonton in May, 2019 – i.e. around the same time she confirmed new health insurance benefits.

[37] This imputation of income is on an interim basis only and is subject to the receipt of further updated, sworn financial information in accordance with my directions below.

[38] Based on an imputed income of $50,000.00, and according to the Alberta table of the *Federal Child Support Guidelines*, SOR/97, 175, (the "***Guidelines***"), the Applicant's interim support obligation would be $412.00 per month to the Respondent in respect of OKM.

[39] As to the Respondent's income, I have sufficient, sworn financial information to confirm the Respondent's income for 2019, and to establish his corresponding obligation to pay child support. Having carefully considered the evidence and submissions, and adjusting his total income applying the principles of Section 18 of the *Guidelines,* as ordered by Justice Warner in the 2018 consent order, I find the Respondent has income of $48,448.11, calculated as follows:

Total income from all sources:	$34,400.00
Plus: Cell Phone	900.00

Plus: Vehicle (including car rental & gas)	5,741.00
Plus: Personal expenses claimed in 2019	1,488.32
Plus: 72 Craig Drive expenses	9,544.45
Adjusted income for the purposes of paying child support	$48,448.11

[40] Based on a calculated income of $48,448.11, and according to the Nova Scotia table of the *Guidelines*, the Respondent would pay $411.85 per month to the Applicant for the support of IM.

[41] I note that this evidence regarding the Respondent's income was not before Kenny, J. when she issued the Provisional Order.

[42] I also note that the Applicant took the position in Alberta that the Respondent's income is understated. Based on the financial and accounting evidence which has been presented to me, I am not satisfied that this is the case. I would require more than speculation and suspicion in support of the Applicant's allegations.

[43] In all of the circumstances, I would make the following interim order for the period commencing January 1, 2019 as follows:

1. The Applicant would pay the Respondent $412.00 per month for the support of OKM, based on an imputed income of $50,000.00, in accordance with Section 19 of the *Guidelines*.

2. The Respondent would pay the Applicant $411.85 for the support of IM, based on an imputed income of $48,448.11, in accordance with Section 18 of the *Guidelines*.

3. The difference between the corresponding child support obligations is minimal. According to Section 8, Split Custody, the Maintenance Enforcement Program Records should reflect that neither party will pay child support to the other commencing January 1, 2019.

4. I direct that the Alberta Court of Queen's Bench serve Notice on the Applicant to file her sworn financial documentation to confirm her income for 2019 and year to date 2020, in compliance with Section 21 of the *Guidelines*, to properly determine her obligation to pay child support.

[44] Again, for clarity, this remedy is interim only. It is subject to further variation and adjustment upon receipt of sworn evidence in compliance with Section 21 of the *Guidelines*. Finally, I note that the sworn evidence before me indicates that parenting or custody arrangements are evolving. IM moved back to Nova Scotia as of December 26, 2019 and now is under the primary care of the Respondent. The Applicant states in an email that IM is planning on moving back to Alberta although I have no sworn evidence on this point – and the Respondent has not had an opportunity to address the allegation. In addition, OKM just turned 19 in April, 2020 (the age of majority in Nova Scotia) and just completed his first year of undergraduate studies at St. Mary's University in Halifax, Nova Scotia.

[45] In sum and based only on the Respondent's evidence, it appears that the parenting arrangements which existed at the time of Justice Warner's Variation Order have changed. One child of the marriage lives with the Respondent full-time. The other child of the marriage lives with the Respondent when not attending university. None of the children of the marriage live with the Applicant – at least on the sworn evidence before me.[2] Moreover, if the evidence of the Respondent is accepted, the Applicant is not assisting with Section 7 expenses incurred in respect of OKM's undergraduate studies.

[46] The interim relief granted above does not reflect these evolving circumstances. In particular:

1. Justice Kenny's original Provisional Order and this decision is premised on the presumption that IM is under the care of Ms. DeGuerre. If that is no longer the case, then the child support calculations described above would obviously change;

2. OKM turned 19 in April, 2020 and was enrolled at St. Mary's University as of September, 2020. He is no longer a "child of the marriage" under Nova Scotia law and only lives with the Respondent for part of the year (when not in university). That said, he is pursuing a post-secondary education and may be entitled to some form of child support or financial assistance. In addition, the ongoing COVID-19 crisis means that many university students were required to spend more time at home, completing the academic year on-line.

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[2] As mentioned, the Applicant contends in an email to the Nova Scotia Court that IM is planning to move back to Alberta and live full-time with Ms. DeGuerre. However, I have no sworn evidence on this point and the Respondent has not yet had an opportunity to respond to these statements.

[47] In all the circumstances, I am not prepared to further alter the interim relief described in Paragraph 43 above.

[48] First, the statutory regime surrounding provisional determinations is limited to spousal support and child support.

[49] Second, the statute does not contemplate varying parenting arrangements on a provisional or interim basis (see Sections 18(2) and 19(11) of the *Act*, for example). Nor do I have the jurisdiction to alter child support obligations based on a presumed variation in custodial arrangements. Put slightly differently, I cannot do indirectly (accept altered custody arrangements) what I lack the statutory authority to do directly.

[50] Thus, I cannot simply change the parenting arrangements for IM (or confirm an altered parenting arrangement) through the provisional process. Should either party seek to vary IM's parenting arrangements as confirmed in Justice Warner's Variation Order (with a corresponding variation in child support), a new proceeding must be commenced and proper notice must be given so that all parties have an opportunity to respond.

[51] I recognize that the interim relief in respect of IM may result in child support arrangements that temporarily do not reflect the actual parenting circumstances in 2019 and continuing into 2020. I am referring specifically to IM's residence in Nova Scotia under the Respondent's care during that period of time. These evolving circumstances may necessitate some form of retroactive relief in the future and prospective relief. However, the underlying policy reasons are sound.

[52] It is one thing to provisionally establish child support obligations (without notice) in respect of IM. It is quite another to provisionally alter IM's actual parenting or custodial arrangements – and possibly sanction dramatic changes in a child's upbringing without proper notice to another parent.

[53] In short, the legislation does not contemplate provisional changes to parenting or custodial arrangements. Those types of changes would require proper notice and the contemporaneous opportunity to respond before even provisional judicial relief is granted.

[54] As to OKM, he remains resident in Nova Scotia but turned 19 as of April, 2020 and, as of September 2019, was enrolled at St. Mary's University, Halifax, N.S. for his first year of post-secondary education.

[55] OKM would have remained a child of the marriage throughout 2019 and I do not have sufficient information before me to retroactively adjust custody or alter section 7 expenses to address the costs of OKM's university education.

[56] In all the circumstances and pending receipt of further evidence, the interim relief confirmed in Paragraph 43 above shall continue while OKM remains enrolled in a post-secondary education programme. Again, I recognize that the interim relief may not fully reflect OKM's evolving circumstances, including both his age and attendance at university. However, on an interim basis, it is in the best interests of OKM and fairly reflects the Applicant's actual support obligations toward OKM in 2019 and 2020.

Keith, J.