

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Findlay v. Bent*, 2023 NSSC 166

Date: 20230526

Docket: *SFHMCA* No. 091591

Registry: Halifax

Between:

Mark Findlay

Applicant

v.

Jaime Bent

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Ingersoll

Heard: April 26, 2023, in Halifax, Nova Scotia

Written Decision: May 26, 2023

Subject: Change in circumstances, obligation to pay child support to the mother in respect of a child who no longer lives with either parent, child under the age of majority, obligation to pay special expense in respect of child care after child care no longer needed.

Summary: Father's application to retroactively vary child support in respect of child who although under the age of majority was no longer living with either parent and to terminate special expense in respect of child care.

Issues: (1) Has there been a change in circumstance to warrant varying the Corollary Relief Order?
(2) If so,

a. is the father obliged to pay child support for child who although under the age of majority does not live with either parent?

b. is the father obliged to contribute monthly to child care expenses if the children are no longer in child care?

Result:

Father's application allowed in part. Child support ordered to be paid in respect of child who longer lived with either parent until just prior to the child's 18th birthday. Father's obligation to contribute toward the cost of child care terminated as of the date when child care no longer required.

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Written Release: May 26, 2023

Counsel: Maggie Shackleton, counsel for the Applicant
Jaime Bent, self-represented

By the Court:

Introduction

[1] Mark Findlay and Jaime Bent have three children, Emma who is 21, Lauren who is 18, and Olivia who is 15. Mr. Findlay and Ms. Bent lived together between 1997 and 2014. They never married.

[2] Pursuant to a Consent Order dated May 25, 2016 (issued on September 7, 2016) (the Consent Order) Mr. Findlay paid monthly child support in the amount of \$1,034.00, together with \$150.00 per month towards the child care expenses.

[3] Mr. Findlay asserts that his obligation to pay child support for Emma ended on February 1, 2019, when she ceased living with either parent. In the alternative Mr. Findlay says that his obligation ceased when Emma graduated from high school and did not continue her education. Mr. Findlay says that his obligation to contribute to child care expenses ended on September 1, 2019, when child care expenses ceased.

[4] On September 26, 2022, the parties agreed that going forward Mr. Findlay would pay child support in the amount of \$770.52 (based on income of

\$54,038.40) in respect of Lauren and Olivia and that Mr. Findlay would no longer contribute toward child care costs. An order was issued confirming that agreement.

[5] The September 2022 order did not address Mr. Findlay's claim for reimbursement of child support paid in respect of Emma and child care expenses paid between 2019 and the 2022 order.

[6] Mr. Findlay paid the full amount of child support and the \$150.00 per month for child care until September of 2022

[7] Mr. Findlay wants Ms. Bent to repay to him the child support he paid in respect of Emma between February 1, 2019, and September 26, 2022. He also wants Ms. Bent to repay him the \$150.00 per month child care contribution he paid to her between September 1, 2019, and September 26, 2022.

Procedural Issues

[8] Mr. Findlay filed his application to vary the Consent Order on February 7, 2020.

[9] The variation application was served on Ms. Bent in 2022.

[10] In September of 2022, Ms. Bent advised me that she is advancing a claim for retroactive repayment of Section 7 and extraordinary expenses she incurred on

behalf of the parties' children. Ms. Bent did not file a formal response to Mr. Findlay's application seeking retroactive reimbursement of expenses in 2022. In January of this year, Mr. Findlay's variation application was set for hearing in April. Ms. Bent was required to file her affidavit in support of her position by March 3, 2023.

[11] Ms. Bent filed a response to Mr. Findlay's variation application on March 14, 2023, in which she sought, among other things, retroactive variation of child support and special or extraordinary expenses dating back to 2016. On March 14, 2023, Ms. Bent also filed an affidavit (sworn that day), a Statement of Special or Extraordinary Expenses, and an Income Statement.

[12] Ms. Bent did not serve the documents filed on March 14, 2023, on Mr. Findlay's lawyer. These documents were not provided to Mr. Findlay's lawyer until April 4, 2023. The trial proceeded on April 26, 2023.

[13] I permitted Ms. Bent's affidavit to be entered as evidence in response to Mr. Findlay's variation application.

[14] I directed that Ms. Bent's claim for retroactive payment be deferred and addressed at a subsequent hearing.

Issues

[15] Mr. Findlay's claim raises two separate issues:

- a. Should Mr. Findlay have paid child support in respect of Emma between February 1, 2019, and September 26, 2022?
- b. Should Mr. Findlay have paid \$150.00 per month for child care expenses between September 1, 2019, and September 26, 2022?

[16] I will address each issue separately.

Issue #1: Should Mr. Findlay have paid child support in respect of Emma between February 1, 2019, and September 26, 2022?

[17] To resolve this issue, I must answer the following three questions:

- a. Has Mr. Findlay established that a material change of circumstances has arisen since the Consent Order was issued, justifying a reconsideration of child support?
- b. Was Mr. Findlay entitled to cease paying child support in respect of Emma prior to September 26, 2022, and if so, when?
- c. If the answer to the above noted questions is yes, how much more child support did Mr. Findlay pay than he ought to have paid?

[18] I will now answer each of these questions:

a. Has Mr. Findlay established that a material change of circumstances has arisen since the Consent Order was issued justifying, a reconsideration of child support?

[19] Subsection 37(1) of the *Parenting and Support Act*, 2015, c. 44, s.2, (the Act) permits me to vary a support order where there has been a change in circumstances since the most recent order was made. In making a variation order I must apply the Provincial *Child Support Guidelines* (Subsection 37(2)).

[20] Section 14 (a) of the *Child Support Guidelines* stipulates that any change that would result in a different child support constitutes a change in circumstance that would justify a variation order.

[21] Mr. Findlay has identified circumstances, either of which if supported by the evidence, could constitute a material change in circumstance, justifying a reconsideration of child support payable under the Consent Order.

b. Was Mr. Findlay entitled to cease paying child support in respect of Emma prior to September 26, 2022, and if so, when?

[22] To answer this question, I must consider whether Mr. Findlay's child support obligation continued during three different time frames between February of 2019 and September of 2022:

- a. First, the period between Emma moving out of her mother's house in February of 2019 and her high school graduation in June of 2020.
- b. Second, the period between Emma's high school graduation and her 19th birthday on April 7, 2021.
- c. Third, the period between Emma turning 19 and leaving her mother's home for the last time in September of 2022.

[23] I will consider each time frame separately:

First, the period between Emma moving out of her mother's house in February of 2019 and her high school graduation in June of 2020

[24] Emma was 17 in February of 2019 when she left her mother's home in Cole Harbour and moved in with the MacDonald family a few houses away from Ms. Bent's home. Emma turned 18 on April 7, 2020, and graduated from high school in June of 2020, at which time she was still living with the MacDonald family.

[25] The Act stipulates that a parent of a child under the age of majority (under 19 years of age) is under a legal duty to provide for the reasonable needs of the child except where there is lawful excuse for not providing them (Section 8).

[26] Mr. Findlay thus had a legal duty to provide for Emma's reasonable needs until her 19th birthday unless he had lawful excuse not to do so.

[27] Mr. Findlay says that the fact that Emma decided to move out of her mother's home and not into his home but rather into a friend's home without being forced to do so constitutes a legal excuse for him to not have to pay child support in respect of Emma.

[28] The following legal principles apply to the question of whether a parent has legal excuse to stop providing for a child's reasonable needs:

- a) Child support is the child's right and survives the breakdown of the relationship between the child's parents. (*Murnaghan v. Lutz*, 2014, NSSC 3, paragraph 25)
- b) Parents bear the burden of proof to establish lawful excuse for not maintaining their child. If that burden is not met the duty of the parent is to provide for the reasonable needs for the child. (*Murnaghan v Lutz, supra* paragraph 9)
- c) Lawful excuse may embrace both entitlement to child support and the quantum of child support. (*W.L. v. S.W.*, 2010 NSFC 31 Paragraph 43)
- d) It isn't necessary that a minor live with a parent to be entitled to maintenance. (*Murnaghan v. Lutz, supra*, paragraph 42)

- e) A child support order can be made in favour of one parent even though the child lives with neither parent. (*Murnaghan v. Lutz, supra*, paragraph 37)
- f) Whether lawful excuse exists should not turn on which party is at fault for the child having left the care of both parents. (Scott (Re), [1996] NSJ No 591 paragraph 12, (*Murnaghan v. Lutz, supra*, paragraph 25))
- g) Lawful excuse exists in those very few cases where the child's conduct is extreme but even then, judges have tried to fashion maintenance awards that will serve the child's best interests. (*Murnaghan v. Lutz, supra*, paragraph 25)
- h) The only possible lawful excuse for the non-support of a child is one which is in the child's best interests (*Murnaghan v. Lutz, supra*, paragraph 25)

[29] The fact that Emma did not live with either parent between February 1, 2019, and her graduation from high school does not, without more, constitute legal excuse for Mr. Findlay to not provide for Emma's reasonable needs during that period. Mr. Findlay must identify facts other than Emma's residence to establish a lawful excuse justifying his non payment of child support in respect of Emma

between February of 2019 and her high school graduation. Mr. Findlay must establish that it was in Emma's best interest that he ceases paying child support. Mr. Findlay may meet this burden if he can establish that Emma's conduct was extreme.

Emma's best interests

[30] Determining whether Mr. Findlay had legal excuse to not provide for Emma's reasonable needs between February of 2019 and her high school graduation is a context-specific undertaking. That context includes not only where Emma was living but also Emma's age, her educational status, her needs and her capacity to engage in employment that could support her.

[31] The evidence establishes that between February of 2019 and Emma's high school graduation in June of 2020:

- a) Emma turned 18 on April 7, 2020.
- b) Emma was not financially independent (she was in school full time).
- c) Emma remained in close communication with her mother.
- d) Emma's mother paid for her cell phone, drove her to volleyball practices and events, paid for sport fees, paid for her trip to volleyball nationals (which Emma did not ultimately attend), paid for her

driver's education course, and for her graduation photos and gown.

Ms. Bent also provided gift cards and food baskets to Emma while at the MacDonalds.

[32] The evidence does not support a finding regarding Emma's drug or alcohol use during this period.

[33] Mr. Findlay's lawyer cross examined Ms. Bent about the quantum of money she spent on Emma while she lived with the MacDonalds. Ms. Bent was unable to quantify exactly how much she spent on Emma; she did not produce any receipts. Ms. Bent testified that Emma was dependent on her for care other than where Emma slept. Ms. Bent testified that she spent Emma's portion of the child support on Emma while she lived at the MacDonalds.

[34] Notwithstanding the absence of receipts, I accept that Ms. Bent incurred costs on Emma's behalf while she lived at the MacDonalds. Most importantly, Ms. Bent remained in constant communication with Emma while she lived with the MacDonalds as she wanted to keep the door open for Emma to return home, which ultimately did happen.

[35] Mr. Findlay submitted an affidavit from Selena MacDonald in which Ms. MacDonald deposed that to her knowledge Emma's mother provided "a couple of

gift cards and a bag of groceries” to Emma in February of 2019 but that she was not aware of any other contributions, financial or otherwise.

[36] I put little weight on the evidence offered by Selena MacDonald. The evidence establishes that Selena MacDonald moved out of the MacDonald residence while Emma lived there, which is an important fact not acknowledged by Ms. MacDonald in her affidavit. Further, I accept that Ms. Bent paid for a number of expenses for or on behalf of Emma, none of which are acknowledged by Selena MacDonald in her affidavit. Based on her affidavit, it appears that Ms. MacDonald was not aware of what Ms. Bent was spending on or doing for Emma.

[37] I conclude that between February of 2019 and Emma’s high school graduation she remained dependent on her parents and that her mother, using child support funds provided by Mr. Findlay, assisted Emma financially. To her credit, Emma was able to complete high school.

[38] Emma’s behaviour leading up to her taking up residence at the MacDonalds or subsequent thereto in this period was not so extreme that she disqualified herself to support from her parents. Emma was deserving of the financial support and emotional support her mother offered her during this period. This support was in

Emma's best interests. I find that Mr. Findlay did not have a legal excuse to not provide for Emma's needs during this period.

Second, the period between Emma's high school graduation and her 19th birthday on April 7, 2021

[39] In the alternative, Mr. Findlay asserts that he should not have paid child support in respect of Emma after she graduated from high school.

[40] As noted, Emma graduated from high school in June of 2022. Emma continued to live with the MacDonalds after she graduated until she returned to her mother's home in March of 2021. Emma did not pursue further education after completing high school. She worked "intermittently" during this time at Tim Hortons. Emma turned 19 on April 7, 2021.

[41] Legal excuse to not provide for a child's reasonable needs can arise, even if a child is under the age of 19, if the child has finished school and is either working or not working without reasonable excuse.

[42] In *Brown v Brown*, 2011 NSSC 148 at paragraph 15, Justice B. MacDonald addressed a mother's argument that she should not be required to pay support for a

seventeen-year-old who was neither working nor attending school. Justice

MacDonald noted:

Even children who are no longer in school, and who are not pursuing skills or job training, are given some transition time to find employment to become self supporting. During this transition child support may still paid [sic]. A transition period will generally come to an end upon the child obtaining reasonable regular employment or when the evidence reveals the child has become a "lay about", disinterested in becoming self-supporting with an expectation his or her parents will continue to provide financial support. A parent may choose [sic] to support such a child, but the court will rarely require child support to be paid under those circumstances.

[43] In *Patriquen v. Stephen*, 2010 NSSC 248 at paragraph 19, Justice Williams declined to award child support for a seventeen and one-half year old who was "simply doing what she wants".

[44] To determine if Mr. Findlay had legal excuse to not provide for Emma's reasonable needs after she graduated from high school I must determine if she had found reasonable employment or if she was, to use Justice MacDonald's words, "a lay about."

[45] Having elected to not continue her education, Emma was obliged to pursue employment after her graduation. Emma graduated from high school approximately ten months before she turned 19. By the time she turned 19 she had stopped working, and as noted by her mother, was focused on her mental health. I do not have any evidence of a medical diagnosis for Emma. I do not have any

evidence from Emma herself, Ms. Bent or any professional witness as to Emma's capacity or ability to work in March of 2021, or why Emma had stopped working by then.

[46] I have no evidence that Emma or her mother reached out for medical or mental health assistance after Emma returned home.

[47] Ms. Bent testified that after Emma moved back in March of 2021, Emma slept at her house about four nights out of seven.

[48] The evidence establishes that Emma had not located "reasonable" employment after graduating from high school and before turning 19. The evidence, although not detailed, establishes that Emma worked, but not consistently on a full-time basis and then stopped working entirely by March of 2021. The evidence does not establish when Emma stopped working.

[49] I do not have budget or income information for Emma, but I infer from the evidence offered by Ms. Bent that Emma was not financially independent in this period. Ms. Bent's evidence was that she continued to support her daughter financially during this phase.

[50] Having elected to not continue her education after high school, Emma was entitled to a transition phase following her high school graduation to locate employment and support herself.

[51] The focus then becomes the length of the transition phase to which Emma was entitled. Based on the evidence, I conclude that Emma's decision to stop working some time prior to March of 2021 was not reasonable. Emma was well enough to come and go from her mother's home at least three nights a week. I have no evidence that she was disabled from working or that she attempted unsuccessfully to find work.

[52] I accept, based on the evidence before me, that Emma was entitled to child support in the transition phase between graduating from high school and ceasing work altogether some time prior to March 1, 2021. As I do not have a date on which Emma stopped working, I will stipulate that her dependence on her parents ought to have ended by the time she moved back in with her mother in March of 2021.

Third, the period between Emma turning 19 and leaving her mother's home for the last time in September of 2022.

[53] Emma turned 19 on April 7, 2021. Mr. Findlay would only be obliged to provide support for Emma if she was unable, by reason of illness, disability, or other cause, to withdraw from the charge of the parents or obtain the necessaries of life (See S. 2 (c) of the Act).

[54] The evidence does not establish that after she turned 19 that Emma was unable by reason of illness, disability, or other cause, to withdraw from the charge of the parents or obtain the necessaries of life.

c. How much more child support did Mr. Findlay pay than he ought to have paid?

[55] Mr. Findlay's obligation to pay child support in respect of Emma ended as of March 1, 2021. Mr. Findlay continued to pay monthly child support of \$1,034.00 (for three children) between March 1, 2021, and September 2022. As of March 1, 2021, Mr. Findlay should have paid the table amount of child support of \$921.00 in respect of Lauren and Oliva based on his 2019 income of \$64,987.80 (applying the year behind approach). That child support should have changed to \$912.00 as of July 1, 2021, based on Mr. Findlay's 2020 income of \$64,320.00. That child support should have changed again as of July 1, 2022, to \$913.00 based on Mr. Findlay's 2021 income of \$64,438.50.

[56] I find that Mr. Findlay overpaid child support to Ms. Bent between March 1, 2021, and September of 2022 in the amount of \$2,291.00. He is entitled to have those funds reimbursed to him.

[57] I direct that Ms. Bent repay this amount to Mr. Findlay by way of an off set against Mr. Findlay's child support payments in the amount of \$229.10 per month for ten months, commencing on June 1, 2023. For clarity Mr. Findlay's monthly child support payment to Ms. Bent will be reduced by \$229.10 for ten months commencing on June 1, 2023.

Issue #2: Should Mr. Findlay have paid \$150.00 per month for child care expenses between September 1, 2019, and September 26, 2022?

[58] To determine if Mr. Findlay is entitled to a reimbursement of the \$150.00 child care expense he paid between September 1, 2019, and September 26, 2022, I must answer the following three questions:

- a. Has Mr. Findlay established that a material change of circumstances has arisen since the Consent Order was issued, justifying a reconsideration of child support?
- b. When did the parties' children stop requiring child care?

- c. Should Mr. Findlay's obligation to pay child support be terminated as of the date his children stopped requiring child care?

[59] I will now address each question.

- a. Has Mr. Findlay established that a material change of circumstances has arisen since the Consent Order was issued justifying a reconsideration of child support?**

[60] Mr. Findlay asserts that his children stopped requiring child care in September of 2019 when his youngest child, Olivia, was 11. He continued to pay \$150 per month toward child care costs thereafter until September of 2022. Ms. Bent does not contest these facts.

[61] The fact that none of Mr. Findlay's children were in child care as of September 2019 constitutes a material change in circumstance which permits me to consider whether a change in the child care expense provisions of the Consent Order is appropriate.

- b. When did the parties' children stop requiring child care?**

[62] As noted, the parties' youngest child stopped requiring child care in September of 2019. The parties agree as to this date.

c. Should Mr. Findlay's obligation to pay child support be terminated as of the date his children stopped requiring child care?

[63] Mr. Findlay's obligation to pay \$150.00 per month for child care expenses is set out in paragraph 7 of the Consent Order. The requirement is specific in that the payment was "towards the child care expenses."

[64] I find that Mr. Findlay's obligation to pay \$150.00 per month in respect of child care ceased once the parties' children stopped requiring child care that expense was no longer being incurred.

[65] Mr. Findlay paid Ms. Bent \$5,500.00 in respect of child care expenses between September of 2020 and September of 2022. Mr. Findlay is entitled to reimbursement by Ms. Bent in this amount.

[66] The parties have agreed that the amount of the child care expense overpayment, which I have set at \$5,500, should be held in abeyance pending adjudication of Ms. Bent's claim for retroactive repayment of child support and special or extraordinary expenses. I direct that overpayment be held in abeyance on the condition that that issue is placed before the court for adjudication within one year of the date of this decision. If the matter has not been adjudicated within one year, the overpayment amount will due and payable and will be set off against

child support payable by Mr. Findlay in the amount of \$220.00 per month for twenty-five months.

[67] The Family Division Scheduling Office will contact the parties to schedule a conference to schedule the trial of Ms. Bent's retroactive repayment claim.

[68] I will ask that Ms. Shackleton prepare the order.

[69] The parties shall provide their written positions regarding costs within one month of this decision.

Ingersoll, J.