

SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)

Citation: *Hayward v. Hayward*, 2016 NSSC 370

ENDORSEMENT

Date: November 10, 2016
Docket: 1201-068953; SFHD-097677
Between: Naomie Dawn Adrienne Hayward v. Vincent Daniel Hayward
Heard: November 7, 2016
Counsel: Andrew I. Kirk for Naomie Hayward
Vincent Hayward, self-represented

Conclusion:

The parties shall be divorced. The children shall have their primary home with Ms. Hayward and be with Mr. Hayward on alternate weekends from Friday at 6 p.m. until Sunday at 6 p.m. and at all other times that the parents agree upon. Neither party shall pay the other spousal support. Mr. Hayward shall pay monthly child support of \$689.00 beginning on November 15, 2016. He shall pay retroactive child support in the total amount of \$1,344.00 payable at the rate of \$56.00 per month, starting on November 15, 2016 and ending on October 15, 2018. The parties shall continue to be jointly and severally liable for the debt relating to the 2004 Buick Century.

Claims:

[1] Naomie Hayward has asked for a divorce and orders relating to parenting and child support.

[2] Ms. Hayward has lived in Nova Scotia for more than twenty years so I have jurisdiction to hear her claim. She and Mr. Hayward have been separated for more than one year and there is no possibility that they will reconcile. I grant her a divorce.

Agreements:

[3] The parents have agreed to joint custody of their three daughters. The girls live with their mother. Mr. Hayward asked to have the couple's daughters with him on alternate weekends from Friday at 6 p.m. until Sunday at 6 p.m. Ms. Hayward agreed, so I will grant this order. The order should also provide that Mr. Hayward may spend whatever other time with the girls that he and Ms. Hayward agree upon.

[4] The parties have also agreed that neither of them should pay the other spousal support nor should they receive it. This, too, should be stated in the Corollary Relief Order.

[5] Ms. Hayward wants to resume the use of her previous surname and I order that her surname be changed to LeBlanc.

Issues:

[6] There are two disputes: how much child support Mr. Hayward should pay and what should be done with a debt.

Child Support:

[7] Ms. Hayward seeks to have Mr. Hayward pay the amount of child support dictated by section 3 of the *Federal Child Support Guidelines* (the child support tables). She has asked that he pay retroactive child support from September 2015 to the present. She has not asked me to order him to make a contribution to any special expenses or any extraordinary expenses the girls have. She has not filed a Statement of Special or Extraordinary Expenses.

[8] Mr. Hayward says that I should base his child support payments on his net income (the amount he gets to take home) rather than his gross income (the total he is paid). He also said that he would experience undue hardship if he was ordered to pay the amount of child support dictated by the child support tables.

Gross or net income?

[9] I am to determine Mr. Hayward's annual income using the sources of income set out under the heading "Total Income" in the personal tax return issued by the Canada Revenue Agency. These amounts are to be adjusted in accordance with Schedule III of the *Guidelines*. This calculation is required by section 16 of the *Federal Child Support Guidelines*. The income sources under the "Total Income" heading on the personal tax return are gross income amounts, which means that I must use Mr. Hayward's gross income, not his net income.

[10] Schedule III tells me to deduct certain amounts from Mr. Hayward's gross annual income when I determine the income on which I calculate his child support. The only amount listed in Schedule III which is relevant to Mr. Hayward is his union dues, an expense listed in subsection 1(g) of Schedule III.

[11] Mr. Hayward filed a Statement of Income in February 2016 and he testified that his income remains the same as it was then. According to his Statement of Income, he earns \$35,928.96 annually. This is the amount of his earnings less his union dues.

[12] Based on Mr. Hayward's annual income of \$35,928.96, the child support table for Nova Scotia requires him to pay monthly child support of \$689.00 for three children. Payments shall begin on November 15, 2016 and be made on the fifteenth day of every month thereafter.

Is there undue hardship?

[13] The undue hardship provision of the *Federal Child Support Guidelines* allows me to order an amount of child support that's different from the table amount where ordering the table amount would cause undue hardship to the person paying child support.

[14] There are two steps in analysing an undue hardship claim. First, there must be a circumstance capable of creating undue hardship if *Guidelines*-based child support is ordered. Second, only where there is an undue hardship circumstance, the standard of living in each household must be compared. This requires a mathematical calculation of all the income from all sources (less certain deductions) in each parent's home and then a comparison of each household's income against the Statistics Canada low income measure. This enables the comparison of households of different sizes and composition, such as comparing a household comprised of two adults with a household comprised of one adult and two children. The calculation is described in Schedule II of the *Guidelines*.

[15] Mr. Hayward has the burden of proving he will suffer undue hardship if he's ordered to pay the table amount of child support. Mr. Hayward was present in court on August 12, 2016 for a conference with Justice B. MacDonald. She explained (and confirmed in a written conference memorandum) that if Mr. Hayward wanted to make an undue hardship claim, he must file the claim and all the documents necessary to pursue the claim "in time to be considered at the hearing". Mr. Hayward did not file these documents at any time.

[16] The first step is to determine whether there are circumstances capable of creating undue hardship if the table amount of child support is ordered. Mr. Hayward says that he is still responsible for a joint debt incurred when he and his wife cohabited and that this debt would create an undue hardship circumstance if he was ordered to pay child support at the table rate for his daughters.

[17] Mr. Hayward testified that in 2009, a 2004 Buick Century was bought. The total cost was \$27,000.00: Mr. Hayward said that this cost included "interest and payments" and that monthly payments were \$500.00. He said that the debt was a joint debt incurred by him and Ms. Hayward. Ms. Hayward's evidence was poor when it came to financial matters: she said didn't recall any debts existing at separation, she didn't recall any debts related to vehicles, and she didn't recall any credit cards.

[18] The car was re-possessed five years ago, in 2011. Mr. Hayward said that \$20,000.00 was owing on the car when it was re-possessed. He said the same amount is still owing on the car now as when it was re-possessed. He has made no payments since the car was re-possessed.

[19] As I've said, the first step in considering an undue hardship application is deciding whether there is some circumstance that means paying the table amount of child support would cause undue hardship. The particular circumstances identified in subsection 10(2) relate to legal obligations to support others, high access costs and paying a high level of debt that was reasonably incurred to support the spouses and their children before the separation.

[20] I find that the debt for the car is not a circumstance that would cause an undue hardship. Mr. Hayward testified that he has not paid on this debt since the car was re-possessed five years ago. Where he isn't paying the debt, it cannot cause him any hardship.

[21] I dismiss Mr. Hayward's undue hardship claim.

Retroactive child support

[22] Ms. Hayward asks that I order child support “retroactive” to September 2015 when she filed her divorce Petition.

[23] Before Ms. Hayward filed for divorce, the parties were involved in an application under the *Maintenance and Custody Act*. A copy of their interim consent order in that case was attached to her Petition. In October 2014, the parties agreed that, based on Mr. Hayward’s annual income of \$25,000.00, he would pay Ms. Hayward monthly child support of \$400.00. The order specifically said “It is acknowledged that [\$400.00] is below the Federal Guidelines Table amount. In lieu of the table amount being Ordered, Mr. Hayward will contribute to Naomie Hayward’s household bills upon request and will provide groceries for the children upon request.”

[24] At an annual income of \$25,000.00, Mr. Hayward should have paid child support of \$496.00 each month. He was ordered to pay \$96.00 per month lower than the proper amount.

[25] Ms. Hayward testified that her husband would not provide extra money when requested for baseball, school supplies and groceries. I have no evidence that he is in arrears of the payments that he was ordered to make.

[26] If Ms. Hayward wants me to retroactively adjust the child support payments that were already ordered, I must have evidence that allows me to do the analysis required by the Supreme Court of Canada in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37.

[27] I must consider four factors in deciding whether to exercise my discretion to vary child support retroactively: the reasonableness of Ms. Hayward’s delay in seeking the retroactive variation; any blameworthy conduct by Mr. Hayward; the girls’ circumstances when the retroactive amount should have been paid; and whether a retroactive award would cause hardship to Mr. Hayward.

[28] Ms. Hayward filed her petition seeking retroactive child support within ten months of the *Maintenance and Custody Act* order being issued. I find she has not unreasonably delayed her retroactive claim.

[29] Mr. Hayward explained that he lost his job which suggests that his failure to pay was not blameworthy. Ms. Hayward said that Mr. Hayward failed to give her money for groceries, baseball and school supplies for three years. Obviously, this period pre-dates the order that required Mr. Hayward to contribute to those expenses on request. I find that Mr. Hayward was not blameworthy in failing to contribute to requested expenses during the retroactive period from September 2015 to date.

[30] I was not told that the girls didn’t get to participate in baseball or that they lacked school supplies as a result of Mr. Hayward’s failure to contribute. Ms. Hayward testified that she would not have a meal so that the girls could. I find that the girls likely went without as a result of Mr.

Hayward's inability to contribute to his wife's household bills and to provide groceries.

[31] Mr. Hayward testified that he lives with his girlfriend who works part-time, working twelve to sixteen hours each week at minimum wage. Annually, she would earn between \$6,676.00 and \$8,902.00, which wouldn't be enough to support herself. She must rely on Mr. Hayward for some of her support.

[32] Children's right to receive support from a parent takes priority over the parent's support of another adult. Adults have the ability to support themselves: children do not. Where Mr. Hayward is able to assist in supporting his girlfriend, he must have the means to support his daughters.

[33] In light of the girls' needs and Mr. Hayward's ability to assist in supporting his girlfriend, I find this is an appropriate case for me to exercise my discretion to award retroactive child support. I quantify the amount at \$1,344.00. This amount reflects fourteen months of payments (from September 2015 to November 2016) at \$96.00 each month.

[34] I am to structure a retroactive award so that it minimizes hardship and, in this case, I order that beginning with his child support payment on November 15, 2016, Mr. Hayward will pay an extra \$56.00 each month toward the retroactive award. He is ordered to make twenty-four payments of \$56.00 each month, so these payments will start on November 15, 2016 and continue until his final payment on October 15, 2018.

Debt:

[35] Mr. Hayward wants me to divide responsibility the Buick debt between himself and his wife. He says that he and she jointly incurred the Buick debt. As I've noted, the car was repossessed in 2011. Mr. Hayward hasn't serviced this debt since the car was taken.

[36] In her Petition, Ms. Hayward did not claim a division of property under the *Matrimonial Property Act*, though she did file a Statement of Property.

[37] Mr. Hayward did not file an Answer to the Petition. He was personally served with the Petition and with various other court documents at different times. He never filed any document which claimed he was seeking to divide the Buick debt. His first claim that he wanted to do this occurred at the hearing.

[38] Ms. Hayward argued that Mr. Hayward should not be able to claim a property division so late in the proceeding.

[39] Subsection 12(1) of the *Matrimonial Property Act* says that "either spouse" is entitled to apply for a division of property where certain triggering circumstances exist. A "spouse" is defined in clause 2(g)(i) of the *Matrimonial Property Act* as one of persons who are "married" to each other. If I divorced the parties, they would no longer be spouses and a property division would not be possible. So if I declined to hear Mr. Hayward's claim now, it would be the same as dismissing the claim.

[40] I agree that claiming a division of property as a hearing begins is late. However, I offered Ms. Hayward the opportunity to have the hearing adjourned and she chose to proceed.

[41] The *Matrimonial Property Act* addresses the allocation of debts only in section 13 to say that the value of matrimonial assets may be divided unequally or that the value of non-matrimonial assets may be divided if an equal division of matrimonial assets would be unfair or unconscionable, having regard to certain listed factors. One listed factor is “the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred”: subsection 13(b).

[42] Here, each spouse swore and filed a completely blank Statement of Property. Neither disclosed the existence of any assets or debts. In his testimony, Mr. Hayward said they didn’t own a house and they each had household contents.

[43] So I have evidence there were some matrimonial assets (household contents), but not enough evidence to determine whether their division would make it “unfair or unconscionable” for Mr. Hayward to retain sole responsibility for the Buick debt.

[44] I have Mr. Hayward’s evidence that the Buick debt is joint. Ms. Hayward has no recollection. As a joint debt, the creditor can seek payment from both Mr. Hayward and Ms. Hayward. If one spouse pays more or all of the debt, he or she would be entitled to claim repayment from the other.

[45] Where the parties’ matrimonial assets were few and have been divided between them, I find it is fair to leave the Buick debt in its current state: a joint debt.

Final directions:

[46] Mr. Kirk shall prepare the Divorce and Corollary Relief Orders and forward them to me.

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