SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Mielnik v. Lumley*, 2022 NSSC 386

Date: 20221208
Docket: *Halifax* No. SFHPSA-112628
Registry: Halifax

Between:

Anna K. Mielnik

Applicant

v.

Glen Lumley

Respondent

LIBRARY HEADING

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: September 26 and October 14, 2022, in Halifax, Nova Scotia

Summary: The parents had a shared parenting arrangement pursuant to a Consent Order. The mother argued that it was not a shared parenting arrangement because the father's partner cared for the child when he was at work. The mother sought child support equal to the applicable table amount and the father sought child support based on a set-off calculation. The mother relied on the table amount of support and required time to adjust her budget. Child support would lessen over time and the set off calculation would be utilized hereafter.

Key words: child maintenance guidelines, Family- parenting time, Family- shared parenting, Family- child support, Section 7 expenses

Legislation: Parenting and Support Act, R.S.N.S. 1989, c.160

THIS INFORMATION SHEET DOESN'T FORM PART OF THE COURT'S DECISION.
QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Mielnik v. Lumley*, 2022 NSSC 386

Date: 20221208
Docket: *Halifax* No. SFHPSA-112628
Registry: Halifax

Between:

Anna K. Mielnik

Applicant

v.

Glen Lumley

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	September 26 and October 14, 2022, in Halifax, Nova Scotia
Written Release:	February 13, 2023
Counsel:	Ashley Donald for the Respondent

By the Court:

[1] The parties have a daughter, M. (currently 11). M. has been in a shared parenting arrangement since September 2019. The parties have had two settlement conferences and have been able to resolve the following issues:

1) The parenting schedule for M.; and

2) The retroactive child support for M..

[2] The sole issue before the court is the amount of ongoing child support.

[3] The hearing took place over two days. The court heard evidence from the parties as well as their partners. Seventeen exhibits were entered into evidence.

BACKGROUND

[4] The parties were in a common law relationship from 2007 to April 2017. A settlement conference held on September 2019 resulted in an order confirming a shared parenting arrangement. The schedule of parenting agreed to in 2019 has not been varied. Mr. Lumley has M. in his care six overnights in a fourteen day cycle as well as additional time during holidays and special occasions.

[5] M. has been described by her mother as an incredible, positive, funny child. Her father notes that M.'s mood is consistently joyful, that she is mature for her age, and enjoys socializing with her friends. Both parents should be congratulated for raising such a lovely well adjusted child.

[6] Things have changed since September 2019. Both parties have repartnered.

[7] Ms. Mielnik remarried her current partner June 29, 2019. They have a child born September 2020 who is now 2 years of age. Ms. Mielnik and her spouse purchased a home in September 2021 near M.'s school.

[8] Mr. Lumley began cohabiting with his fiancée in July 2019. In December 2019 they purchased a home. Both parties reside a short distance from one another. Mr. Lumley's fiancée has a child 10 years of age who resides with them full time.

[9] In addition to the significant changes in their home lives, the incomes of both parties have changed since the settlement conference. Ms. Mielnik's income in 2019 was $31,076 and the income of Mr. Lumley was set on a prospective basis to be $46,800. His actual income was $58,200. At the time of the hearing Mr. Lumley's income was $47,566 based on his 2021 income tax return.

[10] The parties have reached agreement on retroactive adjustments to child support. The retroactive adjustments were made based on Mr. Lumley's income. As noted, the sole issue before the court is the issue of prospective support.

[11] There have also been changes to Ms. Mielnik's income. She took an extended maternity leave following the birth of her son. After an 18 month maternity leave she returned to her former employment. Her employment income after maternity leave was $42,600.

[12] She had been with the same employment since 2015. Her affidavit sworn less than three weeks before the hearing indicated at paragraph 79: "I have a very steady job and position with regular hours." Within days of signing this affidavit, however, she voluntary left her employment and confirmed at the time of signing the affidavit that she had already put in her notice to leave this employment.

[13] Ms. Mielnik indicated that she believed she would be able to secure comparable employment very quickly and indicated that the court could consider her income to be $42,600 for the purpose of establishing child support.

[14] Prior to the hearing, the parties agreed to maintain the current parenting schedule. It is a rotating two week schedule: Ms. Mielnik has six overnights in week one and two overnights in week two. Mr. Lumley has the balance of overnights- 6 overnights in a two week cycle.

POSITION OF MS. MIELNIK

[15] Ms. Mielnik indicates that the current order for prospective child support should not be varied. She indicated that Mr. Lumley agreed to pay the table amount in 2019 and that the court is unable to consider another option for the payment of support (i.e. the set off method of support).

POSITION OF MR. LUMLEY

[16] Mr. Lumley indicates that the circumstances have changed since the initial order in September 2019. His position is that utilizing the set-off method for calculating child support is appropriate in the circumstances.

LAW & ARGUMENT

[17] It is an important distinction in law as to whether the matter is before the court for a "review" or whether it is "variation" which must be grounded on a material change in circumstances. The September 2019 order indicated at paragraph 26 that:

> "This matter is adjourned to a further settlement conference before the Honourable Justice Pamela MacKeigan on February 19, 2020 from 10:00 am to 12:30 pm. The parties intend to review parenting and child support."

[18] As such, the parties consented to a review of child support at that time. As the matter was not resolved through a further settlement conference, the matter was referred to a hearing.

[19] The judicial process may have changed from settlement to a hearing, but the basis for the intervention did not- it was anticipated to be a review. This review was consented to by the parties. As such there is not necessity to find a material change in circumstances to examine the issue of child support.

[20] In the alternative, even if a "material change in circumstances" were necessary, I find that a number of material changes to each parties circumstances would mandate an inquiry into the issue of child support:

1) Both parties have repartnered and are sharing living expenses.

2) Ms. Mielnik has a child from her marriage.

3) Mr. Lumley resides with his fiancée who has a child living with them full time.

4) Both parties have purchased homes and their expenses have change.

5) The income levels of both parties have changed.

[21] Despite agreeing to maintain the current parenting schedule, Ms. Mielnik argued that the parties were not in a shared parenting arrangement. She indicated

that Ms. Lumley's fiancée, Ms. Boivin, was the person to provide the majority of child care for M..

[22] The evidence revealed that Ms. Boivin worked from home and had more flexibility than Mr. Lumley. Her evidence was straight forward and credible. She indicated that she was more than happy to assist Mr. Lumley with child care responsibilities when he was at work. She testified that she would assist in after school care, with transportation to activities, and she and Mr. Lumley shared household responsibilities.

[23] The fact that Mr. Lumley, as a parent working full time, relies on a third party to assist with child care does not negate a shared parenting arrangement. The parties should be grateful that there is a person like Ms. Boivin who is clearly attached to M. and is prepared to assist Mr. Lumley. Ms. Boivin indicated that she has a strong relationship with M. and enjoys her time with M.. Her affidavit at paragraph 23 states:

> "Glen is the primary parent for [M.'s] physical, emotional and financial needs in our home but because of our family dynamics and the flexibility associated with my job, I am able to provide lots of support to both Glen and [M.]."

[24] If Ms. Boivin was unable to provide the level of assistance with M.'s care during Mr. Lumley's scheduled time, he would have to make alternate arrangements. There is nothing to suggest that he has not appropriately made arrangements for M. on his scheduled parenting time. To the contrary, M. has the benefit of Ms. Boivin's involvement in her life rather than a third party care provider.

[25] The calculation of time attributable to each parent in a shared parenting arrangement has been the source of much debate. As noted in the case of *Mehling v Mehling*, [2008] M.J. No. 172 (Man. C.A.) at paragraphs 42 and 43:

> "42. So, should the 40 per cent threshold analysis be a strictly mathematical calculation? I think not. Is there a mathematical component to the analysis? Of course, because the pattern of parenting must be analyzed and this will, by necessity, involve a consideration of the time the children are with their respective parents. In *Cabot*, this court specifically rejected a "minute-by-minute" calculation method. While I would not categorically rule out an assessment on the basis of hours, it seems to me that an assessment of the time that a parent is with, or responsible for the children and their needs, on the basis of days or weeks, or portions thereof, will be a more realistic approach to the analysis than an hourly

> accounting. That being said, the approach to be used for the assessment of time is within the judge's discretion to determine.
>
> 43. In some cases, this assessment of time will lead to an obvious conclusion that the 40 per cent threshold has, or has not, been met. But when that result is not obvious, as was the case here, more will be required. The approach must remain flexible to enable the judge to take into account the varied circumstances of different families. By doing so, the assessment will be more realistic, and more holistic, than a strict mathematical calculation of the time with each parent. In my view, this is in keeping with the equitable goals of s.9."

[26] As noted in the case of *Hamm v Hamm*, [1998] N.S.J. No. 139 (N.S. S.C) at paragraphs 17 and 18:

> "17...The language of Guideline s. 9 is clear. In order to establish shared custody, the child must be the responsibility of a parent through the exercise of a right of access or physical presence of the child for not less than 40% (forty percent) of the time over the course of a year.
>
> 18. The child does not have to be in the physical presence of the parent for all the time to be credited to a determination of the time requirement for shared custody. In order for the time to be credited, the child must be the responsibility of that parent during the entire period. The period of time during the exercise of access will be credited**, even where this primary responsibility is temporarily delegated, for example, for any reasonable temporary limited period where the child is with a grandparent, babysitter, cub master, etc**. A parent seeking credit for any period of time to be included in the calculation for shared custody, must have the primary responsibility of the child during the entire time frame sought to be credited towards the prerequisite 40%." (emphasis added)

[27] It is clear that the current parenting schedule is a shared parenting arrangement as contemplated in section 9 of the *Provincial Child Support Guidelines*, N.S. Reg. 49/2022 (*Guidelines*). In 2021, Mr. Lumley had M. in his care 44.6% of the time. As of September 9 2022, Mr. Lumley had M. in his care over 50% of the time. The fact that Mr. Lumley has the support of Ms. Boivin to assist with M.'s care does not negate that he is the parent with the responsibility of M.'s care during his parenting time. The evidence does not support the assertion that Ms. Mielnik had M. in her care in excess of 60% of the time.

[28] The starting point in an analysis of child support payable is to establish the incomes of the parties. Mr. Lumley's income was $47,566 in 2021. An examination of the evidence reveals that Mr. Lumley remains with his current employer and there is no significant change anticipated in his income.

[29] The 2021 income of Ms. Mielnik in 2021 is drastically different. Her maternity leave ended. She returned to work at an income level of $42,600. Although she voluntarily left that employment, she confirmed that it is appropriate for the court to attribute an income to her of $42,600. Section 2(3) of the *Guidelines, supra* indicate that:

> "Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used."

[30] Where there has been a significant change in the income levels of a party, it is appropriate to consider the current level of income (reference: the *Guidelines, supra; MacPhee and O'Leary*, 2010 NSSC 124; and *Koester v Koester*, 2014 NSSC 367). In setting prospective support, it is appropriate to consider the income levels of the parties as $47,566 for Mr. Lumley and $42,600 for Ms. Mielnik.

[31] In determining the appropriate quantum of child support in shared parenting, the starting point is section 9 of the *Guidelines, supra*, which provides:

> **"9.** Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (*a*) the amounts set out in the applicable tables for each of the spouses;
>
> (*b*) the increased costs of shared custody arrangements; and
>
> (*c*) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought."

[32] As noted at paragraph 27 of the *Contino* decision (*Contino v. Leonelli-Contino*, 2005 SCC 63), the court held:

> "The three factors structure the exercise of the discretion. These criteria are conjunctive: none of them should prevail (see Wensley, at p. 90; Payne and Payne, at p. 254; *Jamieson v. Jamieson*, [2003] N.B.J. No. 67 (QL), 2003 NBQB 74, at para. 24). Consideration should be given to the overall situation of shared custody and the costs related to the arrangement while paying attention to the needs, resources and situation of parents and any child. This will allow sufficient flexibility to ensure that the economic reality and particular circumstances of each family are properly accounted for. It is meant to ensure a fair level of child support."

[33] In considering section 9(a) I determine the applicable table amount of support payable to be as follows:

- Mr. Lumley's table amount of child support payable is $404; and
- Ms. Mielnik's table amount of child support payable is $363.

[34] In determining the increased costs of shared custody arrangements, I have considered the Statements of Expenses filed by each of the parties. Mr. Lumley's Statement of Expenses notes that expenses attributable to M. are $817.65 not including the increased costs of utilities and food. Ms. Mielnik provided evidence that costs related to M. are $339.86 per month. As with the budget of Mr. Lumley, these expenses do not include the increased costs of utilities and food.

[35] In examining the conditions, means, needs and other circumstances of each spouse, I have considered the following:

1) Ms. Mielnik testified that the budgeting for the purchase of their home in 2021 involved a consideration of the child support being paid by Mr. Lumley.

2) Ms. Mielnik testified that her budget was considerably frugal and that, although they had a nice home, it came at a price of not being able to afford significant discretionary spending such as vacations.

3) Mr. Lumley's budget contained some allowance for travel with M. so that she could visit his family in Ireland.

4) Mr. Lumley's home was purchased for $187,500 in late 2019 and Ms. Mielnik purchased her home in September 2021 for $460,000.

5) Mr. Lumley's partner earns approximately $75,000 and Ms. Mielnik's partner earns $64,425.

6) Both families have one other dependent child in their households.

CONCLUSION

[36] It is clear that the parties have different financial priorities and different spending habits. Both provide for M.'s needs while in their care. The ability of the current partners of the parties to financially contribute to the households are

relatively equal. There are also additional costs to each family from the other dependents in their respective households.

[37] To continue to order child support payable by Mr. Lumley based on the full table amount would not be appropriate. Over time, it may lead to significant disparity between the households. The goal of child support in shared parenting arrangements is to ensure that the child is not experiencing significantly different standards of living in each household.

[38] I am mindful that Ms. Mielnik is in a period of transition with her employment as a result of her voluntarily leaving her employment. I am mindful that she has a son of pre-school age with the associated costs. I am also mindful that there had been reliance on some level of child support payable when they purchased their home.

[39] A straight set off calculation would result in Mr. Lumley paying Ms. Mielnik $41 per month. Counsel for Mr. Lumley urges that I consider the set off calculation as appropriate. Ms. Mielnik urges that I order the continued payment of child support in the amount of $398 per month.

[40] Mr. Lumley will pay $200 per month to Ms. Mielnik for a further period of six months when it will reduce to $100 per month for a further six months. Commencing in one year, the parties will apply the set off method of calculating child support.

[41] I do this for a number of reasons:

1) It will provide Ms. Mielnik some time to adjust her budget to address the decrease in child support.

2) It will ensure that the child support quantum will move to a set off calculation over time.

3) It will ensure that the parties will commence utilizing the set off method of calculation in recognition of their varying priorities in relation to their expenses.

Chiasson, J.