SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Denninger v. Ross*, 2018 NSSC 314

Date: 20181213
Docket: 1201-063281; SFH-D 062638
Registry: Halifax

Between:

Kristopher Clair Denninger

Petitioner

v.

Jennifer Dawn Ross

Respondent

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Judge: The Honourable Justice Elizabeth Jollimore

Heard: November 13 and 14, 2018

Summary: Father applied to increase parenting time and reduce child support. Parenting arrangement unchanged where it was not in the children's best interests to spend more time away from the social environment centred on their mother's home. Child support reduced to reflect father's income. Retroactive support awarded.

Key words: Family, Parenting, Shared parenting, Child support, Table amount, Blameworthy conduct, Child's circumstances, Variation, Material change in circumstances

Legislation: *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, section 17

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Counsel:	Kerri-Ann Robson for Kristopher Denninger Jennifer Ross

Introduction

[1] Mr. Denninger is applying to vary the parenting arrangement contained in a variation order of September 2013 and a variation order of November 2015, and to vary child support, retroactively and prospectively. The applications are under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, section 17.

Parenting

[2] Mr. Denninger must show that since the last variation order was granted there has been a change that has "altered the child's needs or the ability of the parents to meet those needs in a fundamental way": *Gordon v. Goertz*, 1996 CanLII 191 (SCC) at paragraph 12.

[3] Mr. Denninger says there have been three changes since the last order was granted in November 2015:

1. The parents haven't followed the November 2015 order;

2. The children have begun to express their wishes about changing the current schedule; and

3. Tumult and conflict between the parents have increased "making block parenting time more beneficial for the children in order to reduce the conflict".

[4] These are not changes that entitle me to vary the earlier orders.

[5] Since the 2013 variation order, the parents have been free to modify parenting times when they choose. Their choice to continue mid-week access in the winter is not a change. It is operation of the orders as permitted.

[6] I have no admissible evidence of the children's wishes. The evidence I have is scant and not admissible as an exception to the rule against hearsay: *Langmead*, 2018 NSSC 244. Mr. Denninger has not described the circumstances in which either child has talked about the parenting schedule, so I can assess whether the comments reflect the child's state of mind. The December 10, 2017 email message from Mr. Denninger to Ms. Ross shows that Mr. Denninger has directly involved Sylas in the parents' discussions. This undermines the suggestion that Sylas's comments are spontaneous and a reflection of his true state of mind.

[7] There is no discernable increase in the conflict and tumult. Mr. Denninger says that his 2013 variation application was prompted by what he described as "extreme difficulties in exercising his access". Their current conflict is no greater than their past conflict. Their conflict is a fact of their life. As Mr. Denninger said in his October affidavit, "my relationship with Jennifer has remained as strained as ever."

[8] There is one change: Mr. Denninger's availability has changed. He is not working and has more time for the children. This is enough to permit me to review the parenting arrangement

and consider it from the perspective of the children's current best interests. I note, as well, that the children have an infant half-sister at their father's home.

[9] With this change in mind, I am to determine what changes – if any – should be made to the children's present parenting arrangement to ensure the parenting arrangement is in the children's current best interests. This inquiry is focussed on the children and their best interests.

[10] Mr. Denninger proposes that the children be with him on a biweekly schedule: from Wednesday after school until Friday before school one week, and from Wednesday after school until Monday before school the next week. He says this schedule is stable and will maximize contact.

[11] The children's schedule has been stable since 2013. The change ordered in 2015 is one the parties didn't follow.

[12] The children are to have as much contact with each parent as is in their best interests: *Divorce Act*, subsection 16(10).

[13] Sylas is 12 and in grade 7 in Lower Sackville. Julianna is 10 and in grade 5. Next year, she and her brother will be in the same middle school.

[14] Ms. Ross lives in Lower Sackville, a fifteen-minute walk from Sylas's school. Mr. Denninger lives in Gore, a 35 to 45-minute drive from the school. Mr. Denninger gets the children up between 6:35 and 6:50 on school days so they can make the drive to their schools. Mr. Denninger's parents live in Ms. Ross's community.

[15] The children do well at school. Both children enjoy school and are motivated. They are high achievers.

[16] The children are active. Julianna is currently involved in gymnastics and cross-country running. In the past, she's been in dance classes, Sparks, Brownies, soccer, swimming lessons, trampoline, and choir.

[17] Sylas is involved with trampoline and plays the trumpet. In the past, he's taken swimming lessons, played soccer, volleyball, baseball, indoor tennis, basketball and floor hockey, and been involved in tae-kwon-do.

[18] The 2013 variation order allowed each parent to enrol the children in no more than two extra-curricular activities. If a parent enrolled a child in an activity, that parent would pay for it. Ms. Ross has been the one to organize the children's extra-curricular activities and pay for them. There was no evidence that Mr. Denninger had enrolled the children in any activities.

[19] Ms. Ross is concerned that, for example, when with Mr. Denninger, the children have missed social activities such as the recent Hallowe'en dance. Julianna was busy with her step-mother at Tim Horton's on the evening of the dance but Sylas was available to attend. Mr. Denninger didn't drive Sylas to the dance.

[20] The children have friends in their mother's neighbourhood. Julianna has sleepovers with her friends and Sylas has friends visit after school. I have no evidence the children have extra-curricular activities or friends in Gore or that they spend time with their Sackville friends or have sleepovers with them while at their paternal grandparents' home.

[21] Julianna has had vision problems since 2013. Ms. Ross has arranged for treatment and paid the associated costs. Sylas has recently had back problems for which Ms. Ross sought treatment by a chiropractor. She has also taken care of Sylas's vision exams.

[22] The parents' Expense Statements show Ms. Ross pays more of the children's costs: only she budgets for their clothing, haircuts, health, school supplies, extra-curricular and other activities, and allowances. I note this not because she is the one paying, but because she is the one attending to all those aspects of caring for the children. There's no evidence that Mr. Denninger has assumed any of this burden, beyond transporting the children to their appointments or activities when they are with him. The parents try to schedule appointments during their own time with the children. Recently, Ms. Ross scheduled an appointment during Mr. Denninger's time. This was controversial.

[23] There is nothing to be gained by an inventory of each parents' shortcomings. No one is blame-free. Mr. Denninger says Ms. Ross is inflexible. She carries most of the parenting burden, financially and otherwise. She is impatient, and she cuts off communication with Mr. Denninger when he criticizes her. Mr. Denninger ignored the 2015 variation order, failed to disclose his tax returns and refused to increase his child support when he should have. The parties are unable to change the way they deal with each other. Each parent assures me that she or he insulates the children from their conflict.

[24] The children are pre-teens, in or almost in, middle school. They have active social and extra-curricular lives which centre on their mother's home. The only part of their life that isn't in the Halifax Regional Municipality is their father's home. When children are young, their lives focus on their family. These children are older, and their activities and their social lives are elsewhere.

[25] Increasing the time the children spend with their father decreases the time they have in Lower Sackville – with friends, activities and school. Friends, activities and school are the central aspects of the life of tweens and teens. Mr. Denninger's proposal puts them on the road, with a 70 to 80-minute round trip commute, two weekdays each week and every other weekend.

[26] Mr. Denninger says that increasing time with him will reduce the amount the parents need to communicate. I don't accept this: there is only so much time to do what needs to be done and if the children are in Gore, Ms. Ross's opportunity to do those things is diminished. Mr. Denninger hasn't identified responsibilities he has for the children, such as getting haircuts, or buying clothes and school supplies. While Mr. Denninger has more time for the children, he has shown no greater ability to meet their needs.

[27] The children have developmental needs. They need to grow independent from their parents and to have social experiences with their peers. These needs are not advanced by having them spend more time in Gore.

[28] I recognize the emotional bond between Sylas, Julianna and their father, and Mr. Denninger's genuine desire to spend more time with them. His move to Gore created two distant homes for the children. In Gore, the children are isolated from the social development that is important for them at this point in their lives.

[29] Ms. Ross is primarily responsible for meeting the children's needs when it comes to things like buying their clothing, getting their school supplies, and getting haircuts. Expanding the children's time with their father limits the time Ms. Ross has for these tasks. Mr. Denninger has not enrolled the children in activities and expanding the time the children spend with him may limit their involvement in activities, with the social and health benefits they bring.

[30] I am to maximize time consistent with the children's best interests. I find that while Mr. Denninger's time availability is a material change in circumstances, the current parenting arrangement remains in the children's best interests. The current arrangement allows ample opportunity for time with Mr. Denninger and their half-sister.

Child support

Is there shared parenting?

[31] In determining child support I must first address Mr. Denninger's claim that the current parenting arrangement is a shared parenting arrangement.

[32] The most generous parenting terms are contained in the 2013 variation order. This order specifically states the children are in Ms. Ross' primary care.

[33] I have no evidence of the exact days the children have spent with their father, so I calculate these from the 2013 variation order. I do this on the basis that there is no suspension of mid-week access during the winter months.

[34] The chart below shows the 9 weeks of the summer schedule. The weeks are not shown in order. They simply show the allocation of time.

Day/ Week	**S**	**M**	**T**	**W**	**T**	**F**	**S**
1	Mr. Denninger has three weeks of block access. (21 days)						
2							
3							
4	Ms. Ross has two weeks with the children, inclusive of camp in Berwick.						
5							
6				Overnight visit		Pick up	Visit
7	Visit	Return		Overnight visit			

8				Overnight visit	Pick up	Visit
9	Visit	Return		Overnight visit		

[35] Five weeks are devoted to block access. During the remaining 4 weeks, the parties follow their regular bi-weekly routine. In every week, Mr. Denninger sees the children overnight on Wednesday evening (returning them on Thursday morning). This is not a full day, but I will treat it as one. Every other week, Mr. Denninger sees the children from Friday afternoon until Monday morning in addition: 2.5 days. The regular bi-weekly routine gives Mr. Denninger 9 additional days of contact during the summer months. In total, he has 30 days with the children in the summer.

[36] There are other times when there is a special holiday schedule: Christmas, Easter and March Break.

[37] In odd years, the special holiday schedule gives Mr. Denninger 14 days: 7 days at Christmas, 2 days at Easter and 5 days at March Break. In even years, he has 13 days: 5 days at Christmas, 3 days at Easter and 5 days at March Break. I will give Mr. Denninger the benefit of crediting him with 14 days from the special holiday schedule.

[38] There are 43 weeks from September 1 to June 30 (the school year). If I remove the Christmas break, the March Break and the Easter weekend, I'm left with 40 weeks (when there would be Wednesday overnight visits) and 38 weekends.

[39] This means Mr. Denninger would have 40 Wednesday/Thursday overnights (counting them as a full day, though they aren't) and 19 weekends of 2.5 days (19 x 2.5 = 47.5).

[40] If I assume there are 5 long weekends during the school year (Labour Day, Thanksgiving, Remembrance Day, Heritage Day, Victoria Day) and 8 professional development days, and give Mr. Denninger 7 of those 13 extra days, that means adding an extra 7 days.

[41] I've rounded up the Wednesday/Thursday overnight into a full day. I've given Mr. Denninger more than half the long weekends during the school year and I've used the special holiday schedule sequence that gives him more time. This analysis still provides Mr. Denninger with less than 140 days with the children each year. This is not a shared parenting arrangement.

Prospective child support

[42] To determine Mr. Denninger's current child support, I must know his current income.

[43] Mr. Denninger provided a January 2018 Armed Forces pension cheque. He admitted that the amount of his pension likely increased by a small amount ($10.00 net each month) as of April or June 2018. If I assume the increase occurred in June, at marginal tax rate of 15%, Mr. Denninger's annual income from his Armed Forces pension is $15,291.72.

[44] Mr. Denninger provided no statement confirming his annual Veterans' Affairs pension of $7,319.52.

[45] Mr. Denninger earned an unknown amount working as a millwright in Truro. He said he worked a "couple of weeks". He provided a paystub which showed an hourly rate of $16.00 and standard hours of 80. I calculate his earnings at $1,280.00.

[46] I determine Mr. Denninger's total 2018 income to be $23,891.24. For each month of 2018, I order him to pay the table amount of child support of $342.00.

[47] Months ago, the parties reduced Mr. Denninger's payments to $350.00 each month. He's paid $4,200.00 so far for 2018. This is an overpayment of $96.00 because he should have paid only $4,104.00.

Historic child support

[48] Mr. Denninger asks me to reduce his child support payments, effective July 1, 2016. Ms. Ross asks that child support payments be increased as of July 1, 2016.

[49] In 2013 the parties were ordered to exchange their tax returns annually. Neither did. Ms. Ross only learned Mr. Denninger's income had increased when he filed this variation application.

[50] Child support is to reflect a parent's current income: *DBS v. SRG*, 2006 SCC 37 at paragraph 38. Many parents look to the last year's tax return to adjust child support. Nova Scotia's Administrative Recalculation program does the same. This is not necessary when calculating historic child support because we know the parent's actual income for the year.

[51] In 2016, Mr. Denninger's total income was $55,402.00 and he should have paid monthly child support of $774.00. His total payments for 2016 should have been $9,288.00. He paid $8,544.00 and owes $744.00.

[52] Mr. Denninger didn't provide his 2017 tax return or Notice of Assessment though both would have been available when he filed his Income Statement in October 2018. In his October 2018 affidavit, Mr. Denninger said his 2017 income was $52,741.00. This is approximately $14,000.00 more than the amounts disclosed on the various T-slips he provided.

[53] I order Mr. Denninger to provide a copy of his 2017 tax return and Notice of Assessment (and any Notices of Re-Assessment) to the court and to Ms. Ross by December 31, 2018. I reserve the right to adjust his 2017 child support if these documents do not confirm an annual income of $52,741.00. Until then, and subject to this reservation, I order Mr. Denninger to pay $738.00 each month from January 2017 to November 2017, and $753.00 for December 2017.

[54] Because Mr. Denninger failed to provide disclosure in the past (and here I am speaking of the requirement that he annually provide his tax return to Ms. Ross), I order that he pay costs of $250.00 to Ms. Ross if he fails to provide his 2017 tax materials to her and the court by December 31, 2018.

[55] On an annual income of $52,741.00, Mr. Denninger should have paid child support of $8,871.00 in 2017. He paid $8,544.00 which means he owes $327.00.

[56] In total, Mr. Denninger owes $1,071.00 for 2016 and 2017. He overpaid $96.00 in 2018, so his historic adjustment is $975.00, owed to Ms. Ross.

[57] Mr. Denninger didn't provide Ms. Ross with his tax returns. Ms. Ross didn't seek a retroactive claim back to 2015: Mr. Denninger's income in 2015 would have increased his child support payments. Even on his reduced income, Mr. Denninger still failed to meet his obligation.

[58] Since 2016, the children have had their primary care with Ms. Ross. Her Expense Statement shows that she has paid many, if not all, of their direct costs: clothing, health, activities, grooming. Despite their time with their father, Mr. Denninger didn't identify any expenses he paid for the children.

[59] Mr. Denninger argues that he shouldn't have to pay retroactive child support because it would cause him undue hardship. His income is low. He is not working, though he is capable of working. His property statement shows no consumer debt (credit cards). He shares his living costs with his wife, who has accumulated an undisclosed amount of savings for Mr. Denninger's younger daughter (not yet one year old).

[60] Mr. Denninger and his wife have two cars and a home. He has RRSPs. He has failed to disclose the balance in his bank account. He has failed to disclose asset and debt information that could prove he has an ability to pay: for example, he hasn't provided proof of the value of his RRSPs; and he has told me his house is worth less than $100,000.00 (though it carries a mortgage for $160,000.00). Mr. Denninger has not satisfied me that paying the child support he owes would cause undue hardship.

[61] I order Mr. Denninger to pay $975.00 to Ms. Ross by March 31, 2019.

[62] Mr. Denninger's counsel will prepare the variation order. This can be done only after Mr. Denninger has filed his 2017 tax materials.

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

Halifax, Nova Scotia