

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: MacDonald v. MacIsaac, 2014 NSSC 374

Date: 2014-10-28

Docket:1217-000436

Registry: Port Hawkesbury

Between:

Francis Darryl MacDonald

Applicant

v.

Stephanie MacIsaac

Defendant

Judge: The Honourable Justice Moira C. Legere Sers

Heard: June 17, 2014 in Port Hawkesbury, Nova Scotia

Final Submissions: Applicant – June 26, 2014
Respondent – June 18, 2014

Counsel: Francis Darryl MacDonald, self-represented
Stephanie MacIsaac, self-represented

By the Court:

[1] This is the May 13th, 2013 Variation Application of Mr. MacDonald.

[2] In this Application, the Applicant seeks to adjust the child support order dated November 8th, 2011 to reflect the fact that both of his son's, Darryl and Derrick currently reside with him. He wants an order that the respondent reimburse him any overpayment.

[3] These parents have three children together; Neil, born April 26, 1993; Darryl born, August 14, 1996 and Derrick, born August 14, 1996.

[4] As of **February 8th, 2007** when the Corollary Relief Judgment was entered into, all three children lived with the Respondent.

[5] The oldest child **Neil** moved to the primary care of his father effective **February 1st, 2009**. The two younger children remained with the Respondent.

[6] When I say moved to the primary care of the Applicant, this must be understood in a context that he lived in his father's home. The Respondent did not always live there. The Applicant works on a rotational basis in the West and is absent from the home for considerable periods of time.

[7] The parties agree that effective **May 2011**, Darryl lived in his father's residence.

[8] The parties agree that effective **July 1st, 2011**, Neil was no longer a dependent child.

[9] For child support purposes, effective **January 1st, 2013**, Derrick lived in his father's residence. The parties agree that Derrick lived with the applicant from **January 2013 to July 14th of 2013**, a period of six and a half months.

[10] Derrick then moved to live with a relative in Halifax from the **14th of July, including August, September, October, November, December of 2013, and January and February 2014**.

[11] The relative with whom Derrick lived confirmed the Applicant did not pay child support to her for Derrick's support. The Applicant indicates that he paid some money directly to the son. I have insufficient information to consider what he paid to his son as child support or to order a set off.

[12] Derrick returned to live in his father's home in March of 2014 to the present. He was expected to graduate grade 12 in June 2014.

[13] The future plans of the remaining dependant young persons are not crystalized as of this hearing.

[14] There were previous applications to vary and they will be referred to later.

[15] The basis **of this application** is that the 'child' Derrick has been in the applicant's home from January 2013 to July 1st, 2013 and again from March 2014 to the current date (with a gap of 8 months in the 2013-2014 year).

[16] This application is to determine what, if any, child support adjustments should be made to determine (1) who is entitled to the credit and (2) what child support, if any, should be paid prospectively.

[17] This will affect the child support payment, the calculation of arrears and the amount of any credit that may exist.

[18] The Applicant only seeks a re-assessment of child support to be paid to him effective January 1st, 2013 for both Darryl and Derrick.

[19] I have concluded a recalculation solely to reflect January 2013 forward would result unfairly in his favour without consideration of any underpayment.

[20] Given the current disclosure, it appears the Applicant has been underpaying child support in the years 2009, 2010 and 2012. If a recalculation is taking place, his underpayments ought to be considered to determine what, if any, credit exists.

[21] The Respondent has made an Undue Hardship Application.

[22] Since July of 2013, she has not been working due to the stress arising out of a serious car accident in which her son was involved.

[23] Should the Court find that the Applicant has overpaid, the Respondent believes her current income, together with her obligations to raise her two children from her current relationship, results in an inability to repay the applicant.

Disclosure

[24] Full and accurate disclosure has not been available throughout the various applications.

[25] At the June 17th, 2014 hearing, the Court still had not received current verified income information from either party. The Applicant failed to file his Notice of Assessment and Re-assessment for 2009, 2010, and 2011.

[26] Additional disclosure was provided subsequent to their attendance in court.

[27] The Applicant's income figures by Revenue Canada are not similar to the income figures provided initially and on which previous orders were based. The Respondent has not provided financial verification for 2014 forward.

[28] Part of the difficulty in providing accurate information may rest in the fact the applicant works in the West for block periods of time and, in part, due to the serious accident in mid-2013 in which at least one of their children was involved.

Delay

[29] This application was put on hold on July 31st, 2013 at the Applicant's request. Subsequently, he requested the matter proceed on November 14th, 2013. This case was then referred to Conciliation on February 20th, 2014. The parties entered into settlement discussions on June 17th, 2014.

[30] Availability of the Applicant and lack of disclosure have delayed resolution of the issues.

[31] Both parties have informed me they do not want to return to Court and they seek resolution immediately. I will accept the most accurate information filed and draw conclusions based on the evidence I have.

Legal History

[32] **In 2007**, the Applicant said his annual income was \$78,626.89; the Respondent said her income was \$22,152.

[33] **In 2008**, the Applicant said his annual income was \$115,093; the Respondent \$17,987.

[34] The Applicant was ordered to pay retroactive support in the amount of \$20,919 for the period of August 2007 to the end of 2008.

Change

[35] The applicant made a second Application resulting in a Consent Varied Order on **the 26th of April, 2011** to adjust for this change.

[36] He provided income information that his **2009** income was \$107,522. The Respondent's income was said to be \$22,437.

[37] The Applicant was to pay child support of \$1,248 per month payable on the first of each month and commencing the 1st of February 2009, excluding the months of May and June.

[38] For **2010**, the Applicant was found to have an income of \$108,192; the Respondent an income of \$18,211.60

[39] For the year **2011**, the Applicant was found to have an income of \$124,288.38; the Respondent an income of \$27,139.84.

[40] Effective February 1st, 2009 (except for May and June) the Applicant was to pay the Respondent \$1,248 per month continuing on the first of each month.

[41] Effective January 1st, 2010, (except for May and June), the Applicant would pay the Respondent \$1,334 per month in child maintenance.

[42] A further change was authorized by Court Order resulting from a hearing on the 8th of November, 2011. The Order was issued on the 2nd of January, 2014

[43] This order recognized that the child **Darryl** moved to the Applicant's household effective **May 1st, 2011**.

[44] Effective January 1st, 2011 and continuing for the months of February, March and April, the applicant was to pay the Respondent \$1,421 per month in child maintenance.

[45] Effective July 1st, 2011 and continuing on the first of each and every month, the Applicant was to pay the Respondent \$633 per month for child maintenance.

[46] Extra ordinary expenses were to be divided with 82 percent payable by the Applicant for orthodontic costs. He was to pay \$4,181 forthwith (\$2,500 related to orthodontic expenses and \$1,681 travel expenses.)

[47] There was further disclosure required by that order.

Maintenance Enforcement Records

[48] Maintenance Enforcement believes the Applicant is in a credit position as of February 20th, 2014 in the amount of \$14,377 based on old orders.

[49] Previous to February 2013, Maintenance Enforcement reimbursed the applicant \$9,000.

[50] The Applicant believes the current credit is net of any set off or unpaid orthodontic or other expenses for which he may have been responsible.

[51] The Respondent believes that \$618 remains owing for orthodontic contribution, although she acknowledges the travel claim has been paid in full.

Actual Financial Information

Year	Mr. MacDonald	Ms. MacIsaac
2009	\$108,521 (Notice of assessment) Income disclosed originally \$107,522	\$22,437
2010	\$122,257 (Notice of Assessment) Income disclosed originally \$108,192 Income tax return indicated \$121,258	\$19,378
2011	\$127,773 (Notice of Assessment) Income Tax Return indicated \$124,188	\$28,306
2012	\$139,819 (Notice of Assessment) Income Tax Return indicated same	\$26,330
2013		\$23,516
2014		\$6,456 (to July 31 st , 2014)*

[52] *In July 2013, due to her son's serious car accident, the Respondent was given one month compassionate leave. She then initiated a claim on July 28th, 2013 for Employment Insurance. Her waiting period was August 4th to August 17th, 2013. She received 45 weeks of benefits to August 2014 at a rate of \$312

(gross) per week. Her income from January 14th to August 2nd would result in \$922.30 monthly for seven months or \$6,456.03 for that period of time.

[53] She has not returned to work since her son's accident in 2013.

[54] The discrepancies in disclosure resulted in an order to pay based on incorrect annual incomes. The Order calculated the Applicant's 2010 child support on an income \$14,065 less than his 2010 Notice of Assessment and \$3,485 less than his 2011 Notice of Assessment.

[55] The Order calculated the Respondent's contribution on an income of \$1,166.40 less than her Notice of Assessment for 2010 and 2011.

[56] Even those calculations made in this application on June 17th, 2014 were done on incorrect information given by the Applicant and less than adequate information given by the Respondent.

[57] Subsequent to the hearing, the parties provided proof of their financial information .

[58] The Respondent has none of the children of this relationship living with her now. She has two dependent children of her current relationship.

Recalculations

[59] **In 2009**, the Applicant's actual income was \$108,521 and the Respondent's was \$22,437.

[60] Using 2006 tables, effective February 1st, 2009 and continuing on the first of each month, with the exception of May and June, the Applicant should have paid the Respondent \$1,446 per month for the children Derrick and Darryl. Given Neil moved in with his father February 1, 2009, the Respondent should have contributed \$186 per month for the child Neil.

[61] The parents were to contribute for nine months (excluding May and June).

[62] With the offset, the Applicant was to contribute \$1,260 per month. He had been ordered to pay \$1,248 by variation order November 8th, 2011.

[63] Therefore, the Applicant has underpaid \$12.00 per month for nine months for a total **underpayment of \$108**.

[64] **For 2010**, Neil lived in his father's home and Darryl and Derrick in their mother's home.

[65] For 2010, the Applicant's income as verified is \$122,257 and the Respondent's \$19,378. Except for May and June, the Applicant was to pay \$1,602 and the Respondent was to pay \$155 for 10 months. With setoff, the Applicant should have contributed \$1,447. He had been ordered to pay \$1,334, resulting in an underpayment of \$113 per month for a period of ten months which would result in an underpayment of **\$1,130**.

[66] **For 2011**, Neil was dependant until July 1st of 2011. Darryl moved into the Applicant's home May 1st, 2011.

[67] From January 1st to April, two children lived with the Respondent and one with the Applicant. The Applicant has an income of \$127,773 and the Respondent \$28,306. For two children, the Applicant should have contributed the amount of \$1,664 for four months and the Respondent \$252.

[68] With the offset, the Applicant should have contributed \$1,412.

[69] He was ordered to pay \$1,421. This results in an overpayment of \$9 for four months resulting in an overpayment of \$36.

[70] For July to December 2011, there is one child with the Respondent, one child with the Applicant and one child independent.

[71] The Applicant should have paid the Respondent \$1,045 and the Respondent to the Applicant \$252 per month resulting in a payment by the Applicant to the Respondent of \$793 for a six month period.

[72] He had been ordered to pay \$633 for this six month period.

[73] This resulted in an underpayment of \$160 for six months for a total of a \$960 underpayment.

[74] For the 2011 year, taking the credit of \$36 into account, the Applicant's 'total' **underpayment is \$924**.

[75] **For 2012**, with one child with each parent, the Applicant's income is \$139,819 and the Respondent's \$26,330. The Applicant should have paid \$1,144 for one child; the Respondent \$214 for the other child, resulting in a setoff

payment of \$930. The Applicant was ordered to pay \$633 resulting in an underpayment of \$297 per month for 10 months for a total underpayment of **\$2,970.**

[76] In late December 2012, Derrick moved into his father's residence.

[77] For 2013, two children lived with the Applicant. The Respondent's income was \$23,516 for a payment of \$337.

[78] For the 2013 year, for the six months within which she worked (January to July) she would have been called upon to pay **\$2,022.**

[79] For the 2014 year to date, there would be no child support payable due to the level of her income.

[80] **The total of underpayments with credit for the one overpayment equals \$5,132.**

[81] Neither indicated there was any fault attributable to the Respondent with respect to the accumulation of credits. The Respondent advised Maintenance Enforcement immediately to terminate payments and without court order, they continued to deduct these payments up until May 9th of 2013, when the final payment was made in the amount of \$858.

[82] The Respondent ceased employment on July 31st, 2013 and has not worked since. Her income for 2013 has been calculated to include EI payments and totals \$23,516. Her income for the year 2014 is insufficient to identify a child support payment.

[83] Maintenance Enforcement ceased taking payments from the Applicant in May 2013. The overpayment they have identified has to be reduced to reflect the underpayments by the Applicant due to the income information which indicates his actual income.

[84] The Respondent returned to the Applicant \$5,000 of the child support which she had saved in an account. That \$5,000 must be deducted from the amount owing.

[85] The current credit is set at \$14,377. The Applicant underpaid by \$5,135. The Respondent contributed \$5,000 of overpayments to the Applicant towards the

son's special expenses. This leaves \$4,242 plus that which she would have been obliged to pay in 2013 (\$2,022) for **a total owing(credit) of \$6,267.**

[86] This shall be sent to Maintenance Enforcement to adjust their records.

[87] Maintenance Enforcement shall also determine whether their records show that the Applicant's share of orthodontic payments have been made in full. If the Applicant has a portion unpaid that shall be added to his underpayment and the figures below adjusted accordingly .

[88] The Court must address the Undue Hardship application to determine what, if any, adjustment to child support or arrears need to be made and what, if any, repayment, is to be ordered.

[89] I have household income for 2011 and 2012. I do not have up to date household income except for the income provided in the table at page 6.

[90] In the Applicant's household for 2011, I have evidence of three separate incomes totaling \$167,311 and in the Respondent's, a household income of \$57,513.

[91] In 2012, I have a household income in the Applicant's home of \$184,892, and in the Respondent's home, \$69,011.

[92] In this case, I have insufficient evidence of the circumstances of both parents other than to observe there is a significant income disparity between the Applicant and the Respondent.

[93] In the current circumstances, the Respondent is unable to earn an income.

[94] The Respondent has two children to support and is unable to repay this amount at this time. I have considered the household incomes and circumstances in the limited manner in which they were presented to the court.

[95] I will decline to fix the arrears for that reason and I place a moratorium on collection of this amount and reserve for the parties the opportunity to review the matter on their application to seek payment, reduce or eliminate the arrears depending on the circumstances of each parent and their household.

[96] I decline to order any payments by the Respondent to the Applicant at this time.

[97] The court was informed by the parties that there is no amount of funds in trust with Maintenance Enforcement. The credit which exists is an overpayment by the Applicant to the Respondent.

[98] Should there be any actual money held in trust by Maintenance Enforcement, that money shall be held in trust and the matter referred back to the court for disbursement of the proceeds.

[99] Additional information including full disclosure of the parties circumstances would be required should the matter be brought back for review.

[100] The court will draft the order.

Moira C. Legere Sers, J.