COURT FILE NO.: 1439/04
DATE: 20040723

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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DAVID WILLIAM ALLAN FROOM	)	Catherine A. Haber, for the Applicant
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	)	
Applicant	)	
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- and -	)	
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	)	
LYNN FROOM	)	Barbara J. McLeod, for the Respondent
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Respondent	)	
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	)	
	)	**HEARD:** June 15, 2004

RULING ON APPLICATION

Coats J.

[1] Mr. Froom commenced this application on March 26, 2004, seeking a variation in the amount of child support he is paying for the two children of the marriage, namely, Zachary Roy Froom, born December 6, 1993, and Oliver William Froom, born February 29, 1996, from that set out in the final Order of The Honourable Mr. Justice Kruzick dated January 2, 2003. In May 2004, he amended his application to seek additional time with the children for overnight each Tuesday. Mrs. Froom opposes both the variation in child support and the request for additional access.

[2] The parties were married on June 29, 1991, and separated in 1998. The parties divorced in 2001.

[3] The January 2, 2003 final order resolved the issues of custody, access and child support. The key provisions of this Order related to this application are as follows:

a) Mrs. Froom was granted custody of the children.

b) Mr. Froom was granted access on alternating weekends and every Monday overnight, alternating Christmas Eve to 12:00 noon Christmas day, alternating March breaks and one month in the summer.

c) Mr. Froom was ordered to pay child support in the amount of $651.00 per month based on an income of $46,200.00 per year and 50% of the daycare costs which 50% was $230.00 per month.

d) The parties were to exchange guideline disclosure by May 15 each year and the child support payments may be varied from time to time to reflect changes in the income of either party.

[4] Mr. Froom has the two boys with him from Friday after school to Tuesday morning before school on alternate weekends and Monday from after school to Tuesday before school in the alternating week. Mr. Froom's position is that if the children leave school early on a Friday and it is his weekend he collects them and if they are sick on a day that he is to return them to school he cares for them. This is not really disputed by Mrs. Froom.

[5] With respect to the child support variation requested, the issues to be decided are as follows:

1) Has there been a change in circumstances as provided for in s. 17(4) of the *Divorce Act* and s. 14 of the *Child Support Guidelines*?

2) If so, what is the appropriate child support? This involves a determination under s. 9 of the *Child Support Guidelines* as to whether Mr. Froom has the boys with him for no less than 40% of the time over the course of a year. If the answer is yes, then the Court must apply section 9 analysis to determine the appropriate child support award.

[6] With respect to whether there has been a change in circumstances, I am satisfied that there has been. The changed circumstances include the following:

a) There has been a significant increase in Mrs. Froom's income. In 2002 her gross income was approximately $27,000.00 annually. According to her 2003 income tax return it is now $49,677.76. This does not include the child tax benefit or the child support. The final order in paragraph 3(d), which order was founded on Minutes of Settlement signed by the Parties, clearly provided that the child support payments may be varied from time to time to reflect changes in the income of either party.

b) The case law regarding the application of s. 9 of the *Child Support Guidelines* changed in October, 2003, with the Ontario Court of Appeal's decision in *Contino v. Leonelli-Contino* (2003), 2003 CanLII 30327 (ONCA), 67 O.R. (3d) 703. Prior to this decision the Divisional Court in the same case (*Contino v. Leonelli-Contino* (2002), 2002 CanLII 2774 (ON SCDC), 62 O.R. (3d) 295) indicated a presumptive approach, such that even if the payor established that he/she had the child(ren) with him/her more than 40% of the time the Court should not depart from the table amount unless the payor could adduce clear and convincing evidence to rebut this presumption. The Court of Appeal overturned the Divisional Court and determined that there is no such presumption in s. 9 of the *Child Support Guidelines* and that each subsection of s. 9 must be analyzed in each s. 9 case. This change in approach by the Courts is a change in circumstances since the granting of the January 2, 2003 Order.

[7] The next issue is whether Mr. Froom has the children with him for not less than 40% of the time over a course of a year. Mr. Froom has prepared a calendar showing a two year cycle. In one year he has the children for Christmas and March break and in the next year Mrs. Froom does. I have read the case law provided by both Parties with respect to the calculation of whether the payor has the children not less than 40% of the time and the case law suggests the following approach, which I accept:

1) The onus is on the payor to satisfy the criteria of s. 9 (*Meloche v. Kales* (1997), 1997 CanLII 12292 (ONSC), 35 O.R. (3d) 688).

2) Section 9 requires the payor to exercise access 40% of the total custodial time, assuming that the custodial parent starts with 100% of the time (*Meloche v. Kales* (1997), 1997 CanLII 12292 (ONSC), 35 O.R. (3d) 688).

3) The Court should try to avoid fine calculations of the amount of time spent by the children with each parent and try to determine whether physical custody is truly shared by the parents (*Borutski v. Jabbour*, [2000] O.J. No. 5173).

[8] Mr. Froom has satisfied the onus. I am satisfied that his calculations are accurate. In year one he has the children 42.5% of the time and in year two 41.1%

of the time. He has treated his extended weekends Friday after school to Tuesday before school as four days. This is accurate. He has ½ day Friday, all day Saturday, all day Sunday and all day Monday and ½ day Tuesday, totalling four days. I also find his position to be accurate that Monday overnight to Tuesday morning is equal one day. These percentages would increase if early dismissals and sick days when he cares for the children were factored in.

[9] The Court must now apply the *Contino v. Leonelli-Contino* (*supra*), Court of Appeal analysis to this case. The starting point is the set off amount. As of September of 2004, Mr. Froom will be making $51,266.00 per year. His 2003 Notice of Assessment indicates an income of $45,471. 00. Mrs. Froom's income for 2003 is $49,677.76. As of September of 2004 Mr. Froom would pay$717.00 per month under the *Child Support Guidelines* for two children and Mrs. Froom would pay $696.00, the set off amount being a payment by Mr. Froom to Mrs. Froom in the amount of $21.00 per month.

[10] Moving on to apply s. 9(b) and 9(c) of the *Child Support* Guidelines, the Court is to consider the increased costs of shared custody, and the condition means and other circumstances. Neither party has presented any evidence of the increased costs of the shared custody. Mrs. Froom still has the children with her approximately 58% of the time (slightly higher or lower depending on the holiday schedule). In the absence of any evidence of Mrs. Froom's fixed costs I apply a multiplier of 50% resulting in a payment by Mr. Froom of $31.50 per month.

[11] Neither Party have made any submissions relevant to section 9(c) and in the absence of any such evidence I can make no adjustment for the condition, means and other circumstances. The Parties have roughly equal incomes and the children will have similar standards of living in both homes. Both Parties are in new relationships, with both new partners being employed. Mr. Froom's new wife is temporarily on maternity leave.

[12] In the result, I vary the Order of January 2, 2003, to provide that commencing July 1, 2004, and for the months of July and August, 2004, only there shall be no child support payable by either Party to the other. Commencing on September, 2004, and on the 1st day of each month thereafter Mr. Froom shall pay to Mrs. Froom for the support of the two children child support in the sum of $31.50 per month. Support Deduction Order to issue. The provisions in the Order of January 2, 2003, regarding child care and s. 7 expenses shall remain unchanged.

[13] With respect to Mr. Froom's request for increased access, I find that there has been no change in the condition, means, needs or other circumstances of the children as required by s. 17(5) of the *Divorce Act* s. 17(5) and therefore decline to vary same. The children already spend significant time with their new step-brother (Mr. Froom's new child) and I am not satisfied that changing the access

arrangements to permit increased time together is in the boys best interests given the stability of the current arrangements which have been in place for some time.

[14] Counsel may arrange to appear before me with respect to the issue of costs if they are unable to resolve same. This is to be arranged through the trial co-ordinator.

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Coats J.

Released: July 23, 2004

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B E T W E E N:

DAVID WILLIAM ALLAN FROOM

Application

- **and –**

LYNN FROOM

Respondent

RULING ON APPLICATION

COATS J.

Released: July 23, 2004