SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *P.S. v. L.J.*, 2018 NSSC 78

Date: 2018-04-05
Docket: SFH-MCA-093363
Registry: Halifax

Between:

P.S.

Applicant

v.

L.J.

Respondent

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Judge: The Honourable Justice Elizabeth Jollimore

Heard: March 6-7, 2018

Summary: Father's application to vary shared parenting arrangement to equal parenting arrangement dismissed. Child support, calculated under s. 9 (shared parenting) adjusted to reflect parents' current incomes. Mother's tax-free long-term disability payments grossed up.

Key words: Family, Parenting, Custody, Shared parenting, Child support, Variation, Material change in circumstances

Legislation: *Parenting and Support Act*, R.S.N.S. 1989, c. 160, section 37
Provincial Child Support Guidelines, NS Reg. 53/98, section 9, section 14

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Counsel:	Tanya G. Nicholson for L.J. Christine J. Doucet for P.S.

By the Court:

Introduction

[1] Mr. J wants to vary the terms of a shared parenting order so he will have equal parenting time and sole authority to make health and education decisions. He and Ms. S both want to adjust child support.

Parenting variation

[2] I may vary the terms of a parenting order only if there's been a change in circumstances since the last order was made: *Parenting and Support Act*, R.S.N.S. 1989, c. 160, section 37.

[3] The change must be one to the child's situation or to the ability of the parents to meet the child's needs. The change must materially affect the child. The change must be one which was either not foreseen or could not have been reasonably contemplated by the judge who made the order sought to be varied: *Gordon v. Goertz*, 1996 CanLII 191 (SCC).

[4] Because this is Mr. J's application, he must prove there has been a change in circumstances since the last order was made. Mr. J argues that the passage of time, combined with Ms. S's "lack of judgment" and her "refusal to deal" with him, constitute a change in circumstances that warrants variation of the time-sharing and decision-making terms of the current parenting order.

[5] Mr. J acknowledges that there must be something more than the passage of time to warrant a variation order. This case is unlike *Kennedy v. McNiven*, 2014 NSSC 162 and *Yates v. Boswell*, 2010 NSSC 11, where there was at least a decade between the variation application and the order sought to be varied, and the presiding judges noted significant changes in the maturity of the children who were the focus of the proceedings. Here, the child is 3 ½ and the current order was made in June 2016. The current order resulted from a settlement conference, two contested hearings and the parties' negotiations, over the period from July 2015 to June 2016.

Have circumstances changed since the order was made?

[6] Mr. J says that Ms. S's "lack of judgment" and her "refusal to deal" with him, combined with the passage of time, constitute a change in circumstances.

[7] Mr. J says that Ms. S demonstrates a lack of judgment by refusing to restrict her brother and her father so they must be supervised in the child's presence.

[8] Mr. J wants contact to be supervised because of events which occurred before the girl was born. In the case of Ms. S's brother, these events were at least 20 years ago. In the case of Ms. S's father, they were between 4 and 6 years ago.

[9] These circumstances are not new. They were known when the parties had their settlement conference and their two hearings.

[10] Mr. J says that he was unaware that Ms. S's brother was living with Ms. S's parents (where the girl was receiving child care), until after the second hearing in 2015, so this is a change in circumstances. I disagree.

[11] Mr. J has not shown that Ms. S lacks judgment, or that her judgment about the child's contact with her uncle or grandfather has changed since the order was negotiated and granted. Ms. S has exercised appropriate judgment in adopting an "eyes on" approach with her brother. The girl or her uncle are observed at all times so they are never left together. Ms. S's mother uses the same approach.

[12] Ms. S does not leave the child with anyone who is intoxicated and there is no evidence that she has ever done this.

[13] Mr. J offers many examples of Ms. S's "refusal to deal" with him, such as:

- she provided him with last minute notice of the child's appointment for a flu shot, effectively denying him the opportunity to have input and to attend;
- she didn't inform him when she became disabled from working;
- she didn't inform him of changes to the child's daycare provider; and
- she hasn't enabled him to monitor childcare payments made to her mother.

[14] The parties were ordered to participate in counselling to develop better conflict resolution skills and to communicate effectively within a separated family. Each has taken part – individually – in counselling. Their communication remains problematic.

[15] For example, in December 2015 Mr. J wrote Ms. S an email. Mr. J said that "a few stipulations" about who could be left alone with the child must be added to the order the parties were negotiating. He commented:

> If you agree [to adding the stipulations], I have no problems keeping these concerns between "us" and handling it as a "Parental/in house/family" issue, but if you disagree and treat me as a lier [sic] or somebody who shouldn't be as concerned as I am, then the truth will have to come forth. I look forward to you and I handling this between us and thus do not have to revisit court.

[16] Ms. S responded by telling Mr. J he must respect and trust her as a parent. She testified that she felt Mr. J was trying to threaten her and she decided to hold her ground. A more respectful approach by Mr. J might have garnered a positive response.

[17] In other emails, the parties accuse each other of lying, or dictate what the other parent *must* do. Rather than communicate as two people who share the responsibility of raising a child where each has an essential part to play in the child's successful upbringing, they are in combat.

[18] I do not accept that the manner of Ms. S's dealing with Mr. J is a change in circumstances. The current order required the parents to undertake communications counselling:

their communications at the time the current order was made were deficient. They remain so.

[19] Mr. J acknowledged that there needed to be something more than the passage of time for me to vary the current order. He has not met the burden on him and I dismiss his application to change the decision-making and parenting time terms of the current order.

Child support variation

Should child support be varied?

[20] Child support may be varied where there's a change in the condition, means, needs or other circumstances of either parent: subsection 14(b) of the *Provincial Child Support Guidelines*.

[21] The current order requires Mr. J to pay Ms. S the set off amount of $282.00, calculated under subsection 9(a) of the *Guidelines*, and the parents to share child care costs so that Mr. J paid 60% and Ms. S paid 40%. The order references the parties' 2014 incomes: Mr. J's was $80,800.00 and Ms. S's was $48,829.00.

[22] Mr. J's year-to-date earnings were $82,261.07, according to his paystub for the pay period ending December 30, 2017. He paid union dues of $750.00, so his income for child support purposes was $81,511.07. Mr. J's income is about $700.00 more than it was when the order was made.

[23] Ms. S's 2017 income was $58,180.08, according to the Statement of Income she filed in early 2017.

[24] Determining Ms. S's 2017 income requires more than looking at her 2017 Statement of Income. In late February 2017, Ms. S stopped working and, after three days of sick time, began to receive short-term disability benefits. This continued until June 24, 2017, when she began to receive long-term disability benefits. These continue to date. Ms. S's short-term benefits were taxable while her long-term benefits are not.

[25] In 2017, Ms. S had earnings and short-term disability benefits of $27,954.00. Her long-term disability benefits were $17,580.00, pre-tax. Because Ms. S had taxable income of $27,954.00 from her earnings and short-term disability benefits, I gross up the tax-free long-term benefits by 24% to reflect the marginal tax rate she would pay on this money if it was received as her last dollars of income. Because of this gross up, her long-term disability benefits are worth approximately $21,799.20 and her total income is $49,753.20, for child support purposes. By grossing up the long-term disability benefits, I am imputing income to Ms. S under subsection 19(1) of the *Guidelines*.

[26] In 2017, Ms. S's income was almost $1,000.00 more than it was when the order was made.

[27] If Ms. S remains off work, her 2018 income would be $35,160.00 from long-term

disability benefits. Grossed up for income tax, her income would be approximately $44,000.00. If she continues long-term disability benefits throughout 2018, her income would be approximately $4,800.00 less than it was when the current order was made.

[28] The parents' means and circumstances have changed, so it is appropriate that I consider a variation of child support.

How should child support be varied?

[29] Mr. J asks that I terminate his child support payments, aside from the proportionate sharing of child care expenses. Ms. S asks that I order Mr. J to pay her the table amount of child support while she receives long-term disability benefits, in addition to a proportionate sharing of child care expenses.

[30] While Ms. S plans to return to work this summer, I don't know if she'll be able to do so or if she'll be able to stay at work. So, I estimate her 2018 income based on her ongoing receipt of tax-free long-term disability benefits, which I gross up for income tax.

[31] Under section 9 of the *Guidelines*, I determine child support by looking at the amount each parent would pay the other by applying the tables, considering any additional expenses that arise because they share parenting, and considering the overall needs, means and other circumstances in each household: *Contino v. Leonelli-Contino*, 2005 SCC 63 at paragraphs 46-56. The goal is to ensure the child doesn't experience a significant variation in her standard of living when moving from one home to another: *Contino v. Leonelli-Contino*, 2005 SCC 63 at paragraph 51.

[32] Mr. J would pay Ms. S monthly child support of $700.00 based on his annual income of $81,500.00. Ms. S would pay Mr. J monthly child support of $375.00 based on her income of $44,000.00. The difference between these amounts is $325.00: this is the amount calculated under subsection 9(a) of the *Guidelines*. It is $43.00 more than Mr. J currently pays.

[33] There was no evidence of any additional costs incurred because of the shared parenting arrangement: subsection 9(b) of the *Guidelines*.

[34] The parties did not take issue with the other's housing or lifestyle.

[35] Mr. J's Statement of Expenses shows he has monthly expenses of $5,136.22. Without paying the set-off amount of child support, he has a monthly deficit of $179.22. He lives only with the girl who is the subject of this application. If he paid the offset amount of child support, his monthly deficit would be $504.22.

[36] Ms. S's Statement of Expenses shows she has expenses of $5,298.82. She lives with her two daughters. She has primary care of her older daughter, while the younger daughter is the subject of this application.

[37] Most of Ms. S's expenses are unchanged while she is not working: the couple's daughter

continues to receive full-time child care during school months. The day-to-day costs related to Ms. S's work, such as transportation, should have decreased, but no change is shown on her Statement. Her expenses have decreased because she no longer pays statutory deductions.

[38] Ms. S's contribution to child care expenses is inflated on her Expense Statement: she says she pays $533.00 each month toward the cost of child care for her younger daughter. Calculations provided in closing argument show the cost is $244.00 per month on an annualized basis.

[39] Ms. S's income includes the Canada Child Benefit, the HST Credit, the child support she receives for her older daughter, and the support calculated under subsection 9(a). Adjusting her child care expense payment to $2,928.00 per year ($73.20 per week for 40 weeks each year), means that Ms. S has overstated child care expenses by $289.00 per month. Considering all her income and her reduced child care costs, Ms. S's actual monthly deficit is $475.18.

[40] The parents' expenses are comparable. Based on their current allocation of child care expenses, they have deficits which are also comparable.

[41] Beginning on April 1, 2018, Mr. J shall pay Ms. S monthly child support of $325.00. He shall continue to pay $109.60 each week to Early Learners for the weeks that the child receives child care there. Ms. S shall continue to pay $13.20 weekly to Early Learners and to cover the weekly cost of $60.00 owed to her mother for child care.

Conclusion

[42] I dismiss Mr. J's application to vary the parenting order relating to his daughter.

[43] Beginning on April 1, 2018, Mr. J shall pay monthly child support of $325.00 to Ms. S and to pay $109.60 each week to Early Learners. Beginning on April 1, 2018, Ms. S shall pay $13.20 to Early Learners and to pay $60.00 to her mother each week.

[44] Ms. Nicholson shall prepare the order.

[45] Submissions on costs, if any, are due by April 27, 2018.

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

Halifax, Nova Scotia