

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Dove v. MacIntyre*, 2021 NSSC 1

Date: 20210106

Docket: *Sydney* No. 41245

Registry: Sydney

Between:

Krista Dove

Applicant

v.

Richard MacIntyre

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: November 27, 2020, in Sydney, Nova Scotia

Written Release: January 6, 2021

Counsel: Nicholas Burke for the Applicant
Richard MacIntyre, Unrepresented

By the Court:

[1] The parties are the parents of one adult child (MMD), who will shortly be 26 years of age.

[2] Ms. Dove has filed applications on several occasions over the years, seeking enforcement of child support and/or special expenses from Mr. MacIntyre. She filed the current application on April 4, 2019, seeking retroactive variation of child support, as well as registration with the Recalculation Program, and adjustment of child support and section 7 expenses.

[3] The parties participated in a Settlement Conference on March 2, 2020, at which time they reached agreement on child support arrears of \$4,974.00, payable “forthwith”. The remaining issues were left for determination at the hearing held on November 27, 2020. A varied consent Order was granted by the Court after the settlement was reached.

[4] MMD was accepted into a dental hygiene program in Ontario, commencing in September, 2018. This was an 18-month accelerated program. MMD contacted Mr. MacIntyre to inform him that she had been accepted into the program, and to inquire into his willingness to assist her with the cost. Mr. MacIntyre declined, saying he was “broke”.

[5] MMD suggested that Mr. MacIntyre pay her mother the full amount of arrears owing, so the monies could be used for her program. However, Mr. MacIntyre only paid \$2,500.00 towards the arrears and then a garnishee order was issued, under which \$200.00 is collected bi-weekly.

[6] Ms. Dove attempted to co-sign for a student loan with MMD, but was denied by the bank. Mr. MacIntyre would not co-sign when requested. Ms. Dove subsequently took on another job to help MMD with her program expenses, and filed this application.

POSITION OF THE PARTIES

[7] Ms. Dove says that MMD was a dependent child during the 18-month dental hygiene program (September, 2018 – February, 2020).

[8] Mr. MacIntyre did not file a response to the variation application, but he did file some income information and a handwritten response to Ms. Dove's claims, in which he rejects the suggestion that MMD is a dependent child. He says that, before she started her Ottawa program, she had been out of school for almost three years, she worked numerous jobs, and she lived out of province for a period of time before moving to PEI with her (now) fiancé.

THE EVIDENCE

[9] In order to support her daughter's studies, Ms. Dove worked her regular day job, as well as an evening shift with Citizenship and Immigration. She also worked concessions at Centre 200 when events were held there. As a result of the stress, she was forced to stop working the evening job after several months.

[10] Ms. Dove says that without assistance from Mr. MacIntyre to meet MMD's expenses, she has been left to rely on credit, which is maxed out.

[11] Ms. Dove provided evidence to show that Mr. MacIntyre is the proud owner of a new F-150 truck, a new ATV, and a motorbike which has been overhauled. She also presented evidence that he and his spouse own a matrimonial home, as well as a rental property.

[12] When Ms. Dove filed her sworn statement of income on April 4, 2019, she reported income from two jobs. Her estimated total annual income for 2019 was \$58,502.76. In 2018, she earned \$60,061.91.

[13] Ms. Dove tendered an amended statement of special or extraordinary expenses at the hearing. This contained extensive supporting documentation to show her daughter's expenses in Ottawa.

[14] They are as follows:

Tuition	\$36,900.00
Monthly rent x 18 (1/2 total)	\$647.50 x 18 = \$11,655.00
Tenant's insurance \$419.04/year	\$628.56
Hydro \$984.98 /2	\$492.49

Flights	\$1,427.05
Internet \$1,230.50 /2	\$615.25
Cell phone	\$629.22
Car insurance	\$900.74
Travel to & from Ottawa	\$870.63
Licensing & related employment costs	\$1,340.00

[15] I did not hear evidence from MMD. Ms. Dove presented income information for her. MMD earned \$10,006.00 in 2018. In 2017, she earned \$12,307.00 and in 2016 she earned \$12,549.00.

[16] Mr. MacIntyre is employed and his wife also works. He reported income of \$63,214.39 in 2019. That includes RRSP income of \$4,988.50. He did not produce income information for 2018.

ISSUES

1. Has there been a material change of circumstances?
2. Is MMD a dependent child for purposes of child support?
3. What is Mr. MacIntyre's income for purposes of child support?
4. If MMD is a dependent child, what child support is payable?

Has there been a material change of circumstances?

[17] I must first determine whether circumstances have changed since the last child support order was issued. The order issued on July 9, 2013 which is referenced in Ms. Dove's affidavit corrects a calculation contained in the earlier order issued on May 2, 2013. In all other respects, the May variation order was confirmed. That order addressed arrears owing by Mr. MacIntyre, ongoing child support payments under the Nova Scotia table, and Mr. MacIntyre's contribution to MMD's educational expenses (set at 50% of \$7,010.00 per annum). MMD was pursuing an undergraduate degree at the time.

[18] Since then, MMD left home and lived for a period of time with her boyfriend (now fiancé). She moved to work and live in other provinces. She bought a car, and she was able to save some money, which she used to pay off her car loan in 2018.

[19] The evidence isn't entirely clear, but it appears that MMD started her degree in the 2012-13 academic year and graduated in 2015. MMD had income in 2016, 2017, and 2018, but it fell below full-time minimum wage earnings.

[20] A change from being a student, to working and living away from home, to being a student again can constitute a material change in circumstances sufficient to justify variation of a child support order. Ms. Dove argues that MMD's decision to pursue her hygiene diploma wasn't on the horizon when the 2013 order was issued. I accept that. The evidence supports a material change in this case because of the hiatus in MMD's educational pursuits, and her resumption of studies in 2018.

Is MMD a dependent child for purposes of child support?

[21] Under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160, the definition of a dependent child is found at section 2(c):

(c) "dependent child" means a child who is under the age of majority or, although over the age of majority, is unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or the guardians or obtain the necessaries of life;

[22] MMD is over the age of majority. There is no evidence that she suffers from illness or disability that prevents her from becoming independent. I must consider instead, whether she's unable, by reason of "other cause", to withdraw from the charge of her parents. *Bona fide* educational pursuits can be considered "other cause" for purposes of this definition.

[23] As DeWolfe, J. stated in **Harnish v Harnish**, 2015 NSFC 5:

9 ... There is no rule which says a child is disentitled to maintenance if she is enrolled in a subsequent academic program, see: **Lee v. Lee** 2009 NSSC 121 at paragraph 23. There is no longer an age cap on the definition of "dependent child".

[24] The fact that MMD is almost 26 years of age doesn't automatically remove her from the definition of a dependent child. She was 24 years old and a full-time college student when Ms. Dove filed her application.

[25] As I noted in **Penney v Simmons**, 2016 NSSC 277:

11 However, the question is whether pursuing a **second** degree or diploma, or a **post-graduate** degree, is "other cause" for being unable to withdraw from parental support. No one case is exactly the same as another. Courts have to pick a point at which parental support will end, on a case by case basis. Such determinations are factually based.

12 The Nova Scotia Court of Appeal in **Martell v. Height (N.S.C.A.)**, [1994] N.S.J. No. 120 stated:

"As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field."
[emphasis added]

...

14 Various cases have enumerated factors to consider in determining whether a child is eligible for support while pursuing a post-secondary education. The factors apply equally to post-graduate programs, although the older a child and the longer they study, the more closely a court will scrutinize their program, their efforts to support themselves, and their progress. These factors include:

1. Whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies.
2. Whether the child has applied for or is eligible for student loans or other financial assistance, or has received any bursaries or scholarships, and if so, the amounts received.
3. The ability of the child to contribute to their own support through part time employment.
4. Whether the child has a reasonable and appropriate education and career plan, or whether they are simply attending an ongoing educational program because there is nothing better to do.

5. In reviewing the child's education and career plan, important factors include the nature and quality of the plan, the duration of the proposed study period, the prospects of the child succeeding in the program, the potential benefit of the studies and the associated cost of the course of study.

6. The child's academic performance, and whether the child is demonstrating success in the chosen course of studies.

7. The age, qualifications and experience of the child.

8. The aptitude and abilities of the child, their level of maturity and commitment and their sense of responsibility.

9. Whether the child is performing well in the chosen course of studies.

10. What plans the parents made for the education of their children, particularly where those plans were made during cohabitation. In considering this factor, the court should bear in mind that reasonable parents are ordinarily concerned about treating each of their children comparatively equally.

11. The means, needs and other circumstances of the parents and the child.

12. The willingness of the child to remain reasonably accountable to the parents with respect to their post-secondary education plans and progress. If a child is unwilling to remain accountable, or has unilaterally and without justification terminated their relationship with a parent, they may have difficulty establishing that they are unable to withdraw from parental charge based on a reasonable course of post-secondary education.

[26] I find that:

- MMD was enrolled in a recognized post-secondary program on a full-time basis between September, 2018 and February, 2020.

- She tried to finance her education through loans, but her mother was not approved to co-sign. Her father declined to co-sign.
- She used her savings to pay off her car. She could have used that \$8,000.00 to pay her living expenses while living in Ottawa, including the monthly car loan payment.
- Her education plan was reasonable and she has secured employment as a result.
- The course was condensed, which allowed her to pursue employment sooner, though the cost may have been higher than a 2-year program. There's no comparative evidence to determine whether the accelerated course cost outweighed the employment income earned in those extra 6 months of work.
- There is no evidence of any plans the parents had for MMD's education, as they separated when she was a young child. However, Mr. MacIntyre acknowledges that he's proud of what MMD has accomplished.
- MMD did not have such high earnings between 2016 – 2018 that she could reasonably afford to save enough money to pay all of her program expenses herself.
- Ms. Dove worked two (and at times three) jobs and maxed out her credit to help support MMD during the program.
- Mr. MacIntyre sent \$200.00 to MMD on two occasions in 2019. He says that is only part of his contribution, but there's no evidence of any other payments to her, or monies paid toward her expenses.
- He is remarried, with a two-income household.
- He cashed an RRSP in 2019 to make a down payment on a second (rental) property. He obtained a consolidation loan when mortgaging the purchase, which included renovations to the rental property. The mortgage exceeds the value he places on the home.
- He receives rental income of \$400.00/month from his step-daughter that he doesn't report to CRA.

[27] Based on the above, I am satisfied that MMD was a dependent child for the period of September, 2018 through to February, 2020 inclusive. She regained her

dependent status because she returned to college to pursue a career that would allow her to generate a living wage.

What is Mr. MacIntyre’s income for purposes of child support?

[28] In 2019, Mr. MacIntyre reported income of \$63,214.39. This included the RRSP cashed to buy the rental property. The RRSP income is a non-recurring source of income. I therefore decline to include in his income for purposes of calculating child support. His 2019 income for purposes of child support is therefore \$58,225.89.

If MMD is a dependent child, what child support is payable?

[29] The *Parenting and Support Act* states:

Powers of court

10 (1) When determining the amount of support to be paid for a dependent child or for a child under Section 11, the court shall do so in accordance with the Guidelines.

[30] The Provincial Child Support Guidelines enacted under s. 55 of the *Parenting and Support Act* state as follows:

Special or extraordinary expenses

7 (1) In a child support order the court may, on a parent'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 parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation:

...

(e) expenses for post-secondary education; ...

[31] Ms. Dove seeks a contribution from Mr. MacIntyre towards MMD’s program costs. I must assess whether those costs were necessary, and in MMD’s best interests, and whether the expenses are reasonable in relation to the means of the parties.

[32] I’ve reviewed the receipts supplied by Ms. Dove and find that MMD’s expenses were necessary, with the exception of flights to and from Sydney. MMD

made a decision to pay off and keep her car. She paid car insurance, and she used the car for local travel, as well as travel to and from Ottawa. The flights were not necessary where MMD had an alternate means of travel.

[33] The expenses were in MMD's best interest, as she completed the program and secured employment immediately after graduation. That employment will allow her to live independently, because she'll earn a decent wage.

[34] MMD's expenses were reasonable in relation to the means of her parents. Their incomes, and Mr. MacIntyre's asset situation, place them in a position where they were able to help MMD with her program.

[35] MMD did try to finance her program through borrowing. In **Selig v Smith**, 2008 NSCA 54, Roscoe, JA stated:

19 In **Rebenchuk v. Rebenchuk**, 2007 MBCA 22, after reviewing numerous cases on these points, Chief Justice Scott, wrote:

para. 53 Most courts seem to accept that it is reasonable for a child to be able to obtain one degree with the support of a non-custodial parent, with entitlement to subsequent degrees being very much a fact-driven issue. There is no set pre-determined cut-off for support, although I have been unable to find a case that required support past the age of 26 or 27. I agree with the view that, ordinarily, student loans ought to be required only when the means of the child combined with the means of the parents leave a shortfall. It is to be remembered that student debt delays the cost of education. It is not a reduction. In his annotation to **Mabey v. Mabey**, 2005 NSCA 35 (CanLII), 2005 NSCA 35, 12 R.F.L. (6th) 403, Professor McLeod notes (at p. 407):

Most courts are reluctant to allow a payor to avoid child support by insisting the child maximize his or her contribution by student loans, since student loans are just cost deferrals. When the child is finished school, the loans must be paid.

para. 54 Most courts assume a child will earn income during the summer and this is usually taken into account one way or another in determining the amount of the child's contribution. While the authorities are not consistent on the subject, I much prefer a simple requirement that adult children contribute a "reasonable amount" of their total earnings to their education rather than placing a more onerous burden upon them, leaving the precise determination to the exercise of the trial judge's discretion. [emphasis added]

20 However, there is no hard and fast rule that student loans should be the last resort. In other cases, for example, **Everill v. Everill**, [2005] N.S.J. No. 37, 2005

NSSF 8, and **Houston v. Houston**, [2007] N.S.J. No. 393, 2007 NSSC 277, the child was expected to contribute the full amount of any available student loans. Each case depends on its own particular facts and although the trend seems to be leaning towards determining the parents' ability to contribute before resorting to student loans, **it cannot be said that it is an error in principle or a palpable and overriding error of fact in a case where the divorced parents' total income approximates \$100,000 for a judge to assume that an adult child will be expected to borrow to finance post secondary education. The higher the parents' income, the less the student should be required to contribute. ...**

[emphasis added]

[36] Had Mr. MacIntyre co-signed a student loan with MMD, I have no doubt that she would have been able to pay it. A loan would have placed the burden of her program expenses on MMD's shoulders. But Mr. MacIntyre's priority at the time was to purchase his wife's family home, which they rent to his stepdaughter. Co-signing a loan for MMD would have affected his debt ratio and left him unable to finance that purchase.

[37] Without a student loan, MMD relied on her mother for support. Mr. MacIntyre concedes that without Ms. Dove's support, MMD would not have been able to take the dental hygiene program. But he characterizes this as her choice. I disagree.

[38] MMD was a dependent child for that 18-month period. Both parents were able and should have helped support her. Even though this was a second post-secondary program, taken after MMD had lived independently for three years, she wasn't qualified in a field where she could earn a living wage until she completed the dental hygiene program. And she couldn't finance the cost herself, either through savings or loans.

[39] I'm prepared to allow total costs for the program of \$53,131.15. That's exclusive of some expenses, like groceries, that Ms. Dove did not document. Of that, MMD should have contributed \$10,000.00 from savings. I direct that the balance be shared equally as follows: \$21,565.58 payable by Ms. Dove, and \$21,565.58 payable by Mr. MacIntyre.

CONCLUSION

[40] Because she financed the program, Mr. MacIntyre's share of MMD's educational expenses is payable to Ms. Dove within 30 days. Failing payment in full within 30 days, he will pay interest on the outstanding balance at the rate of

10% (compounded monthly) until his share is paid in full. If Ms. Dove had produced credit statements with a higher interest rate, I would have awarded a higher rate payable by Mr. MacIntyre.

[41] There is no periodic table support payable, so there's no need to register the order under the Recalculation Program as Ms. Dove requested.

[42] Mr. MacIntyre will also pay costs of the application to Ms. Dove in the amount of \$1,000.00, payable forthwith.

[43] The order will be enforced through the Maintenance Enforcement Program.

MacLeod-Archer, J.