

CITATION: Bonello v. Bonello, 2024 ONSC 1756
COURT FILE NO.: FS-23-00043-0000
DATE: 2024 03 25

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
)	
SHELLEY BONELLO)	Self-Represented
)	
Responding Party/Applicant)	
)	
- and -)	
)	
NICOLA BONELLO)	K. Deol, for the Moving Party/
)	Respondent
Moving Party/Respondent)	
)	
)	HEARD: March 20, 2024

REASONS FOR JUDGMENT

Fowler Byrne J.

[1] The Respondent Father (“the Father”) has brought this Motion to Change, wherein he seeks to terminate his remaining child support obligations. Within this Motion to Change, he has brought this motion to terminate his child support obligations as of April 30, 2023, and have any overpayments reimbursed to him. If this motion is granted, it will in effect, resolve all outstanding issues in the Motion to Change.

[2] The Father's child support obligations arise out of the final order of Justice Chozik, dated November 27, 2019 ("the Chozik Order") and the final order of Justice Mills, dated July 7, 2022 ("the Mills Order").

I. Background

[3] The Applicant Mother ("the Mother") and the Father were married in 2002 and separated in May, 2013. They have been divorced since 2022. There are two children of the marriage. The father's child support obligations with respect to the first child of the marriage have already been terminated. This motion is only with respect to his child support obligations for the parties' other child O.B., born December 15, 2003.

[4] It is agreed that O.B. graduated high school in June 2021. She then started at Humber College and completed a two-year college course in Early Childhood Education. Her classes in her final year were finished in April 2023. She successfully obtained her diploma. She then started at Brock University, online in September 2023, and has completed her first semester. The Mother indicates that O.B. wishes to become a teacher or a Child Life Specialist. O.B. has continued to live at home with the Mother since high school.

[5] To her credit, O.B. works part time with EarlyON Child and Family Centre and is an emergency supply teacher with a local school board. Unfortunately, we have no evidence of her income. The Mother indicates that O.B. suffers from anxiety and takes medication in relation to her thyroid, which she says limits O.B.'s ability to work more. The court was not supplied with any evidence to support this submission.

[6] Whether or not O.B. should take on more part-time work is not determinative for the purposes of this motion. Both parties should be commended for having such an industrious daughter who is pursuing post-secondary studies while also working part-time. She also seems focused on a career with children. Whether it is as an early childhood educator, a teacher or a child life specialist, she is pursuing the education and the part time work that is bringing her closer to her goals.

II. Final Orders

[7] As indicated, there are two final orders which are relevant in this matter. The Chozik Order sets out the Father's child support obligations for both children. It further provides:

6. Child support ends for each child when:

(a) the child ceases to be a "child" as defined in the Divorce Act;

- (b) the child no longer resides full-time with one of the parties;
- (c) the child becomes self-supporting;
- (d) the child obtains one post-secondary degree or diploma;
- (e) the child turns 22 years of age;
- (f) the child marries;
- (g) the child dies.

7. The parties will adjust the table amount of child support paid each calendar year based on the party's actual incomes for that calendar year. The party shall determine the appropriate table amount of the parties for the child support obligation for the applicable calendar year, in accordance with the Child support guidelines.

.....

9. For as long as child support is to be paid, the payer and recipient, if applicable must provide updated income disclosure to the other party each year, within 30 days of the anniversary of this order, in accordance with section 24.1 of the Child Support Guideline.

[8] The Mills order terminates child support for the parties' first child, and then continues as follows:

1. [The Father] ... will pay \$4,500 to the [Mother]in full satisfaction of all arrears of child support, retroactive child support, and arrears of section 7 expenses within 90 days of this order.
2. Commencing on May 1, 2021, on the first day of each month thereafter, [the Father]...shall pay child support to [the Mother] for [O.B.] based on [the Father's] 2021 income of \$73,812.70, in the amount of \$691 per month payable on the first of each month. The parties agree that this paragraph shall be non-variable, absent an extraordinary change in the health of either party.

3. [The Father] will be solely responsible to pay for [OB's] tuition fees and textbooks for her post secondary education for the academic years commencing September 2021 and September 2022.

[9] The parties agree that the Father has been paying his child support as indicated in these two orders.

[10] The Father argues that his child support obligations for O.B. have come to an end in accordance with the plain reading of the Mills Order.

[11] The Mother does not consent to the termination of child support for O.B. She argues that child support should continue given that O.B. is continuing her post-secondary studies. Unfortunately, in her Response to Motion for Change, she seeks no changes or variation to the two final orders.

III. Issues

[12] The following issues must be determined:

- a) Can I rely on the Mother's sur-reply affidavit, sworn February 16, 2024;
- b) Should the Father's child support obligations with respect to O.B. be terminated?

- c) If so, what is the appropriate termination date?
- d) Should the Father's monthly child support payments be varied in light of his change in income?
- e) If the Father is required to continue to pay child support for O.B., what is the appropriate amount to be paid?

IV. Analysis

A. Sur-Reply Evidence

[13] At the beginning of the hearing, the Father requested that I not rely on the Mother's affidavit sworn February 16, 2024. The Father states that this affidavit is sur-reply evidence and is not provided for under the *Family Law Rules*, O. Reg. 114/99 under *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[14] The Mother, who is unrepresented, submitted that she was advised that she would have the right to reply to any evidence submitted by the Father.

[15] Rule 14(20) of the *Family Law Rules* clearly states that the evidence on a motion is restricted to the evidence in support of the motion, the responding evidence, and any evidence in reply to new matters raised in the responding materials. No other evidence may be used.

[16] That being said, in order to fulfil the primary objective of the *Family Law Rules* as specified under rule 2(4), I have power under r.1(7.2)(g) to make any orders giving directions respecting procedural matters as are just, which include making orders about what affidavit evidence may be relied upon.

[17] I have reviewed the mother's sur-reply affidavit. Other than the reference to settlement discussions in the last paragraph (which I will disregard) I see no difficulty in considering this evidence. There is no prejudice to the father in doing so. Some of it repeats what the Mother has already stated. Some is with respect to their other child or past child support paid, which is not relevant to the issue before me. Some of it relates to the Father's knowledge of O.B.'s educational plans, which does not assist me in determining the issue before me. Accordingly, I will allow this affidavit to be relied upon by the Mother.

B. Termination of Child Support

[18] Upon reading paragraph six of the Chozik Order there appears to be a clerical error in that it is not clear that only one of the factors specified is sufficient to end the Father's child support obligation. The word "or" appears to be missing after the last subparagraph or some wording to the effect that "child support will end on the earlier of any of the following..".

[19] That being said, I am content that the plain reading of this paragraph is such that any one of those provisions would be sufficient to terminate child support. To interpret it otherwise would lead to a conclusion that child support could continue until O.B. marries or dies. That clearly could not have been the intention of the parties when they made the agreement that forms the basis of the Chozik Order.

[20] Accordingly, based on a plain reading of the Chozik Order, the Father's child support obligations cease when O.B. finished her two-year diploma. The parties agree that this has occurred. If the Mother wishes child support to continue, she must make the appropriate Motion to Change for the Chozik Order, wherein she can request the appropriate relief.

[21] In so deciding, I do note that in the affidavit the Mother swore in support of her Response to Motion to Change, she suggested that child support should continue. Unfortunately, even with due consideration for the fact that the Mother is self-represented, without her so indicating that she was seeking that change in her Response to Motion to Change, the issue is not before the court.

[22] Alternatively, even if I was to consider this request, it is the Mother's onus to show a change in circumstances: s.17(1)(a) *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.). It must be a material change that was not contemplated by the parties at

the time the initial order was made, and if it had been known, would have resulted in different terms. In addition, the Mother would then bear the onus of establishing the need for continued support, and that the child still remains under parental charge: *Licata v. Shure* 2022 ONCA 270 at para. 19-22, 33.

[23] The evidence proffered by the Mother in this regard is insufficient. I have no evidence of O.B.'s course or programme. I have no evidence of the costs of this programme. I have no evidence of O.B.'s earning capacity and whether she has applied for any student loans or grants. As a result, I have insufficient evidence to determine whether O.B. must remain under parental control and what degree of support is required, given O.B.'s own contributions.

[24] Accordingly, subject to a motion to vary the termination clause of the Chozik Order, this clause is enforceable and thus the Father's ongoing obligation to support O.B. shall terminate upon the completion of her first diploma.

C. What is the Appropriate Termination Date?

[25] While it is agreed that O.B. finished her classes in April 2023, I have no evidence of the exact date she received her diploma. Usually, a period of time is required for final marks to be given and then the diploma conferred. Neither party provided that information.

[26] Accordingly, it falls to me to decide how long child support should continue in recognition of the completion of her diploma. It has been recognized that in appropriate circumstances, a child is entitled to a period of transition to allow him or her to become independent: see *Wasney v. Wasney* [2000] O.J. 1371 (Ont.C.A.); *P.D. v J.M.* 2008 CanLII 66151 (Ont.S.C.) at para. 35.

[27] In these circumstances, I find that the summer of 2023 is an appropriate period to give O.B. the opportunity to become independent. Had she decided to work as an early childhood educator, it is unlikely that she would have started any employment prior to the school year in September 2023.

[28] Therefore, in the circumstances before me, I find that Father's support of O.B. through her first diploma shall continue until the end of August, 2023.

D. Should the Monthly Child Support Amount Change?

[29] In accordance with the Mills Order, the Father's arrears were up to date as of July 7, 2022 upon payment of the amount of \$4,500. The new child support amount was to commence on May 1, 2021. It was based on the father's 2021 income in the sum of \$73,812.70.

[30] The Mills Order also states that child support is *non-variable*. This is despite the fact that it was contemplated that O.B. would be in college until

approximately April or May 2023. In the normal course, and in accordance with paragraph 7 of the Chozik Order, there would be an exchange of income information when the parties received their 2022 income. If appropriate, the necessary variation in child support payments would be made. That specific clause of the Chozik Order was not varied, and in fact is required by s.25(1) of the *Child Support Guidelines*, SOR/97-175, as amended.

[31] The Father has sworn in his financial statement that in 2022 he earned \$105,999. Accordingly, in the normal course, the Father's child support obligations would increase in 2023 to \$958 per month, or \$267 more per month than he was paying. If he was obligated to pay this amount from January to August, 2023, that would result in an additional \$2,136 child support owing.

[32] That being said, the Father also agreed to pay 100% of the O.B.'s tuition fees and textbooks for her two-year college course. If not for this provision, the Mother would have been responsible for her proportionate share of these expenses which, based on their 2021 incomes, would have been forty-one percent (41%). While I have no specific evidence of the tuition or textbooks costs over a two-year college course, I am confident that this apparent under payment of child support by the Father was compensated by his payment of the Mother's share of the O.B.'s post-secondary costs.

[33] What then, is the impact of the “nonvariable” clause in para. 2 of the Mills Order? In the particular facts of this case, it is of little consequence. Child support is the right of the child and should not be negotiated away by the parents: *D.B.S. v. S.R.G.* 2006 SCC 37 at para. 38. In these circumstances though, I do not believe that O.B. has been disadvantaged. I am confident that based on the evidence before me, the Father paid reasonable child support and s.7 expenses for the period at issue.

E. What Amount Should be Paid Going Forward?

[34] In light of my earlier decisions, this issue is moot.

Conclusion

[35] For the foregoing reasons, I make the following orders:

- a) The Mother’s affidavit, sworn February 16, 2024 shall be admitted into evidence on this motion;
- b) The Father’s obligation to pay child support to the Mother, for the support of O.B., shall terminate as of August 31, 2023;
- c) The Mother shall be responsible for repaying the Father for any overpayment; and

- d) The parties are encouraged to settle costs themselves; if they are unable, the Father shall serve and file his written costs submissions, limited to 2 pages, double spaced, plus his Costs outline, on or before April 5, 2024; the Mother shall serve and file her responding written costs submissions, with the same size restrictions, plus her costs outline, on or before April 19, 2024; the Father may serve and file reply costs submissions, limited to one page, on or before April 26, 2024.

Fowler Byrne J.

Released: March 25, 2024

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