SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Carroll v Richardson*, 2014 NSSC 293

Date: 2014-08-07
Docket: SFHMCA-069321
Registry: Halifax

Between:

Joann Carroll

Applicant

v.

Michael Richardson

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	May 26, 27 and July 30, 2014, in Halifax, Nova Scotia
Counsel:	Joann Sawler on her own Michael Richardson on his own

By the Court:

Introduction

[1] These are applications pursuant to section 37 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c 160. Ms. Sawler (formerly Carroll) seeks to vary child maintenance prospectively and retroactively. Her request includes a claim for a contribution to the special or extraordinary expenses of the parties' daughter, Grace. Mr. Richardson seeks to terminate his spousal maintenance payments retroactive to the date of Ms. Sawler's marriage.

[2] Subsection 3A(1) of *the Maintenance and Custody Act* provides that where I am dealing with an application for child maintenance and common-law partner maintenance, I'm to give priority to child maintenance when deciding the applications. So, I'll begin with child maintenance.

Prospective child maintenance

Change of circumstances

[3] Before I may vary a child maintenance order, I must be satisfied that there's been a change of circumstances since the last order was made, according to section 37 of the *Maintenance and Custody Act*. Subsection 14(a) of the *Child Maintenance Guidelines*, N.S. Reg. 53/98 provides that, where child maintenance is determined in accordance with the tables, any change which would result in a different child maintenance order is a change in circumstances.

[4] At the time of the most recent order Mr. Richardson's annual income was $47,000.00. He was ordered to pay monthly child maintenance of $412.00.

[5] Mr. Richardson's current annual income is $54,117.53, according to his April 25, 2014 Statement of Income. This is a change of circumstances that warrants varying the child maintenance order.

Section 3 payment of child maintenance

[6] Based on an annual income of $54,117.53, Mr. Richardson should be paying child maintenance of $456.00 each month according to the table provided for in clause 3(1)(a) of the *Child Maintenance Guidelines*. I grant Ms. Sawler's request, and vary Mr. Richardson's monthly child maintenance payment from $412.00 to

$456.00 as of January 2014. The shortfall between the amount I am ordering and the amount Mr. Richardson has paid to date in 2014 must be paid by August 29, 2014.

Section 7 contribution to special or extraordinary expenses

[7] Ms. Sawler filed a Statement of Special or Extraordinary Expenses. Most of the expenses detailed in it have already been incurred and come in the context of her claim for retroactive child maintenance. Expenses for school trips are both ongoing and historic and will be dealt with in each context. There are historic costs for Grace's braces and cadet trips. Mr. Richardson has met his obligation to contribute to braces through his insurance. There is no evidence of upcoming cadet trips.

[8] According to subsection 7(1) of the *Child Maintenance Guidelines*, one parent can ask that I order the other pay all or any portion of certain enumerated expenses. The amount of the expense claimed may be estimated. In deciding to make an order under section 7, I am to consider the necessity of the expense as it relates to the child's best interests and the reasonableness of the expense in relation to the parents' and child's means and the family's pre-separation spending pattern.

[9] Section 7 of the *Child Maintenance Guidelines* lists six categories of expenses to which I may order a parent contribute, in addition to paying the amount of child maintenance required by section 3. Of these categories, expenses for extra-curricular activities, listed in clause 7(1)(e), must be "extraordinary" if they are to be the subject of an order for contribution. In contrast, health care expenses, which are listed in clause 7(1)(c), need not be extraordinary.

[10] Following the reasoning in *L.K.S. v. D.M.C.T.*, 2008 NSCA 61, at paragraph 27, I will first determine whether the expenses are necessary in relation to Grace's best interests, reasonable in relation to her means and her parents' and in keeping with the family's pre-separation spending pattern, before I deal with whether they are extraordinary. (Leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was denied at *D.M.C.T. v. L.K.S.*, 2009 CanLII 1998 (SCC).)

School ski trips

[11] The school ski trips are day-long trips to the local ski hill. A trip typically costs $45.00. The number of trips depends on the weather, and Grace attends two ski trips per year, usually.

[12] Mr. Richardson said the expenses for school ski trips aren't necessary in relation to Grace's best interests, and they aren't reasonable in relation to his means. He said their cost could be afforded within the child maintenance he pays.

[13] The burden of establishing that the expenses are necessary, reasonable and consistent with the family's pre-spending pattern is Ms. Sawler's. She offered no evidence on these points.

[14] At paragraph 25 in *L.K.S. v. D.M.C.T.*, 2008 NSCA 61, Justice Roscoe emphasized that an order pursuant to section 7 is "is discretionary. The starting point is that it is assumed that the table amount will ordinarily be sufficient to provide for the needs of the child."

[15] I find that the school ski trips are not necessary in relation to Grace's best interests, nor are they consistent with the family's past spending pattern. Their cost is reasonable and, as Mr. Richardson suggests, they are easily afforded within the child maintenance that he pays. The table amount of child maintenance is sufficient to provide for this expense. I dismiss Ms. Sawler's request for a contribution to the cost of Grace's ski trips.

Braces

[16] Mr. Richardson does not object to the necessity or reasonableness of the expense for Grace's braces. There is no historic precedent for this expense prior to her parents' separation.

[17] When dealing with health related expenses, clause 7(1)(c) of the *Guidelines* says that the portion to be shared is that portion which exceeds insurance reimbursement by at least $100.00 annually. As well, I'm to consider eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense, pursuant to subsection 7(3). Braces would be covered by the non-refundable medical expense tax credit.

[18] Grace began wearing braces in 2012. Ms. Sawler said they cost $3,400.00. Evidence from Mr. Richardson indicates that $2,488.00 of this amount has been paid. He said that his insurer has paid $1,244.00 between June 21, 2013 and April 21, 2014. I was told that Mr. Sawler's insurance has paid its maximum amount toward the cost. Approximately $912.00 remains unpaid.

[19] Mr. Richardson "assumes" that his insurer will cover one-half of this outstanding balance. According to Ms. Sawler, her husband's coverage is exhausted and will pay no more toward the braces. There is some uncertainty about this because Mr. Sawler's evidence was less emphatic on this point than his wife's. For my purposes, I accept that Mr. Sawler's insurance will make no further contribution to the orthodontic expense.

[20] Accepting that Mr. Richardson's insurer will pay $456.00 toward the outstanding orthodontic bills, I am left to address Ms. Sawler's claim for a contribution to the remaining cost of $456.00. Of course, this cost must be reduced by $100.00, pursuant to clause 7(1)(c) of the *Guidelines*. I must also consider the non-refundable medical expense tax credit pursuant to subsection 7(3).

[21] The medical expense tax credit of fifteen percent applies to eligible medical expenses that exceed the lesser of $2,171.00 or three percent of net income. The Nova Scotia credit (8.79%) applies those expenses that exceed the lesser of $1,637.00 and three percent of net income. According to Ms. Sawler's Statement of Income, she is eligible for the credit because Grace's uninsured orthodontic expense of $456.00 exceeds the income threshold of three percent of her net income. However, at her income level, Ms. Sawler doesn't pay income tax, so the tax credit doesn't reduce the cost.

[22] The non-refundable medical expense tax credit may be claimed by either spouse. However, Mr. Sawler's income is too great and the expense too small to generate the tax credit if claimed by him. Ultimately, the medical expense tax credit isn't available.

[23] Considering the deduction in clause 7(1)(c), Ms. Sawler is seeking a contribution to the $356.00 uninsured expense.

[24] The guiding principle for sharing expenses, stated in subsection 7(2) of the *Guidelines*, is that it is to be done in proportion to the parents' incomes. To determine their proportionate shares, I calculate Mr. Richardson's income at $51,117.53. I've deducted his spousal maintenance payments, having regard to section 3.1 of Schedule III of the *Federal Child Support Guidelines*, SOR/97-175. Schedule III of the provincial *Guidelines* incorporates this federal Schedule.

[25] I accept Mr. Richardson's submission that Ms. Sawler's annual income is approximately $9,500.00. He determined this based on the hours she estimates working (there are seasonal variations in her work hours) and her hourly wage.

[26] At these income levels, Mr. Richardson would pay eighty-four percent of the cost, or $299.04 ($24.92 per month for a twelve month period). This is a reasonable amount for a necessary expense, and I order Mr. Richardson to make a payment of $24.92 for each of the next twelve months, beginning on August 15, 2014.

Retroactive child maintenance

[27] Ms. Sawler identified this claim at the pre-hearing conference on March 31, 2014. Specifically, Ms. Sawler asks that I order Mr. Richardson make a contribution to the cost of trips Grace has taken with her cadet group or her school class.

[28] To assist the parties, in the memorandum I prepared following the conference, I referred them to the Supreme Court of Canada's decision in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 and directed, "The parties must provide evidence addressing Ms. Sawler's delay in pursuing her claim, whether Mr. Richardson has contributed to her delay, Grace's needs, and whether a retroactive award would create hardship." According to the majority opinion in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, these four factors are all important in helping me determine whether I should exercise my discretion to make a retroactive award. Retroactive claims need not be exceptional to succeed, but they aren't automatically successful, either.

Ms. Sawler's delay

[29] Ms. Sawler offered no explanation of why she delayed in bringing the retroactive claim. The original maintenance application was heard in May 2011. Ms. Sawler filed an application in November 2012 to vary child access, but she didn't seek to vary child maintenance payments then. She applied to vary child maintenance prospectively on January 24, 2014, however, she didn't give notice of a retroactive claim until the conference on March 31, 2014.

[30] Ms. Sawler has not provided a reasonable excuse for her delay.

Mr. Richardson's conduct

[31] Ms. Sawler identified no conduct by Mr. Richardson that has caused her to delay bringing the retroactive claim. She offered no evidence to suggest his

conduct had an impact on her bringing her initial claim or her prospective variation claim.

[32] Ms. Sawler has many complaints about Mr. Richardson's conduct. She says he's harassed her family by "stalking" them, "driving by" their home, repeatedly making reports to the RCMP and the Department of Community Services about them, and hiring a private investigator to telephone members of her extended family. Mr. Richardson was ordered to provide financial disclosure from Marilyn Byce, the woman with whom he cohabits. He refused to do so.

[33] From Mr. Richardson's perspective, Ms. Sawler has been found in contempt of a court order and was fined $1,000.00. She was ordered to pay the fine by July 31, 2013. She has not paid the fine and, in fact, she said that she was ordered to pay it only when she "had extra money". Mr. Richardson has not taken steps to enforce that judgment against her assets. Ms. Sawler has been convicted of assaulting Mr. Richardson's former girlfriend. She and her husband both intentionally did not disclose ownership of real estate on their Statements of Property. When questioned by me, each confirmed that these Statements were true. Only when cross-examined by Mr. Richardson and shown their deed to the land did each admit to ownership and the action in hiding this fact.

[34] While the atmosphere is fraught with conflict, there's no evidence that this inhibited Ms. Sawler from taking steps to seek appropriate maintenance for Grace. Ms. Sawler has initiated two applications against Mr. Richardson. Both parties represented themselves in this application, though Ms. Sawler did retain counsel since this round of litigation began in July 2012.

[35] At paragraph 106 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, Justice Bastarache said that he "would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support." The misconduct Ms. Sawler describes does not fall into this category.

Grace's circumstances

[36] Grace is active in her community. She is an achiever, having been locally recognized for her participation as a young firefighter. She participates in cadets and activities at her school, such as the running club. She has friends and an active social life: Ms. Sawler described having ten children in his home for a pizza party, and driving Grace to her various activities. She has taken part in cadet trips, school

ski trips and a class trip. She participates in the Duke of Edinburgh's bronze medallion programme.

[37] Mr. Richardson and Ms. Sawler each provided Statements of Expenses, Statements of Income and Statements of Property. These show that Grace is well provided for from their incomes: they said they spend $300.00 per month on her extracurricular activities; $170.00 per month on gifts, birthdays and Christmas. Ms. Sawler said that more than $130.00 would be spent on Grace's grading this year as she completes grade nine.

[38] Based on the evidence, I conclude that Grace's circumstances have not been impaired by any historic under-contribution by Mr. Richardson.

Undue hardship

[39] With regard to the issue of hardship, Mr. Richardson's Statement of Expenses (which is carefully completed), shows that paying his new child maintenance payment of $456.00, will leave him with a monthly surplus of $38.00. His Statement of Property shows his only asset is a 2006 car, other than the judgment of $1,000.00 owed to him by Ms. Sawler.

[40] I have no information about the financial circumstances of Marilyn Byce, with whom Mr. Richardson cohabits.

[41] Ms. Sawler has savings of over $3,500.00. She and her husband have purchased land and started constructing a home. They have two vehicles.

[42] There is no reasonable excuse for Ms. Sawler's delay, there is no conduct by Mr. Richardson which privileged his position over Grace's, and Grace's circumstances have not suffered. Mr. Richardson didn't provide adequate evidence for me to conclude he would experience hardship if a retroactive award was made. Considering these factors, the balance lies in favour of preserving the certainty of the prevailing order, and I conclude that I ought not exercise my discretion to make a retroactive child maintenance award.

Spousal maintenance variation application

[43] Mr. Richardson was ordered to pay spousal maintenance of $250.00 each month and this was "reviewable by the parties upon [Mr. Richardson] reaching 65 years of age". There is no prohibition on any earlier variation.

[44] In 2012, when the spousal maintenance order was granted, Ms. Sawler was in receipt of Social Assistance benefits.

[45] Mr. Richardson claimed that there have been a number of changes since Justice Gass awarded spousal maintenance: Ms. Sawler has married, and she is now employed. Mr. Richardson calculates that Ms. Sawler earns approximately $9,500.00 per year, exclusive of child maintenance. Given her household income she would be ineligible for the Canada Child Tax Benefit.

[46] Ms. Sawler's marriage and employment are significant and long-lasting changes. I find that they warrant a review of the spousal maintenance award.

[47] Clause 6(2)(c) of the *Maintenance and Custody Act* specifically refers to a spouse's re-marriage and the spouse's entitlement to maintenance, saying, "Maintenance to which a spouse or common-law partner would otherwise be entitled may be reduced or eliminated where the spouse or common-law partner entitled to maintenance [. . .] marries".

[48] An earlier version of this provision, contained in subsection 6(3), stated that the right to maintenance was forfeited where the person married, remarried or cohabited in a conjugal relationship. In *Fancy v. Shephard*, 1997 CanLII 1473 (NS SC), then-Chief Justice Glube held that this earlier provision violated section 7 and subsection 15(1) of the *Charter of Rights and Freedoms* (*The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11). The "cure" was found in amending the *Act* so that there was no automatic forfeiture, but that maintenance might be reduced or eliminated. The reasoning of more recent decisions, such as *C.A.L. v. P.M.L.*, 2009 NSFC 20, at paragraph 33, reflects the view, which I believe is correct, that this provision is discretionary and there is no requirement that I must reduce or eliminate spousal maintenance upon marriage, re-marriage or cohabitation.

[49] Section 4 of the *Maintenance and Custody Act* outlines the considerations I'm to have in determining both entitlement and the quantum of spousal maintenance. I find these considerations are relevant in determining whether Ms. Sawler's spousal maintenance should be terminated.

[50] According to Mr. Richardson, spousal maintenance should be terminated because Ms. Sawler has been economically self-sufficient since she married in August 2012. He said that she underestimated her income, and he calculated her annual earnings at approximately $9,500.00, inclusive of vacation pay. In

calculating Ms. Sawler's total income, Mr. Richardson included the child maintenance payments Ms. Sawler receives, though this is not money for her: it is for Grace. The amount I've indicated is his calculation of her earnings alone.

[51] Mr. Richardson challenged the expenses that Ms. Sawler claimed, saying that she overestimated them.

[52] To put Ms. Sawler's earnings in context, at an annual income of less than $10,000.00, her earnings are below the level at which she'd be ordered to pay child maintenance. If she lived on her own, her earnings would be below the "low income measure" identified in Schedule II of the *Federal Child Support Guidelines*. On her own, Ms. Sawler is not economically self-sufficient. To the extent that she may no longer need the money Mr. Richardson pays as spousal maintenance, it is not because she is economically self-sufficient. It is because she is supported by her husband.

[53] According to Ms. Sawler, spousal maintenance was awarded because Mr. Richardson kept all the property when their relationship ended. Ms. Sawler said that Mr. Richardson has many expenses which are not reasonable.

[54] I have had the benefit of reading Justice Gass' decision resolving Ms. Sawler's claim for an equal division of an investment fund. This is reported as *Carroll v. Richardson*, 2012 NSSC 18. (Ms. Sawler's previous surname was Carroll.) According to this decision, Ms. Sawler failed to show a connection between a contribution she made and Mr. Richardson's investment fund, and this is why she wasn't awarded a share of that asset or its value. She was not awarded spousal maintenance as a means of effecting a property division and, indeed, it would be incorrect to do so.

[55] Turning to the considerations in section 4 of the *Maintenance and Custody Act*, I have no evidence about the matters identified in subsections 4(a), (b), (c), and (h).

[56] Relevant to subsection 4(d), I do know that Grace's primary residence is with her mother and that Grace has no contact with her father at all. Neither party has any other children for whom they pay child maintenance. Ms. Sawler has a hearing impairment: she is gainfully employed in any event. I have Statements of Income and Expenses from each party identifying his or her needs. Each believes the other's expenses are inflated.

[57] Each party's financial circumstances have improved since their separation: Mr. Richardson's income has increased. Ms. Sawler is working and has the advantage of her husband's income. Additionally, Ms. Sawler is now solely responsible for parenting Grace: Mr. Richardson plays no part in parenting Grace. Grace is very involved in activities so parenting her is a significant commitment which would limit Ms. Sawler's ability to pursue greater financial independence.

[58] Ms. Sawler has not overcome the financial consequences of her relationship with Mr. Richardson and some of these consequences are perpetuated by her parenting responsibilities. I conclude that this is not an appropriate case to terminate spousal maintenance for Ms. Sawler, and I dismiss this request.

Costs

[59] Mr. Richardson asked to be able to speak to the issue of costs. I am not willing to award costs. Mr. Richardson failed in his application to terminate spousal maintenance. Ms. Sawler succeeded in her application to increase child maintenance and failed in her retroactive claim. I consider success to be divided.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia