SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Elliott v. Melnyk*, 2014 NSSC 446

Date: 2014-12-31
Docket: *Halifax* No. SFHMCA-078122
Registry: Halifax

Between:

Ingrid Elliott

Applicant

v.

Milan Melnyk

Respondent

DECISION

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	September 11, 2014, in Halifax, Nova Scotia
Written Release:	December 31, 2014
Counsel:	Sarah Harris, for the Applicant Milan Melnyk, Self-Represented

By the Court:

[1] **Introduction**

[2] Four-year old Dylan is the much loved son of Ingrid Mary Elliott and Milan Matthew Melnyk. Dylan is described as a smart, loving child, who enjoys sports, outside activities, and spending time with family. He has a promising life. Despite this promise, Dylan's emotional well-being is compromised because of parental conflict. The current court application has intensified the conflict. The court application concerns unresolved parenting and maintenance issues.

[3] **Issues**

[4] The following issues will be determined in this decision:

- Has Ms. Elliott proven a material change in circumstances?
- What, if any, parenting provisions of the 2013 consent order should be varied?
- What school will Dylan attend in September 2015?
- Has Mr. Melnyk proven an undue hardship claim?
- What is the appropriate child support order?

[5] **Background Information**

[6] Ms. Elliott and Mr. Melnyk were in a relationship between 2007 and 2011. Following their separation, Ms. Elliott applied to the court for a determination of outstanding parenting and financial issues.

[7] On January 12, 2012, an interim, consent order issued. The joint custody order granted Ms. Elliott primary care, and Mr. Melnyk reasonable access. Mr. Melnyk was ordered to pay $300 a month in child support, together with one-half of the child care expenses. The quantum of child support was less than the table

amount and was based upon the parties' consent. Mr. Melnyk assumed the parties' joint debt.

[8] In 2012, Mr. Melnyk earned employment income of $71,248.54, less union dues of $777.64, for a total income for child support purposes of $70,470.90. Mr. Melnyk also collapsed RRSPs valued at $9,965. Ordinarily, a monthly child support payment of $596 would have been assigned. Mr. Melnyk was only required to pay $300. Dylan thus received $3,552 less in child support than the *Tables* generated.

[9] On June 5, 2013, a permanent, consent order issued from the court. The joint custody and primary residence provisions remained unchanged. A specified access schedule was outlined, together with a provision that holiday and vacation time would be shared between the parties. Child maintenance was confirmed at a rate of $300 per month. Child care expenses, which were to be claimed by Ms. Elliott, were equally shared. Property and debt division were also effected.

[10] The permanent, consent order once again approved a departure from the payment of the table amount of child support based upon Mr. Melnyk's assumption of debt. The consent order does not state whether the departure was premised on hardship factors set out in s.10 of the *Guidelines* or special provisions as set out in s. 10 of the *Maintenance and Custody Act*.

[11] In 2013, Mr. Melnyk earned employment income of $69,735.79. He also collapsed RRSPs valued at $2,965. The RRSP income is not a reoccurring amount. Union fees equal $891.12. Total income for the child support calculation was thus $68,844.67 and would ordinarily produce a monthly support payment of $582. Mr. Melnyk paid $300. In 2013, Dylan received $3,384 less in child support than would have been produced had the *Tables* been applied.

[12] On November 4, 2013, Ms. Elliott filed a notice to vary the child support provisions of the order. On November 14, 2013, she filed an amended notice of variation application to correct an error in the reference to the order sought to be varied. On April 2, 2014, a second amended notice of variation application was filed which sought to address communication difficulties, a specified holiday and

vacation parenting schedule, and a determination of the school Dylan would attend in September 2015.

[13] The variation hearing was held on September 11, 2014. At the outset of the hearing, Mr. Melnyk asked the court to consider his request to vary the joint custody order to one based upon a shared parenting regime. The court denied this untimely request because of a lack of compliance with the Civil Procedure Rules, insufficient notice, and Ms. Elliott's inability to properly prepare and present her position.

[14] The court proceeded to hear the application of Ms. Elliott. Both parties testified. Both relied on affidavit evidence. Each was cross examined. The affidavits which were filed and entered as exhibits contained opinion, hearsay, and other inadmissible material. Neither party objected. I assigned zero weight to all inadmissible material.

[15] Submissions were received and considered. The court reserved for decision. There was a delay in having the written decision produced because of a reduction in available judicial support staff.

[16] **Analysis**

[17] **Has Ms. Elliott proven a change in circumstances?**

[18] *Position of the Parties*

[19] Ms. Elliott argues that a change in circumstance has occurred. In relation to the parenting issues, Ms. Elliott notes the increase in conflict and the problematic communication difficulties which have negatively impacted on Dylan. Mr. Melnyk's behaviour, she states, amounts to bullying and emotional abuse.

[20] In relation to the financial issues, Ms. Elliott notes that a child support agreement which does not reflect the *Guidelines* is not binding because child support is the right of a child. In the alternative, Ms. Elliott argues that a change in circumstance has occurred because Mr. Melnyk is now sharing expenses with a new partner and his financial circumstances have improved. Indeed, if Mr. Melnyk

can afford the expenses associated with a private school, then he can afford to pay the table amount of child support.

[21] For his part, Mr. Melnyk denies a change in circumstances. With respect to parenting issues, Mr. Melnyk disputes the suggestion that conflict is widespread and destructive. With respect to financial issues, Mr. Melnyk states that he is responsible for the same debt that was designated as his responsibility under the terms of the current court order. In addition, he denies sharing expenses with a new partner, although he does not dispute this possible eventuality once his partner's home sells. Further, he states that his income has decreased because overtime is no longer available at his place of employment.

[22] *Decision*

[23] I am required to find a material change in circumstances before I can vary the provisions of a court order as noted in s. 37 of the *Maintenance and Custody Act*. An application to vary is not an appeal of an original order, nor is it an opportunity to retry a prior proceeding. The existing order must be treated as correct as of the date the order was made.

[24] A material change is one which has not been foreseen, or could not have been reasonably contemplated by the judge who made the original order: **Gordon v. Goertz,** [1996] 2 S.C.R. 27; or, a change that if known at the time would have resulted in different terms: **Willick v. Willick**, [1994] 3 S.C.R. 670. A material change must be more than a temporary or minor change. The change must be a substantial, continuing one which, in the case of a parenting decision, impacts the child and the ability of the caregivers to meet the needs of the child.

[25] Although **Gordon v. Goertz**, ***supra***, involved proceedings pursuant to the *Divorce Act*, the same legal principles apply to an application made pursuant to the *Maintenance and Custody Act*: **Rafuse v. Handspiker,** 2001 NSCA 1.

[26] I find that a material change in the circumstances has occurred since the last order issued. In respect of the parenting issues, I note that the parental conflict has intensified. Dylan was exposed to conflict. Dylan was negatively affected by the conflict. The flexible holiday and vacation access provision is a source of

confusion and conflict between the parties. Conflict and confusion in access scheduling is never in the best interests of children.

[27] In respect of the financial issues, I find that Mr. Melnyk's financial position has improved since the issuance of the last court order for four reasons, which are noted as follows:

- Mr. Melnyk's income increased since 2013. The evidence does not support the contention that Mr. Melnyk's financial position deteriorated since the last court order. In 2013, his income was $69,735.79. Mr. Melnyk's income is set to increase in 2014, based upon the evidence. The last paystub produced is dated July 12, 2014 – a period of 6.5 months. Gross income of $39,289.87 was earned during this period. If this figure is prorated over the year, Mr. Melnyk will earn $72,535 in 2014. This figure does *not* include the accrued vacation pay of $4,640.52, nor the other listed miscellaneous benefits. In addition to the paystub, Mr. Melnyk also supplied a letter from his employer which stated that Mr. Melnyk earned $46,439.03 up to August 16, 2014 – a period of 7.5 months. If this is prorated, an annual income of $74,302 is produced. Therefore, and despite the assertion that Mr. Melnyk is no longer eligible for overtime, his current income information reveals an increase in employment earnings.

- Mr. Melnyk and his new partner are sharing some expenses. The intermingling of expenses will increase once Mr. Melnyk's partner sells her own home. Currently, Mr. Melnyk and his partner reside together, in two homes. The partner's home is being readied for sale. The fact that Mr. Melnyk and his partner are a family unit has been proven and is evident from the fact that Mr. Melnyk is representing his relationship as a family unit to a private school.

- Mr. Melnyk has not paid the table amount of child support since at least the January 2012 interim order. This produced a benefit to Mr. Melnyk of $6,936 from January 2012 to December 2013. In addition, between 2012

and 2013, Mr. Melnyk collapsed RRSPs valued at $12,930. Mr. Melnyk had sufficient time and resources to pay down the joint debt.

- Mr. Melnyk states that he can afford to pay his share of the fees associated with Dylan attending a private school.

[28] Given the above findings, Ms. Elliott has proven a material change in circumstances; her application to vary the parenting and financial provisions of the current court order is properly before the court.

[29] **What, if any, parenting provisions of the 2013 consent order should be varied?**

[30] *Position of the Parties*

[31] Ms. Elliott seeks to reduce opportunities for conflict in two ways. First, she asks that a third party be available for access transfers. Second, she asks that a holiday and vacation schedule be adopted. In addition, she seeks an order that provides for the acquisition of a passport for Dylan.

[32] Mr. Melnyk agrees that a third party can assist with access transfers, provided the third party is a mutually acceptable person. In addition, he has no difficulty with the adoption of a holiday and vacation schedule, though he wants additional summer vacation time with Dylan. Mr. Melnyk is entitled to five weeks of vacation; Ms. Elliott has four weeks. Further, Mr. Melnyk agrees that the parties should acquire a passport for Dylan. Finally, Mr. Melnyk seeks to have further particulars of all appointments which are scheduled for Dylan. Ms. Elliott is not opposed to the inclusion of such a provision in the order.

[33] *Decision*

[34] All decisions affecting Dylan must be based on his best interests, as defined in the *Maintenance and Custody Act*. It is in Dylan's best interests not to be exposed to parental conflict. Ms. Elliott and Mr. Melnyk have the emotional and intellectual resources to disentangle Dylan from their battle. They must do so immediately. They must gain greater insight so that they can nurture and direct Dylan's healthy journey towards adulthood. Anger, bitterness, and resentment play no role in this parental responsibility.

[35] The variation request is granted. Clause 4 of the consent order dated June 5, 2013 is vacated and is replaced with the following provisions:

Counselling

- The parties will attend individual counselling to gain information about parental conflict and children; and to acquire healthy communication skills for separated parents. The purpose of such counselling is to learn techniques to ensure that Dylan is not placed in the middle of the parental conflict, and to enhance respectful and child-focused communication between the parties.

Communication between the Parties

- Matters respecting Dylan's health, education, and general welfare will be subject to communication between the parties. All communication will be respectful and child-focused, and will be facilitated by email communication, unless there is an emergency.

- The parties will keep each other advised of a current email address and any changes thereto. The parties must maintain an email address.

Access to Professional Records and Information

- Each party has the right to communicate with all professionals involved in Dylan's care, and each has the right to obtain information and documentation respecting Dylan from all medical professionals, educators, health professionals, and social welfare professionals without the consent of the other party.

Travel

- Each party will notify the other party of travel plans involving Dylan. Notice will include dates of travel, location, address, and telephone numbers where Dylan can be reached, and any applicable flight details. Both parties will co-operate in the acquisition of a passport for Dylan and both parties will sign any necessary letters or travel documentation to allow Dylan to vacation with the other parent outside Canada.

Access Transfers

- Access transfers will be facilitated by a mutually acceptable third party where possible. In the event third party transfer is not possible, the parties must conduct themselves in a mature, respectful, and child-focused fashion, and ensure that Dylan is not exposed to any negative comments or conduct.

Holiday and Vacation Parenting Schedule

- The regular parenting schedule will be suspended during the holidays and summer vacation as stated as follows:

(a) Christmas:

- *During the even numbered years*, Dylan will be in the care of Ms. Elliott from 2:00 pm on December 24 until 2:00 pm on December 25. Dylan will be in the care of Mr. Melnyk from 2:00 pm on December 25 until 5:00 pm on December 26 and from 4:00 pm on December 31 until January 1 at 2:00 pm, at which time the parties will revert back to the regular schedule.

- *During the odd numbered years*, Dylan will be in the care of Mr. Melnyk from 2:00 pm on December 24 until 2:00 pm on December 25. Dylan will be in the care of Ms. Elliott from 2:00 pm on December 25 until 5:00 pm on December 26 and from 4:00 pm on December 31 until January 1 at 2:00 pm, at which time the parties will revert back to the regular schedule.

(b) Easter:

- *During the even numbered years*, Dylan will be in the care of Ms. Elliott from 9:00 a.m. on Good Friday until 5:00 pm on Easter Sunday, at which time the parties will revert back to the regular schedule.

- *During the odd numbered years*, Dylan will be in the care of Mr. Melnyk from 9:00 a.m. on Good Friday until 5:00 p.m. on Easter Sunday, at which time the parties will revert back to the regular schedule.

(c) Summer Vacation

- Ms. Elliott will have Dylan for two block weeks of summer vacation, which may be consecutive if she so chooses.

- Mr. Melnyk will have Dylan for three block weeks of summer vacation, two of which may be consecutive if he so chooses.

- Summer vacation can only be exercised in the event the parent has booked the vacation time from work.

- A block week is defined as Monday to Sunday.

(d) Thanksgiving Monday

- Dylan will spend Thanksgiving Monday, from 10:00 am until 6:00 pm, with Ms. Elliott during the even numbered years; and with Mr. Melnyk during the odd numbered years.

(e) Mother's and Father's Day

- In the event Ms. Elliott is not scheduled to have Dylan in her care on Mother's Day, she will exercise parenting time from 10:00 am until 6:00pm.

- In the event Mr. Melnyk is not scheduled to have Dylan in his care on Father's Day, he will exercise parenting time from 10:00 am until 6:00 pm.

(f) Other Statutory Holiday Mondays

- In the event a long week-end is created by a statutory holiday Monday, the party exercising parenting time on the week-end immediately preceding the holiday Monday, will have their parenting time extended to 2:00 pm on the holiday Monday.

[36] **What school will Dylan attend in September 2015?**

[37] *Position of the Parties*

[38] The parties were unable to reach agreement as to which school Dylan should attend once he begins grade primary in September 2015. Ms. Elliott asks that the elementary school in her neighbourhood be designated as Dylan's school. In contrast, Mr. Melnyk seeks to designate a private school as the school that Dylan will attend.

[39] *Decision*

[40] As I indicated to the parties at the conclusion of the hearing, I am not prepared to make a decision on the schooling issue, at this time, because of the limited evidence before me. The application is premature.

[41] The current court order is based upon joint custody. Neither party has final decision making authority. Joint custody often produces the optimal type of parenting because the child will benefit from the judgment and parenting perspective of the two people who love the child the most. A joint custody order requires timely and meaningful consultation. A joint custody order obliges each parent to consider the strength and weaknesses of the decision being suggested by the other parent, before any attempt is made to reach a solution. The weighing of strengths and weaknesses must be completed within the framework of Dylan's best interests, and not based on the needs of the parents. Only after the failure of meaningful consultation, should the court be asked to make a fundamental, parenting decision.

[42] The evidence reveals that the parties did not engage in meaningful consultation. Dylan was thus deprived of a decision which should be made by his parents. Therefore, before the court will determine the school issue, Ms. Elliott and Mr. Melnyk are required to do the following:

- Provide a written statement to the other parent as to which school he/she believes Dylan should attend.
- Attend and view the schools that are suggested, including a meeting with the principals or other appropriate school officials, to gain a better appreciation of the programs and resources that are available.
- Provide a written statement to the other party as to the strengths and weaknesses of each of the schools suggested.
- Determine if there is agreement on the issue of designating Dylan's school.
- In the event there is no agreement, a hearing will be scheduled in February. One week before the hearing, each party must file an

> affidavit in which each provides confirmation of the schools which he/she has viewed, and the efforts made to ensure that each has sufficient information regarding the strengths and weaknesses of each school, together with a statement as to why the particular school chosen by each parent is in Dylan's best interests. As with all affidavits, opinions are to be avoided; affidavits must be based on fact.

[43] **Has Mr. Melnyk proven undue hardship?**

[44] *Position of the Parties*

[45] Mr. Melnyk seeks to displace his obligation to pay the table amount of child support based on a claim of undue hardship. He states that he continues to pay the debt which was incurred by the parties before their separation, and this obligation negatively impacts on his ability to pay the table amount of child support pursuant to s. 10(2)(a) of the *Guidelines*.

[46] Ms. Elliott vehemently opposes the claim of undue hardship.

[47] *Law*

[48] Section 10 of the *Guidelines* authorizes the court to veer from the table amount based upon a two stage test. First, the court must find that undue hardship has been created by the circumstances, including the non-exhaustive list outlined in s.10(2). Second, if circumstances of undue hardship have been proven, then the court must compare household standards of living. If the payor has a lower standard of living after the payment of child support, then the court may reduce the child support payable. However, the court can also refuse to reduce child support even where there is a lower household standard of living: **Hanmore v. Hanmore** 2000 ABCA 57, at para. 9, leave to appeal to the Supreme Court of Canada refused at [2000] S.C.C.A. No. 182.

[49] In **Pretty v. Pretty** 2011 NSSC 296, this court reviewed applicable legal principles to claims of undue hardship at para. 78, which provides, in part, as follows:

- A narrow definition of "undue hardship" must be adopted to ensure that the objectives of the *Guidelines* will not be defeated. Only exceptional circumstances will justify a reduction in child support: **Hanmore v. Hanmore**, ***supra***, at para 10;
- The burden of proof is on the person claiming the relief: **Hanmore v. Hanmore**, ***supra***, at para 11;
- "Hardship" is defined as "difficult, painful suffering", and "undue" is defined as "excessive, disproportionate." To succeed, one must prove that the hardship is exceptional, excessive, or disproportionate in the circumstances. This produces a "very steep barrier" to a successful claim: **Hanmore v. Hanmore, *supra***, at paras 11 and 17, and quoting from **Barrie v. Barrie** (1998), 230 A.R. 379 (Alta. Q.B.);
- A departure from the *Guidelines* for undue hardship should be the "exception and not the norm": **Hanmore v. Hanmore**, ***supra***, at para. 13, and quoting from **Hansvall v. Hansvall**, (1997), 4 W.W. R. 202 (Sask. Q.B.);
- Parents are expected to exhaust all efforts to increase their incomes and decrease discretionary expenses before consideration can be given to reduce a child support obligation: **McPhee v. Thomas** 2010 NSSC 367.

[50] Mr. Melnyk relies upon s.10(2)(a) of the *Guidelines* to support his claim; this section states as follows:

> (2) Circumstances that may cause a parent or child to suffer undue hardship include the following:
>
> (a) the parent has responsibility for an unusually high level of debts reasonably incurred to maintain the parents and their children prior to the separation, where the parents cohabited, or to earn a living;

[51] As noted by Julien and Marilyn Payne, at p. 333, of their text *Child Support Guidelines in Canada*, 2012, three conditions must be met in order to come within the ambit of section 10(2)(a), as follows:

- the debt must be at an unusually high level;
- the debt must have been reasonably incurred; and
- the debt must have been incurred to support the parties and their children before the separation or to earn a living.

[52] *Decision*

[53] Mr. Melnyk did not provide clear, convincing and cogent evidence necessary to displace the burden upon him: **C.(R.) v. McDougall,** 2008 SCC 53. He failed to prove his claim of undue hardship for the following four reasons:

- Mr. Melnyk did not prove that the former joint debt is at an unusually high level. According to his statement of expenses, the monthly line of credit payment equals $219.43. This is not unusually high, especially in the context of an annual income which is in excess of $72,000. Further, the line of credit balance should have been reduced significantly given the savings generated from the nonpayment of the table amount of child support since January 2012, and the collapse of the RRSPs.

- Mr. Melnyk's shelter expenses do not create circumstances of undue hardship. Shelter expenses total $1,439.40, and are composed of a monthly mortgage payment of $1,147.40, together with taxes of $292. Mr. Melnyk's shelter expenses are not unusually high, although they are higher than those incurred by Ms. Elliott, who is the primary care parent. While the shelter expenses may contribute to budgeting challenges, a reduction in child support is not warranted for two reasons. First, Mr. Melnyk has the option of reducing his shelter expenses by selling his home and acquiring a more modest dwelling. Second, child support should not be reduced so that a noncustodial parent can increase equity in a capital asset. Child support assumes priority over debt payment in such circumstance.

- I have little evidence to support a finding that the lines of credit were reasonably incurred to support the family prior to separation.

- Mr. Melnyk's standard of living is not lower than the standard of living of Ms. Elliott. Mr. Melnyk's income is approximately $72,000 per annum. We have not been provided with details of his partner's income and financial situation. Ms. Elliott is the primary care parent. Her income is approximately $59,000. Ms. Elliott does not share expenses with a third party. Mr. Melnyk has a higher standard of living than does Ms. Elliott, even without considering his partner's income.

[54] Mr. Melnyk's undue hardship claim fails at both stages of the test. He did not prove that the debt was at an unusually high level. He did not prove that the debt was reasonably incurred to support the family prior to separation. He did not prove hardship that was exceptional, excessive, or disproportionate in the circumstances. Mr. Melnyk is also expected to make better efforts to decrease discretionary expenses.

[55] **What is the appropriate child support order?**

[56] *Position of the Parties*

[57] Ms. Elliott seeks child support from the date of her application. She asks that the s. 7 expenses be shared on a prorata basis. Mr. Melnyk does not agree to any changes in the provisions of the current order.

[58] *Decision- Effective Date of Variation Order*

[59] The current court order issued on June 5, 2013. The correctness of the current order is assumed as it was not appealed. The order must continue "to be appropriate for at least some period of time beyond the date it became effective": **Conrad v. Rafuse**, 2002 NSCA 60, at para. 25 per Roscoe, J.A. Child support will be varied effective January 1, 2014.

[60] Mr. Melnyk's income for 2014 is projected to be $73,000 less union dues of approximately $900, for a total income of $72,100. The table amount would produce a monthly child support payment of $610. Mr. Melnyk paid $300. A retroactive payment of $3,720 is due.

[61] In determining that a lump sum retroactive payment is appropriate, I find as follows:

- Ms. Elliott should not be penalized for the administrative delay in having her application processed quickly and efficiently through to trial.

- Ms. Elliott struggles to meet the financial needs of Dylan. Dylan requires the retroactive support. Ms. Elliott will ensure that the retroactive support is applied to Dylan's needs.

- Mr. Melnyk had the ability to pay. Mr. Melnyk had notice that Ms. Elliott was seeking the table amount of child support once he received the variation application in November 2013.

- The retroactive support will be paid out over time so that any budgeting difficulties that Mr. Melnyk may experience can be mitigated. I have reviewed Mr. Melnyk's budget. I set the retroactive payment at $100 per month until the arrears are paid in full.

[62] *Decision – S. 7 Expenses*

[63] I grant the request to prorate the net, child care expenses and any health related expenses which exceed $100 annually. Mr. Melnyk is responsible for 55%, while Ms. Elliott is responsible for 45% of the net, after tax child care expenses, and the net health related expenses, effective January 1, 2014.

[64] In the event, the parties are unable to reach agreement on the exact figure outstanding for 2014 and 2015, each party must supply their calculations to the court, and each other, no later than January 16, 2015.

[65] **Conclusion**

[66] Upon finding a material change in the circumstances, the court made the following rulings:

- Ms. Elliott's application to vary the parenting provisions is granted pursuant to the terms outlined in this decision.

- Mr. Melnyk's undue hardship claim is denied.

- Ms. Elliott's application to vary the child support payment is granted.

- Mr. Melnyk must pay a retroactive lump sum to Ms. Elliott in the amount of $3,720, payable at a rate of $100 per month commencing January 15, 2015.

- The net s.7 child care, and health care expenses that exceed insurance reimbursement by $100 annually, must be prorated between the parties, such that Mr. Melnyk is responsible for 55% and Ms. Elliott is responsible for 45%, effective January 1, 2014 .

- Mr. Melnyk must pay Ms. Elliott the table amount of child support in the amount of $610 per month commencing January 1, 2015.

[67] If either party wishes to be heard on the issue of costs, submissions should be in writing and received no later than January 30, 2015.

Forgeron, J.