IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Ponsford v. Eknes, 2008 NSSC 290

Date: 20081003
Docket: 1201-56437, SFHD-013797
Registry: Halifax

Between:

Paul Ponsford

Petitioner

v.

Sissel Eknes

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Heard:	September 8, 2008, in Halifax, Nova Scotia
Written Decision:	October 3, 2008
Counsel:	Paul Ponsford, the Applicant Patrick Casey, counsel for the Respondent

By the Court:

[1] On May 15, 2007 Mr. Ponsford signed a Variation Application seeking changes to the Corollary Relief Judgment dated September 7, 2005. This Judgment incorporates by reference the terms of the parties Separation Agreement dated April 28, 2003 except for any terms changed by the wording in the body of the Corollary Relief Judgment. The effect of incorporation by reference is to give the authority of a order to the unamended terms of the Separation Agreement.

[2] In his application Mr. Ponsford requested changes to the parenting arrangements and to the table guideline amount paid for child support. He requested that the changes become effective as of February 28, 2007. On September 2, 2008 he signed an Amended Variation Application requesting the changes become effective as of September 7, 2005. At the hearing it was clear that Mr. Ponsford was seeking changes that had not been appropriately identified in his Variation Applications. These requests were embedded in the affidavits he has filed in these proceedings. Ms. Eknes wanted to dispose of all issues irrespective of procedural irregularities and I have undertaken to do so. In summary Mr. Ponsford requests the following:

- a change to the "secondhand smoke" provision found in the recitals of paragraph 1 of the Separation Agreement;

- a change in the description of the parenting arrangement from joint custody to shared custody effective September 7, 2005;

- a change in the parenting schedule to confirm the child Kurt Harald Ponsford, born May 19, 1992 was in his primary care and the child Chad Richard Ponsford, born September 30, 1996 was in a shared parenting arrangement;

- a change in the parenting schedule to provide that when the children are in his care on a Sunday they are to remain with him overnight and attend school from his residence or in the alternative, if they are to be returned to their mother's residence on Sunday evening that the return time be later than "7 p.m. on school nights and 8 p.m. otherwise".

- a recalculation, retroactive to September 7, 2005, of the child support obligation based upon the changed parenting arrangement and the parties changed incomes;

- a review of his spousal support obligation and a retroactive variation to September 7, 2005 based upon the parties incomes as they existed during the time period when this support was to be paid.

- an order that Ms. Eknes contribute 50% of the Child Tax Benefit she receives for both children into an RESP account set up for the parties eldest son.

[3] Ms. Eknes filed a Response to Mr. Ponsford's Variation Application. Her first Response is dated September 4, 2007. Her second Response is dated February 21, 2008. The relief she requests is essentially the same in both:

- she opposes Mr. Ponsford's request for variation except in respect to a change to the "secondhand smoke" provision;

- she requests a calculation of the arrears of child support;

- she requests a calculation of the arrears of spousal support;

- she requests a determination of child support on a prospective basis;

- she requests costs.

VARIATION OF THE PARENTING SCHEDULE

[4] A court cannot change the terms of a previous order unless there is jurisdiction to do so. The order in this proceeding was issued pursuant to the Divorce Act. Section 17(5) of that Act requires that a court, before making a variation to the custodial arrangements,

> "...satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order..."

[5] The parties have a detailed parenting schedule that has been incorporated into a court order. They have joint custody of their two children. The regular schedule places the children in Mr. Ponsford's care

> "...each Wednesday evening and Thursday evening and every second weekend and will be with the Wife each Sunday evening, Monday evening, Tuesday evening, and every second weekend...". In addition "... on Sunday evening , they will be dropped off before 7:00 p.m. on school nights and 8:00 p.m. otherwise, or later when age appropriate....".

[6] Mr. Ponsford originally wanted to change the regular parenting schedule because the parties eldest son had been residing almost exclusively with him from March 9, 2007. However, on or about July 2007 their son reverted to the previous schedule and this is the parenting situation that has existed since that time with one exception; both children were in Mr. Ponsford's exclusive care from September 17, 2007 until November 5, 2007. This was arranged with the consent of both parties and occurred because Ms. Eknes was traveling to Norway to attend to her dying mother.

[7] The eldest son's change of residence, if sustained, could have constituted a change of circumstances justifying a change to the Corollary Relief Judgment. The change in residence was not sustained. Therefore the Corollary Relief Judgment cannot be varied for that reason. The change of residence in the fall of 2007 was an appropriate accommodation and does not constitute a change of circumstances justifying a variation to the parenting schedule.

[8] Mr. Ponsford would like to have his sons in his care overnight on Sunday but he has not provided any facts to suggest there is a change in their condition, needs or other circumstances to justify my interfering with the terms of the original order. The boys are older but this, in itself, is not, in these circumstances, a sufficient change to rearrange the parenting schedule. The fact that the children would grow older was known to the parties when they were devising the schedule. Provision could have been made to expand Mr. Ponsford's parenting time as they aged. Except in one respect, upon which I will remark later in this decision, no such provisions were made. The fact that Mr. Ponsford now would like to have additional time is not a change contemplated by section 17 (5) of the Divorce Act. There is no information to suggest that there has been a change in the boys lives that would suggest more time with their father is required in their best interest.

[9] The parenting schedule did suggest that the return time on Sunday evening might be later “when age appropriate”. Mr. Ponsford has not suggested what may be a more age appropriate “later time”. He wants overnight and that is a different concept. Not having any specifics before me about suggested different times, I am unable to address this issue.

[10] If I am incorrect in my analysis in respect to the impact of age upon the issue of change, I have no information supporting an argument that the requested change is in the best interest of these adolescents. Mr. Ponsford has the burden of proof on this issue and he has failed to convince me on a balance of probabilities that staying with him overnight on Sunday would be in his sons’ best interest. He has considerable parenting time with his children and there is nothing in the evidence to suggest they have some need for more time with their father important to their development, socially, intellectually, psychologically or in any other articulated way. I also note that in paragraph 4.4 of the Separation Agreement the following appears:

> “.... Both parties agree to give notice to one another for any special family events so that the children will be able to attend.”

[11] Mr. Ponsford complains that when members of his family were visiting him Ms. Eknes would not provide him additional time with the children. It is unclear why these family members could not have visited with the boys during Mr. Ponsford’s parenting time. He does not provide any details of any particular special family event that was organized at which the boys attendance was requested and refused by Ms. Eknes. He recites generalities. I am not satisfied that Ms. Eknes is as unwilling as he suggests to provide him additional time with the children for these events. The problem may be in respect to the notice and details he has given to her in respect to these requests. There will be no variation to the parties parenting plan.

[12] Mr. Ponsford asks for a variation in the description of the parties parenting arrangement from joint custody, as appears in the separation agreement, to shared custody, representing the actual parenting structure. The parenting schedule as outlined in the Separation Agreement may well result in the children being in Mr. Ponsford’s care for 40% or more of their time. However, this was the schedule that has existed since the Separation Agreement was signed by both parties. Mr.

Ponsford signed the Agreement and had legal counsel representing him at the time. Notwithstanding the parenting schedule the Agreement described their arrangement as joint custody. No request for change was made when the Corollary Relief Judgment was granted. There is no change in the "condition, means, needs or other circumstances" of the children since the Corollary Relief Judgment was granted.

[13] There will be no variation to the description of the parenting arrangement.

VARIATION OF CHILD SUPPORT

[14] A variation of child support requires a court to

> "...satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order....". (section 17 (4) or the Divorce Act)

[15] The relevant portion of the Federal Child Support Guidelines is found in section 14. It provides that the amount of child support to be paid is to change when:

> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and.....

[16] The parties Separation Agreement dated April 28, 2003 has the following provisions in respect to child support:

> 4.14 a) Regardless of the current time-sharing schedule of access contained in 4.0 CUSTODY AND ACCESS (paragraph 4.12 4.13 inclusive) and the current circumstances of the Parties, the Husband covenants and agrees to pay to the Wife the Base Table Amount of child support, which is presently $915 per month, for

> the care and support of the children of the marriage pursuant to the Federal Child Support Guidelines,.....
>
> b) the Husband's base salary for setting the monthly child support amount for the year 2003 shall be the Husband's salary on the days when the couple separated – $70,000 per year. Should the Husband's annual income for the year 2003, as per Line 150 of the husband's 2003 income tax return be more or less than this amount, the lump some adjustment will be paid to correct the amount of child support for 2003. If the Husband's annual income is more than the base salary, the Husband shall pay an adjustment to the Wife. If the Husband's annual income is less than the base salary, the Wife will pay an adjustment to the Husband. The amount of the adjustment shall be based on the child support tables and shall equal the difference between the amount of support actually paid and the amount that should have been paid based on the Husband's annual income. The lump some adjustment payment shall be made no later than August 1, 2004;.....

[17] Additional terms in the Separation Agreement attempt to devise a system requiring, on a yearly basis, a readjustment to the amount of child support to be paid based upon Mr. Ponsford's income as disclosed in Line 150 of his income tax return. The parties had hoped to bind the Maintenance Enforcement Program to these changes but it is apparent from the evidence provided by Ms. Eknes this Program will only respond to variation orders. Neither Ms. Eknes nor Mr. Ponsford had orders prepared to reflect income changes.

[18] The essence of the argument put forward by Mr. Ponsford, to support his request for a variation in the amount he has paid and will pay for child support, is based upon his definition of the parties parenting arrangement as shared parenting. He wishes to invoke the provisions of Section 9 of the Federal Child Support Guidelines. As I said previously, the parenting schedule as outlined in the Separation Agreement may well result in the children being in Mr. Ponsford's care for 40% or more of their time. However, this was the schedule that has existed since the Separation Agreement was signed by both parties. No request for change was made when the Corollary Relief Judgment was granted. There is no change now. The parties are operating under the same parenting arrangements that existed when the Corollary Relief Judgment was issued. Mr. Ponsford is faced with a court order that requires him to pay child support based upon the table guideline amount provided by the Child Support Guidelines, "Regardless of the current time-sharing schedule of access contained in 4.0 CUSTODY AND ACCESS (paragraph 4.12

4.13 inclusive) and the current circumstances of the Parties ....". There has been no change in the parenting arrangements since that order that would justify a variation to the requirement that Mr. Ponsford pay child support based on the table amounts required by the Federal Child Support Guidelines.

[19] Mr. Ponsford complains that relief was not granted to him when he became unemployed and when he earned less than the $70,000.00 salary he was earning when he signed the Separation Agreement. However, this was taken into consideration. The Corollary Relief Judgment addressed that situation and contained the following provisions as an amendment to the Separation Agreement:

> (a) IT IS ORDERED that the amount of child support payable to the Respondent by the Petitioner for the care and support of the children shall be in the amount of $305.00 per month payable to the Respondent commencing the 15th day of March, 2004 and shall be payable on the 15th day of every month thereafter until otherwise ordered by a Court of competent jurisdiction;
>
> (b) IT IS FURTHER ORDERED that upon receipt of verification of the Petitioner's Employment income the Petitioner shall provide same to the Respondent and the amount of child support payable shall be adjusted to reflect the Petitioner's Employment Insurance income, as verified, pursuant to the Child Support Guidelines without the necessity of a further Court Order and Maintenance Enforcement shall be advised;
>
> (c) IT IS FURTHER ORDERED that the Petitioner shall notify the Respondent immediately upon becoming employed and shall immediately provide the Respondent verification of the Petitioner's income and child support shall be adjusted accordingly to reflect the amount payable pursuant to the Child Support Guidelines, upon the first month the Petitioner becomes employed and shall be payable on the first day of each month thereafter until otherwise ordered by a Court of competent jurisdiction and Maintenance Enforcement shall be advised;

[20] There are some problems in respect to the wording of these provisions. Paragraph 1 (a) suggests there would be no variation in the amount of child support unless by way of court order. This could suggest the regular adjustment mechanism provided in the Separation Agreement would no longer apply. Paragraph 1 (b) and (c) suggest a mechanism of variation that does not require a court order but only in respect of the two circumstances described in those

paragraphs. Ms. Eknes' evidence is that the intent of these provisions was to recognize Mr. Ponsford's unemployment would be temporary and to provide a means to avoid returning to court when two known events would occur - his receipt of Employment Insurance and a return to paid employment. She did not understand these provisions to have deleted the requirement for regular yearly change to the amount of child support to be paid based on changes in income.

[21] The court ordered that the child support could be adjusted by the mechanism provided in paragraph 1(b) and (c) of the Corollary Relief Judgment. By incorporating the Separation Agreement into the Corollary Relief Judgment the court was in effect "ordering" that the mechanism for adjusting child support contained in the provisions of that Agreement would apply to the parties. I am satisfied that the provisions of paragraph 1 (a) of the Corollary Relief Judgment did not amend the provisions contained in paragraph 4.14 (c) and (d) of the Separation Agreement.

[22] There has been a variation in the amount Mr. Ponsford has paid for child support. When he obtained employment he did begin paying a greater amount than $305.00 for child support. The problem is, he did not pay what he should have paid based upon his income. The effect of this will be discussed in reference to child support arrears.

CHILD SUPPORT ARREARS

[23] Paragraph 4.14 (c) and (d) of the Separation Agreement contemplated a recalculation of child support for a preceding calendar year once the Line 150 Income Tax Return income was known. If the Line 150 income was greater than the income amount used for the table guideline calculation the difference between what should have been paid and what was paid was to be provided to Ms. Eknes on or before August 1. If the Line 150 income was less than the income amount used for the table guideline calculation, a reimbursement would be due to Mr. Ponsford from Ms. Eknes to be paid on or before August 1.

[24] Mr. Ponsford did increase his child support payment from $305.00 per month. In August 2004 he became employed. He paid $804.00 for the month of August. He paid $832.00 for the month of September and he continued to pay this amount until September 2005. In October 2005 he paid $530.00 and in November 2005 he commenced paying $835.00. Whether he paid the correct amount, based

upon his income, to July 2006 is not an issue before me. What is at issue is the appropriate amount to be paid since August 2006.

[25] Mr. Ponsford's Line 150 income has been as follows:

2005	$64,879.00
2006	$67,093.00
2007	$69,174.00

[26] Ms. Eknes has prepared a calculation of what Mr. Ponsford has paid and what he should have paid based upon his increasing income from August 2006 until July 2008. She determined that Mr. Ponsford owed her an additional sum of $2,592.00 for child support. This calculation is attached as Exhibit "A" to her supplemental affidavit found at Tab 13 of Exhibit 1 in this proceeding. When questioned about this calculation and whether the math was correct Mr. Ponsford testified that he was unable to dispute the correctness of the calculations.

[27] I am satisfied that Ms. Eknes is not required to have a court order as a foundation for each of the arrears payments she now requests. This is because these amounts were due as a result of the effect of paragraph 4.14 (c) and (d) of the Separation Agreement. The provisions of the Separation Agreement when read together with the provisions of the Corollary Relief Judgment entitles her to seek these arrears based on Mr. Ponsford's changes in income notwithstanding she did not seek an order from the court to confirm the payment to be made based on each of those income changes. Hers is an enforcement claim not a request for a retroactive variation.

[28] Ms. Eknes accepts that some credit should be given for the period in 2007 when Mr. Ponsford had primary care of their eldest son. If a set off had been used at that time when Mr. Eknes' income was $31,470, child support would have been reduced to $321.00 per month. Recalculating for the year, after applying the amount Mr. Ponsford should have paid based on his income ,Ms. Eknes would owe Mr. Ponsford $16.00. Under these circumstances I consider it appropriate not to order payment of the arrears or a set off of child support during the period requested.

[29] The care arrangements for both children when Ms. Eknes attended to her dying mother were an accommodation not a change in parenting arrangements. I will not order Ms. Eknes to pay child support to Mr. Ponsford for this period.

PROSPECTIVE CHILD SUPPORT

[30] By operation of section 14(a) of the Federal Child Support Guidelines, the provisions of the parties Settlement Agreement and the Corollary Relief Judgment the amount to be paid for child support is to change when there are changes in Mr. Ponsford's income. Mr. Ponsford has been paying child support, for two children, in the amount of $835.00 per month. This represents, for the Table Guideline calculation, an income of $58,800.00. Mr. Ponsford's Line 150 income from his 2007 Notice of Assessment from Revenue Canada is $69,174.00. This income requires a payment of $973.00 per month. As required by the Corollary Relief Judgment resulting from the incorporation of the Separation Agreement Mr. Ponsford is to pay this amount on the 15th day of each month commencing August 15, 2008.

FUTURE VARIATION

[31] The Guidelines require child support to be based upon current income. This occasionally is difficult to determine and estimates are often incorrect when later compared to Line 150 of an income tax return. There is no administrative structure available to calculate current yearly income. As a result parents are forced to return to court repeatedly to ensure the correct amount of child support will be paid and collected. In this case the parties, by agreement, have attempted to base payments on previous income with an adjustment for increases or decreases in that income as verified by Line 150 of the payor's income tax return. I consider it important that an enforceable means be found to carry out the intent of the parties Separation Agreement. As I result the following should appear in the order to be prepared as a result of this decision:

[32] When Ms. Eknes receives a copy of Mr. Ponsford's income tax return, if his income is different from the income disclosed in his previous taxation year, and if that difference would result in a different Table Guideline child support payment, Ms Eknes shall have prepared a consent order varying the Corollary Relief Judgment in respect of the amount to be paid for child support. The order is to state that the new payment amount shall commence August 15, of the current year. She

shall also include in that order the amount to be paid by Mr. Ponsford to her as a result of an underpayment of child support, or the amount to by paid by her to Mr. Ponsford as a result of an overpayment of child support for the year to which the income tax return applies. The order is to state that the underpayment or reimbursement is to be paid on or before August 1 in the current year. When the terms of the consent order correctly state Mr. Ponsford's income(which will be the income from Line 150 of the received income tax return), properly calculate the child support amount, and any underpayment or overpayment, both parties shall consent to the terms of the order by placing her and his signature on the last page of the order.

[33] Ms. Eknes shall file the consent order with the court and include an Ex-Parte Application requesting that the consent order be issued by the court. Ms. Eknes shall attach an affidavit to the Ex-Parte Application in which she shall refer to this Variation Order as the basis for her request that the court issue the consent order. She shall attach a copy of Mr. Ponsford's Income Tax Return and his Notice of Assessment from Revenue Canada, if the notice has been provided to her, to confirm his Line 150 income for the year in question.

[34] If Ms. Eknes incurs legal expense for the preparation of the order, the Ex-Parte Application and the affidavit, Mr. Ponsford shall pay one-half of that legal account within 10 days after she has provided him with a copy of the account and her receipt for payment.

CHILD TAX BENEFIT

[35] Ms. Eknes receives that child tax benefit. There are regulations that control entitlement to this benefit. The court cannot order a government department to pay this benefit to one party or the other. Perhaps a court could order a parent to apply this benefit in some specific way but it would have to have some juristic reason for doing so. No cases have been provided to me where other courts have made such an order. I consider Ms. Eknes to be a responsible parent. She must manage her financial resources to attend to her children's support as well as her own. I do not intend to micro manage what she does with money she receives to assist her with the financial cost of raising the children. I will not order her to apply this benefit to an R.E.S.P.

VARIATION TO SPOUSAL SUPPORT

[36] The Divorce Act has a threshold requirement to justify a variation of spousal support. Section 17 (4.1) provides that a court

> "...satisfy itself that a change in the condition, means, needs, or other circumstances of either former spouse has occurred since the making of the spousal support order..."

[37] The Separation Agreement required Mr. Ponsford to pay spousal support to Ms. Eknes in the amount of $600.00 per month at a time when he was earning $70,000.00. The support was time limited and was to terminate absolutely on December 1, 2007. Paragraph 3.7 of the Separation Agreement provided:

> ..... It is understood that the Wife shall not seek an increase in spousal support should the Husband's income increase. It is understood that should the Husband's income decrease to such an extent as to be a change in the Husband's economic circumstances prior to December 31, 2007 the Husband may apply to a court of competent jurisdiction for a review of spousal support payable by the Husband to the Wife.

[38] In fact a change in Mr. Ponsford's financial circumstances did occur; he became unemployed. The change is reflected in the Corollary Relief Judgment:

> 1(d) IT IS FURTHER ORDERED that all spousal support payments ....are suspended. Upon the Petitioner becoming employed again the amount of spousal support payable shall be reviewed but this Corollary Relief Judgment does not abrogate or vacate Part 3 of the Separation Agreement with respect to spousal support. Spousal support shall be reviewed pursuant to clause 3.7 of the Separation Agreement, attached as Schedule "A";

[39] Neither party, until this proceeding, requested a review. When Mr. Ponsford returned to work in August 2004, he paid $515.00 as spousal support for that month. Beginning September 2004 and until December 2007, he paid $535.00 per month. There was no agreement that this was the amount to be paid. Ms. Eknes was unable to enforce the payment of $600.00 per month through Maintenance Enforcement due to the wording of the order. I will now conduct the inquiry that should have occurred when Mr. Ponsford returned to work given that he did not have the consent of Ms. Eknes to reduce spousal support as he did.

[40] Paragraph (clause) 3.7 of the Separation Agreement suggests no review of the amount of spousal support to be paid would be appropriate unless his income decreased " *to such an extent as to be a change in the Husband's economic circumstances"*. I interpret this to mean that the change needed to be substantial in that it would interfere with his ability to support himself and pay spousal support. This certainly was the case when Mr. Ponsford was unemployed but in April 2004 he returned to work. He has not provided any information about his living expenses since he returned to work. His income in 2004 was $61,577.00 but $5,055 of that came from his cash out of an R.R.S.P. Nevertheless this did provide income to Mr. Ponsford that represented a total gross monthly income of $5,131.00 from which he was to pay $600.00 per month in tax deductible spousal support. I realize he was to pay child support and on this income that payment would be $822.00 per month. He also had a tax deductible child care expense. I have estimated his net income to be $4,000 per month after payment of income tax and compulsory deductions. After paying spousal support and child support he would have $2,578 to support himself and provide for the children when they were in his care. I have no evidence to suggest he was unable to support himself or provide for the children on this amount and therefore cannot make a determination that his decrease in income from $70,000.00 to $61,577.00 created a change in his economic circumstances. A similar analysis applies to his ability to pay in subsequent years. Certainly by 2007 the argument for a decrease cannot be sustained. His income by then was very close to $70,000.00.

[41] Ms. Eknes has calculated the arrears for spousal support to be $2,685.00. Mr. Ponsford is to pay her these arrears in full.

COSTS

[42] Ms. Eknes is seeking costs. Her submissions on costs shall be filed with the court and copied to Mr. Ponsford within 10 working days (days exclusive of Saturday, Sunday and holidays) from the date of this decision. Mr. Ponsford's submissions are to be filed with the court and copied to Ms. Eknes within 5 working days of his receipt of her submissions. If Mr. Ponsford has raised an issue in his submissions not considered in Ms. Eknes submissions she may file a further submission addressing those issues within 5 working days of receiving his submissions.

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Beryl MacDonald, J.