SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *MacDonald v. Istvankova*, 2017 NSSC 145

Date: 2017-05-25
Docket: *SFSNMCA* No. 96681
Registry: Sydney

Between:

Shaun Allen MacDonald

Applicant

v.

Zuzana Istvankova

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	March 14, 2017, in Sydney, Nova Scotia
Written Release:	May 25, 2017
Counsel:	Shaun Allen MacDonald, Self-represented Zuzana Istvankova, Self-represented

By the Court:

Introduction

[1] The parties have one child of the marriage, M.H.M., born March 18, 2004. They separated on March 11, 2011 while residing in Newfoundland and Labrador and signed a separation agreement on October 25, 2011. That agreement was incorporated in the parties' Corollary Relief Order in Newfoundland and Labrador, and filed as an order of the Supreme Court of Nova Scotia on July 25, 2015. Mr. MacDonald filed a variation application on May 4, 2016.

[2] He seeks changes to the requirement to pay special expenses for the child, and to reduce his obligation to maintain life insurance coverage for her. His application also includes a request to change the access provisions of the separation agreement

[3] Ms. Istvankova is opposed to several of the changes requested, and in particular says that Mr. MacDonald should be paying section 7 expenses for the child.

[4] The parties were able to reach agreement on a number of other issues before trial. Those agreements include:

1. Mr. MacDonald will have one month's uninterrupted access with the child from August 1st to August 31st inclusive, each year.
2. Mr. MacDonald may name the child as partial beneficiary of his life insurance, leaving the other half available for his other children, for so long as the child is a dependent child.
3. Ms. Istvankova may change the child's permanent place of residence from Canada, subject to providing 90 days written notice to Mr. MacDonald.
4. Neither party will require the consent of the other to travel for vacation purposes outside of Canada while the child is in their care.
5. Mr. MacDonald will pay child support based on his increased income on a prospective basis, which means for 2016 he will pay $1360.55 per month effective June 1, 2016 based on income in 2015 of $169,398.00 under the Manitoba table.

Background

[5] In their separation agreement, the parties agreed to exercise joint custody of M.H.M., but the child remains in the primary care of her mother. Mr. MacDonald's access was specified, according to his place of residence, and included holiday and vacation access. He agreed to pay all costs of access.

[6] Mr. MacDonald agreed to pay child support of $1,300.00 per month for the support of the child, plus $433.33 per month toward "special expenses". The agreement does not reference his income for purposes of determining the table amount of child support, nor does it state what proportionate share of special expenses he was responsible for. It also fails to identify the type of "special expenses" being incurred for the child.

[7] In addition, Mr. MacDonald agreed to pay spousal support to Ms. Istvankova of $866.67 per month. The spousal support was to terminate after five years, or when Ms. Istvankova obtained full time employment after completion of her education, whichever occurred sooner.

[8] In 2012, Ms. Istvankova and the child relocated to Cape Breton. Mr. MacDonald moved to Cape Breton for a short time and then to Manitoba. Since his move to western Canada, he has been able to exercise regular access with the child, paying for her to fly as an unaccompanied minor on some occasions, and accompanying her himself on other occasions.

[9] Mr. MacDonald has paid monthly child support since the agreement was signed. He stopped paying section 7 expenses in October, 2012 and he no longer pays spousal support.

[10] Ms. Istvankova has re-partnered and has a second child. She is employed full-time. The child M.H.M. is now in middle school, doing very well academically, and involved in a number of extra-curricular activities. Mr. MacDonald has married and he, too, has a young child, as well as a stepson.

Issues

1. Has there been a change of circumstances sufficient to justify variation of the order?
2. Did Mr. MacDonald's obligation to pay section 7 expenses terminate in 2012?

3. Should Mr. MacDonald pay section 7 expenses for the child's extra-curricular activities on a retroactive or prospective basis ?

4. If so, what is the appropriate contribution to section 7 expenses ?

ISSUE 1: Has there been a change of circumstances sufficient to justify variation of the order?

[11] There have been a number of significant changes in the parties' circumstances since the agreement on which the corollary relief order is based was first signed. The child's needs have changed - she no longer requires childcare, and is in middle school. The parties have both re-partnered and have new dependents. They have also both moved to a different province and secured new employment, with increases in their respective incomes. I find all of these changes constitute sufficient reasons to vary the order.

ISSUE 2: Did Mr. MacDonald's obligation to pay section 7 expenses terminate in 2012?

[12] When the parties separated, the child M.H.M. was in daycare. The monthly cost was $430.00. Mr. MacDonald cites this as the reason why the figure of $433.33 was used in the separation agreement. He says that he and Ms. Istvankova agreed that when the child care costs ended, he would no longer be required to pay anything above the table amount for M.H.M.'s support.

[13] Ms. Istvankova says that although the child care costs ended when she moved to Cape Breton, M.H.M. was enrolled in a number of extra-curricular activities, to which Mr. MacDonald has not contributed. She feels that he should pay his proportionate share of the activity costs retroactive to 2012.

[14] Although the parties attempted to negotiate changes to the agreement after 2011, none of those changes was incorporated in a new court order or written agreement signed by both. They communicated by email, several of which were tendered in evidence. The first one, dated November 22, 2012 from Mr. MacDonald to Ms. Istvankova, attaches a copy of an amended agreement. That amendment contains a new clause 11.1 which was intended to replace the former clause 11 dealing with section 7 expenses. It reads:

> Special expenses for [M.H.M.] shall be negotiated and agreed upon on a monthly basis.

[15] Just days later, on November 25, 2012, there is an email from Ms. Istvankova to Mr. MacDonald, this one entitled "Changes to support payments". In it, Ms. Istvankova addresses payment of spousal support, which Mr. MacDonald had stopped paying. He agreed to pay the two missed weeks' support and resume payment of spousal support.

[16] Ms. Istvankova's email goes on to confirm that "… upon receipt of the above payment I do agree to adjust the amount of the spousal support payments starting on October 4th 2012 as follows: You shall pay $866.67 per month for the support of [M.H.M.], this amount shall be paid in weekly installments of $200 per week. You shall pay $1266.67 per month in spousal support, and this amount shall be paid in weekly installments of $300 per week."

[17] The email further states that a "legal agreement" would be drafted to capture " the above changes in addition to others."

[18] In 2015, Mr. MacDonald had his counsel draw up an amended agreement, which he emailed to Ms. Istvankova. It contains a different clause 11.1 which states:

> The former husband shall not pay to the former wife any monies towards special expenses or extra-curricular activities for [M.H.M.]. As previously agreed by both parties, the amount outlined in the original separation agreement, has not been payable since October 4, 2012.

[19] There is no evidence that this, or any of the other proposed amendments, was ever signed by the parties.

[20] Ms. Istvankova tendered a series of emails ranging from 2013 – 2015, in which the parties discussed M.H.M.'s activities. A couple of the emails contain requests from Ms. Istvankova that Mr. MacDonald contribute to activity costs. He agreed to pay for a summer program as M.H.M.'S grading day present, and Ms. Istvankova suggested that he help with the cost of M.H.M.'s bagpipes as a Christmas or birthday gift. However, there is no evidence that she asked Mr. MacDonald to resume regular, monthly contributions to M.H.M.'s activity expenses.

[21] After November 25, 2012, Ms. Istvankova negotiated a contribution to the cost of M.H.M.'s activities as the expense arose. She adduced no evidence to show that she advised Mr. MacDonald (at least prior to 2015) that he was in default of his obligation to pay $433.00/month in "special expenses" according to the order. So although the original separation agreement was never formally amended to reflect the agreement to terminate monthly payment of section 7 expenses, I find the parties conducted themselves as if an agreement had been concluded on that point.

ISSUE 3 - Should Mr. MacDonald be required to pay section 7 expenses for the child's extra-curricular activities retroactively or prospectively ?

[22] Ms. Istvankova registered the order in Manitoba for enforcement with the Maintenance Enforcement program in September, 2015. Arrears of $15,066.64 were calculated at that time.

[23] I find that registration of the order constituted notice to Mr. MacDonald that Ms. Istvankova was seeking a regular, monthly contribution to M.H.M.'s section 7 expenses. Mr. MacDonald did not resume payment at that time, though he did start paying an extra $50/week on May 12, 2016 to address the arrears.

[24] I must consider whether M.H.M.'s activity expenses constitute extraordinary expenses to which Mr. MacDonald should contribute as of September, 2015 when he was put on notice of Ms. Istvankova's claim.

[25] The separation agreement references payment of "special expenses" at clause 11, but there is no definition of that term in the agreement.

[26] In **Currie v. Currie**, 2016 NSSC 175, Justice Beryl MacDonald decided a variation application in which the parties disagreed on section 7 expenses. Like the case before me, there was no definition of what constituted special or extraordinary expenses in their original agreement. MacDonald, J. resorted to the wording of the federal **Child Support Guidelines** for assistance.

[27] In **Conohan v. Cholok**, 2017 NSSC 7, Justice D.W. Wilson dealt with a claim for retroactive section 7 expenses for extra-curricular activities. Wilson, J. considered sections 7 (1.1)(a) and (b) of the provincial **Child Support Guidelines,** which state:

Definition of "extraordinary expenses"

7. (1.1) For the purposes of paragraphs (1)(d) and (f), the term *extraordinary expenses* means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

[emphasis mine]

[28] In **Conohan v Cholok** *(supra*), Wilson, J. noted that the onus is on the parent claiming expenses for extra-curricular activities to demonstrate that the expense is "extraordinary", and that it should be paid in addition to the table amount of child support. He confirmed there is a starting presumption that the cost of extra curricular activities is included in the monthly table amount of child support paid by the payor parent.

[29] In the result, Wilson, J. found the child's participation in a drama group was beneficial to her, and he allowed the expense. He also allowed piano lessons and sporting activities, all of which the child had participated in for years, and which contributed to her healthy development. However, limits were set for the amount of expenses to be cost shared between the parties.

[30] Wilson, J. declined to order payment of sports registration fees and school fees, considering them base expenses in relation to the activities which were covered under the basic table amount.

[31] In **Desrosiers v. Pastuck**, 2016 NSSC 308, Justice Forgeron dealt with a claim for extracurricular activity expenses. She noted that in considering whether activity expenses are "extraordinary", a court must examine the activities in their totality and in the context of the family's resources and the applicable legislative factors. This analysis is "subjective and fact specific". In that case, Forgeron, J. found that the proposed expenses were necessary for the child's development, and that the expenses were reasonable in relation to the means of the parties, both of whom were financially secure.

[32] In the present case, M.H.M. is currently enrolled in:

- swimming
- dance
- drama class and camp
- piano
- fiddle
- bagpipe lessons
- voice lessons
- school band
- summer camp at the Gaelic College
- choir

[33] The total amount of extra-curricular activity expenses for M.H.M. since the school year 2012-2013 is as follows:

2012 – 2013	$7,074 / $589.50 m
2013 – 2014	$6,959 / $579.92 m
2014 – 2015	$6,195 / $516.25 m
2015 – 2016	$7,005 / $583.75 m
2016 – 2017	$7,069 / $589.08 m

[34] Ms. Istvankova earned the following amounts from 2013 - 2017:

YEAR	ANNUAL INCOME
2013	11,232.00
2014	16,975.00
2015	37,908.00
2016	38,000 (est.)
2017	38,000 (est.)

[35] M.H.M.'s activity expenses constitute a significant percentage of Ms. Istvankova's income, even including the table amount of child support. She cannot reasonably pay them without contribution from Mr. MacDonald. She has successfully rebutted the presumption that the cost should be included in the table amount of child support payable to her as of September, 2015.

[36] The activities in which M.H.M. is currently involved are ones in which she has participated for years. A number of them pre-date separation. M.H.M. is said to be a talented actor, musician and singer, who needs to be kept busy. Both parents agreed that structured activities are necessary for her development, and that she excels in performing arts.

[37] Mr. MacDonald raised several points in opposing payment of the expenses claimed:

- He says he was not consulted in relation to many of these activities. However, the emails tendered by Ms. Istvankova show that she sought Mr. MacDonald's input on the issue of M.H.M.'s activities. There is no evidence that Mr. MacDonald opposed those activities. Indeed, he testified that he supports many of M.H.M.'s activities. So this argument carries no weight.

- He says M.H.M. is enrolled in too many activities and thus enjoys no "down time". Despite this, there is no evidence that M.H.M.'s school work has suffered. This argument carries no weight either.

[38] Mr. MacDonald's position when he filed his variation application was that payment of special expenses should be terminated. However, he stated in closing submissions that he is prepared to pay $205.00 monthly towards M.H.M.'s drama, vocal, piano and dance expenses, which form only a portion of her scheduled extra-curricular activities.

[39] Mr. MacDonald's annual income from 2012 – 2017 based on his notices of assessment from Revenue Canada is as follows:

YEAR	ANNUAL INCOME
2013	177,370.00
2014	186,361.00
2015	$169,398.00
2016	170,000 (est.)
2017	170,000 (est.)

[40] Ms. Istvankova summarized the cost of M.H.M.'s activities since 2010, to demonstrate that M.H.M. has been involved in the performing arts and sports for many years. She argues that the child should be entitled to continue all of these activities, because both parties agreed on them before separation.

[41] In the current school year, Ms. Istvankova estimates the total for all of M.H.M.'s activities will be about $589.00 per month. Next year, she estimates the cost will drop slightly, to $525.00 per month.

[42] Based on an income of $170,000.00 in 2016, less child support payable in the amount of $1,360.55 as agreed, Mr. MacDonald's proportionate share of the total section 7 expenses for this academic year would be 74%. This would equate to $436.00/month, which on top of his child support and access expenses would bring his total monthly payment to $2,111.55.

[43] Mr. MacDonald argues that a reasonable contribution would be $205.00 per month, based on a limited list of arts and music activities. He suggests this payment should start in March, 2017.

[44] Ms. Istvankova says that she would accept a contribution towards certain activities, but she calculates a higher figure based on **all** the musical and performing arts activities in which M.H.M. is involved. She believes that **all** of these activities benefit M.H.M., and should be supported. She calculates Mr. MacDonald's contribution, after deduction of child support payable to her, at 68% of the total cost, or $355.00 per month. She believes arrears should be recalculated retroactively to 2012 on that basis.

[45] Ms. Istvankova argues that since Mr. MacDonald's income is now higher, his cost is proportionately less. I do not agree. The total amount she proposes for the 2016 – 17 academic year of $7,069.00 is not reasonable or sustainable, considering the means of the parties and their other obligations.

[46] I find it is appropriate to vary Mr. MacDonald's section 7 obligations to require payment of $300.00, per month, based on a reasonable contribution to M.H.M.'s activity expenses. That sum shall be payable retroactive to September, 2015.

[47] In setting the figure of $300.00/month, I have taken into consideration the fact that Ms. Istvankova has not included in her calculations the cost of transporting the child to her activities, and the fact that she was eligible for the child fitness and arts tax credit for income tax purposes until 2016. I have also taken into account Mr. MacDonald's access costs.

[48] I direct that any accumulated penalties and interest charged on arrears calculated for the period prior to September, 2015 be forgiven. Interest and penalties shall be adjusted to reflect the lower figure for section 7 expenses payable between September, 2015 – May, 2017.

[49] Commencing June 1, 2017 Mr. MacDonald will pay $300.00 monthly towards section 7 expenses, for so long as the child remains enrolled as a full-time secondary school student.

Disposition

[50] Mr. MacDonald's application to terminate payment of s. 7 expenses is allowed in part. Arrears before September, 2015 are forgiven. He will pay $300.00 / month towards the child's extracurricular expenses retroactively to September, 2015 and on a prospective basis. The other changes agreed between the parties to the order are approved.

[51] Given the divided success, and the fact both parties were self-represented, I direct that each party bear their own costs.

MacLeod-Archer, J.