FAMILY COURT OF NOVA SCOTIA

Citation: *J.T. v. T. T.*, 2014 NSFC 17

Date: 2014 11 14
Docket: FLBISOS No. 090471
Registry: Bridgewater

Between:

J. T.

Applicant

v.

W. T.

Respondent

Judge: The Honourable Judge William J. Dyer

Heard: September 17, 2014

Present: J. T., the Applicant, not in attendance
W. T., the Respondent, on his own behalf

By the Court:

Introduction

[1] J. T. (“the mother”) and W. T. (“the father”) are the parents of two daughters, M. (now about 14 years old) and Ma. (now about 13 years old). In late January 2014, the mother started a child support application against the father under the *Interjurisdictional Support Orders Act (Ontario)*. He was served pursuant to Nova Scotia’s companion legislation and responded.

[2] The mother submitted a bundle of documents to support of her claim. She had advice and help from an Ontario lawyer who participated (by telephone) in several case management conferences and exchanged some communications with court staff. However, the lawyer is not authorized to practice in Nova Scotia and her retainer did not include an active role in the final hearing in this Province. The father had a lawyer when the case started; but soon after he elected to represent himself in court. My impression is that cost was a decisive factor for the limited roles the lawyers played.

The Mother’s Application

[3] The mother’s conventional application package was handwritten. It may have been done without the help of the lawyer she consulted. Her factual assertions were that the parties are still married and that divorce proceedings have not been started. If there are any written agreements or court orders between the parents touching on parenting and child support, she did not include them in the package. She stated that the parties were married in late June, 1996 and that they separated in early October, 2001. She did not disclose what prompted the separation, or what happened during the intervening years. Nothing was said about the children’s circumstances, then or now - or about her own circumstances for that matter. However, in fairness, the standard application forms do not invite any narratives.

[4] This is the first application by the mother for child support. It was signed in late January, 2014. She requested child support starting “08/01/2013”. I took this to mean basic child support. In the same package, she also claimed $1,000 – representing the father’s estimated share of orthodontic expenses for M.’s benefit. Later it was revealed that the expenses were first incurred in 2011. And, by invoices, etcetera she subsequently doubled the claim to $2,000 (against total expenses of $4,000).

[5] Ordinarily, the case law regarding retroactive support claims would have some relevance. [See, for example: *Wood v. Legge*, 2004 NSFC 12.] But, as it happens, the father did not seriously object to the scope of the requests. Rather, he defended the claims on the merits – citing inability to pay – including the extraordinary expense components, ostensibly reaching back to 2011.

[6] Except as later mentioned, there is no evidence to explain why the mother did not launch an application before now. As noted, she seeks the (Nova Scotia) Table amount of basic support for the benefit of both daughters plus a contribution to orthodontic expenses under section 7 of the **Child Maintenance Guidelines ("the Guidelines")**. She invited the court to impute an income of $35,000 annually to the father should he fail to provide adequate financial disclosure. As it happens, he made full disclosure.

[7] As I considered the application, it occurred to me that the mother may be under the mistaken impression that the court could make a section 7 award, even if there was no award of basic (Table) support. This is not so.

[8] From the mother's application, I find that she had very little knowledge about the father's employment or income, except for information gleaned from the internet social media service, Facebook. Consistent with the father's evidence, she said he posted information to the effect that he was starting a job in Alberta in early January, 2013. She provided a copy of the post which also mentioned previous contract work with two major local employers. I find disclosure likely prompted the current **ISO** application.

[9] Returning to M.'s dental work, the mother provided a copy of a "Professional Payment Agreement" (dated August 30th, 2012). It speaks about "orthodontic treatment" and a $4,000 fee. It does not otherwise describe the services or provide any elaboration regarding the treatment. In April, 2014, on my direction, there was a Request for Further Information sent to the reciprocating authority asking for (among other things) "reports and any other pertinent information from the orthodontist with an explanation of what is involved and why orthodontic treatment is necessary". The need for a report was reiterated during several court appearances and in communications with the mother's lawyer. The professional's estimate and proof of payment were provided. However, nothing else was forthcoming about the treatment.

[10] In late August, 2014 the mother submitted copies of a receipted invoice disclosing total fees and payments of $4,500 to cover services going back to mid

July 2011. As mentioned, the mother's original claim was for considerably less. (And, I am unable to resolve the discrepancy between the receipts for $4,500 and the most recent $4,000 estimate.) That said, I find that the payments for M.'s benefit were likely $4,500 in total.

[11] Regrettably, I am unable to determine the amount, if any, that may be covered by, or recoverable from, provincial government dental coverages and plans for children. Moreover, the mother did not provide a net cost calculation – assuming, if nothing else, she claimed all eligible amounts for personal income tax purposes. This is significant because quantification of the expense (assuming necessity) under the **Guidelines** requires a determination of a net cost to the applicant.

[12] As already mentioned, there is a dearth of evidence addressing the necessity question – despite repeated requests from the court. In this context, the law requires a determination about the necessity of a claimed expense in relation to the child's best interests, and the reasonableness of the expense in relation to the means of each parent. Decisions about such claims must be evidence-based. With respect, the absence of relevant evidence needed to conduct a proper analysis under section 7 of the **Guidelines** cannot be simply glossed over. And judges cannot speculate or otherwise fill in the gaps for parties. [See *Parnell v. Hubley-Parnell*, 2012 NSSC 437.]

[13] However, as will appear, much of the foregoing becomes academic against the first question (and my decision) on the issue of whether the father should be ordered to pay basic support.

[14] The mother filed copies of Notices of Assessment from the Canada Revenue Agency. Her Line 150 income history is as follows: 2010 - $25,805; 2011 - $28,748; 2012 - $34,415; 2013 - $17,312. With regard to her 2014 income, the mother submitted a "transaction report and invoices payable" from an undisclosed source showing a total income of $4,472 (or about $2,236 monthly), as of early March, 2014. The mother heavily redacted information on her Tax Summaries and other written materials - by drawing what appears to be a thick marker through any information that she arbitrarily decided ought not to be disclosed. With respect, this was inappropriate - although not fatal to her application. She did not disclose her current or past occupation(s). Making the best of what was submitted, it appears she has recently held one or more "contract position job(s)" as a personal or fitness trainer, at or near Belleville, Ontario. Ironically, she has demanded full

disclosure of the father's employers, employment record, etcetera but she redacted her own materials to the point where her own employer(s) and employment record could not be discerned with any confidence.

[15] Against that background of her section 7 claim, and a declaration by the father that he would be advancing a defence of undue hardship under section 10 of the **CMG**, the mother was asked to provide proof of her "household income". She did not reply directly. Rather, her lawyer sent an e-mail to a Family Court Officer advising that the mother is "living alone". I took from the communication that the lawyer was stipulating (as an officer of the court) that the mother is not cohabiting with anyone who has an income and contributing financially to the household for **Guidelines** purposes.

The Father's Circumstances
First Family

[16] The father's evidence was that he and the mother were residing in Ontario at the time of their final separation. At that time, their first daughter was very young and the mother was pregnant with their second daughter when there was a serious incident of family violence following which (according to the father) he was charged with two counts of aggravated assault. His evidence was that under a plea bargain arrangement he was sentenced to four months in custody for one or more charges, placed on a lengthy probation order and was subject to a no contact provision in regard to the mother and perhaps other members of her family.

[17] Upon release from custody, the father said that he was "homeless and jobless". He admitted to further involvement with the criminal justice system and, apparently, more charges and sentencings. He admitted to a host of (now regrettable) lifestyle choices and criminal involvements. In the aftermath, the father left Ontario and returned to Nova Scotia. For all practical purposes contact with the mother and his daughters ended. According to him, as the months and years passed, there were no formal requests or demands for child support. I accept this evidence.

Second Family

[18] Thereafter, the father and K.B. had a relationship. Their daughter, J., was born in late October, 2006. The relationship ended and was followed by legal proceedings which resolved the parenting arrangements by consent. In December, 2007 the father and Ms. B. executed an agreement whereby the father agreed to

pay B. for J.'s benefit support at the rate of $128 monthly starting in February, 2008. Upon registration with the Family Court, the agreement gained the status of a court order. The child support agreement has not been varied. Ms. B. receives payments via the Maintenance Enforcement Program (MEP). A record of payments from MEP discloses irregular payments in varying amounts since 2008. According to the father, he did not seek to vary the child support agreement during periods of unemployment or when his annual income would otherwise reflect a change in his circumstances. As a consequence, arrears climbed to over $5,500 at one stage. The father said that it was his hope to "catch up" on his payments when he resumed employment from time to time. He was not entirely successful and this, in turn, resulted in garnishee of employment and other income. As at September 16, 2014 arrears under the B. Agreement were just shy of $1,600.

[19] The father said that B. knows about the mother's application. He stopped short of suggesting that B. might be aware that the mother's application could impact on the amount of money being paid for J.'s benefit. Nor did he suggest his financial obligations to his growing "third family" might prompt review and recalculation. In any event, he has not given B. any formal notice of a variation request. And, consequently, there is no parallel case to be consolidated with the present one.

Third Family

[20] About nine years ago, the father started a relationship with A.W.. By contrast to his other relationships, his relationship with W. appears to be successful. The unmarried couple now have a six year old son, a four year old daughter, and toddler who is about 19 months old. Ms. W. is employed outside the home as a cook.

[21] According to the father, the couple have built and now occupy a residence on property owned by W.'s parents. Title remains vested in the W. family. It seems that her family largely underwrote or subsidized construction of the residence and that the couple live there under a "rent to own" arrangement.

[22] The father disclosed that in the past he did contract work for two large industrial employers. Unfortunately, he secured that employment by misrepresenting his criminal record. His past caught up with him when the misrepresentations were discovered. He was arraigned locally on multiple charges, pleaded guilty, and was sentenced to six months of house arrest plus probation.

According to the father, these convictions were highly publicized in the aftermath; he found it next to impossible to find work locally.

[23] In late 2012 the father decided to go to the "Oil Patch" in Alberta where there was a job waiting for him. However, after less than a month there, he quit and returned to his home and family in Nova Scotia. His evidence was that one of the factors driving his decision to go to Alberta was a desire to earn enough money to start support payments for his daughters in Ontario – in addition to meeting his obligations to J. and to his younger children. According to him, he broached the subject with the mother with the hope that this would set the stage for gradual introduction and restoration of his relationship with his daughters that has been severed for many years.

[24] The father said he was in communication with the mother *via* Facebook about working in Alberta and that it was on the heels of his disclosure that she commenced her ISO application in Ontario. However, she steadfastly still refuses to support his interest or efforts to have contact with their daughters.

[25] To corroborate (at least in part) his version of historical events, the father introduced a copy of a Facebook message apparently authored by the mother in mid-October, 2012. I do not intend to reproduce the entire message, but I find that the tenor was surprisingly low key and conciliatory – given past events. Among other things, in her message, the mother stated that she has always told their daughters that when they are old enough they could seek him out if they wanted. However, she asserted that her primary goal was to protect them from anything or anyone that might harm them. She asked that he put himself in her position and think back to past events and the lifestyle he was then living. She disclosed some of the children's activities and involvements and mentioned that they had travelled a lot.

[26] The father drew particular attention to one portion of a message which reads as follows, "As far as the money you wanted to offer….it's never been important to me. Money is a necessity to live, and the more you have the 'better' materially you live but health, happiness, love go a lot further." And then later, "…… they are never in need of anything but may be in 'want' because they are young girls." He offered this evidence in support of his contention that in the intervening years there have not been any formal demands for child support or other assistance and that it was he (not she) who broached the subject of support (in late 2012) and tethered it to potential contact with his daughters.

[27] Returning to his narrative, the father's evidence was that when he returned to Nova Scotia in early 2013 he was unable to find gainful employment until August. When he did find work, it was at a local lumber mill. Despite his difficulties in the criminal justice system, the local employer apparently was satisfied with his work. Unfortunately, the mill has experienced economic challenges and there are periodic or rolling lay-offs. Once again the father finds himself unemployed. He has provided proof of his 2014 income up until the time of his most recent lay-off and proof of employment insurance benefits which he now receives.

[28] The father expressed an interest in finding work elsewhere than at the mill, but has been constrained by his criminal record and limited education and training. He enrolled in an electrician's course at a local community college but did not complete it because (he said) there is currently a limited market for the trade in the local area. Accordingly, he is shifting focus and giving thought to enrolling in training which will allow him to operate heavy machinery.

[29] The father takes the position that he should not be chastised for assuming additional child support obligations after his separation from the mother many years ago, keeping in mind there were no support requests before now. He submitted he is unable to pay support to his first family at the present time, but conceded that he is under a legal duty to contribute to the support of his daughters if and when his income circumstances permit. He understands the court must apply the **Guidelines**.

Income History and the Tables

[30] The father submitted Income Tax Summaries and Returns which demonstrate the following Line 150 income: 2011 - $6,821.53; 2012 - $7,799.98; 2013 - $16,276.31. Suffice it to say, by comparison to the mother's income in recent years, the father's income has usually been less than hers. More to the point, his income for 2011 and 2012 was well below the threshold ($10,820) for payment of support under the Nova Scotia Tables.

[31] The Table amount for 2013 - for two children – is $234 monthly, before consideration of his obligations to the second and third families. As at the hearing, there was no final estimate of the father's 2014 income, and he was receiving employment insurance benefits. I find his income this year is unlikely to exceed that of last year.

[32] Ms. W.'s Line 150 income is as follows; 2011 - $22,211; 2012 - $21,606; 2013 - $19,379. A Statement of Financial Information for the household disclosed a total monthly income of approximately $4,427. But this figure includes universal child care benefits for three children. Not surprisingly, for GST/HST credit application purposes, 2013 "family net income" was established at the considerably lower figure of about $31,100. Monthly household expenses are about $3,175.

[33] I am mindful that child care benefits are excluded for some purposes under the **Guidelines**. I observe that the mother did not disclose the amount of benefits she receives. Nor did she file a household budget (i.e., an Income and Expense statement.). On the evidence, I find the father's current partner is contributing considerably more than him to the household generally and to their children's financial needs, in particular; and that the child care benefits constitute almost a third of the family's current income. Indeed, were it not for those benefits the family would be experiencing a significant budget deficit, each and every month.

Discussion/Decision

[34] The objectives of the **Guidelines** are to establish a fair standard of maintenance for children that ensures that they benefit from the financial means of both parents, to reduce conflict and tension between the parents by making the calculation of child maintenance orders more objective, to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance orders and encouraging settlement, and to ensure consistent treatment of parents and children who are in similar circumstances.

[35] The presumptive rule is that the amount of child maintenance is the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates, and the income of the parent against whom the order is sought; plus the amount, if any, determined under section 7. The Nova Scotia Table is applicable because the father resides here. I have already canvassed the results for basic support.

[36] Under section 7 of the **Guidelines**, the court may, upon request, provide for an amount to cover all or any portion of health related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment. (See section 7(1) (c)). The expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the

reasonableness of the expense in relation to the means of the parents and those of the child.

[37] The guiding principle in determining the amount to be paid is that the expense is shared by the parents in proportion to their respective incomes, after deducting from the expense, the contribution, if any, from the child. Importantly, the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense. (See section 7(3)). In determining the amount of an eligible expense, the court must not take into account any universal child care benefit or any eligibility to claim that benefit.

[38] Under section 10 of the **Guidelines**, a court may award an amount of child maintenance that is different from the presumptive amount if the court finds that the parent making the request would otherwise suffer "undue hardship". Section 10(2) of the **Guidelines** gives a non-exhaustive list of circumstances that may cause a parent to suffer undue hardship. In the present case, the father cites the following circumstances – namely, that he has a legal duty under a past court order to maintain another child of his (under the age of majority) and is making payments pursuant to the order; and that he has a legal duty to maintain, and is maintaining, three other children (all under the age of majority). He is the father of these children. (No order is in place because they are living as a family unit.)

[39] On the evidence, I find the father has met the threshold for consideration of his undue hardship position. I hasten to add that his current partner is also under a legal duty to contribute to the support of <u>their</u> children - but she is under no obligation to contribute to the financial support of the father's daughters by his relationship with Ms. T.. As discussed, her financial contribution to the household is mainly relevant for the section 10 aspects of the case.

[40] Even when there is a determination of an undue hardship circumstance, the court must deny the undue hardship defence if it is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child support payable to others, have a higher standard of living than the household of the other parent. In comparing standards of living, the court may use the Comparison of Household Standards Living Test referred to in Schedule II to the **Guidelines**. If the court decides to award a different amount of support than ordinarily presumed, the court may specify in an order a reasonable time for the satisfaction of any obligation arising from the circumstances causing undue

hardship and the amount payable at the end of that time. This latter section has no practical application in the present case because all of the children (other than those in Ontario) are under the age of majority and will be for many more years.

[41] Practically speaking, as discussed above, if the father achieves relief from payment of basic support, any claims for additional help under section 7 necessarily fall by the wayside. Neither party submitted calculations for the purposes of section 10 (3) and (4) of the **Guidelines,** but I have considered the comparative household living standards having regard to the respective incomes and the number of children in each home, as well as the father's court ordered support for another child, and all of the other evidence before the court.

[42] In the result, I decline to impose the Table amounts for child support basic, current or retroactive. And, on the evidence, I order that no basic support (or support under section 7) shall be due and payable by the father to the mother for their daughters' benefit at this time. However, given his stated willingness to consider financial assistance should his income circumstances improve, I order that starting in 2015, if requested in writing by the mother, he shall annually deliver to the mother true copies of his personal income tax returns by June 1st, plus true copies of his Notices of Assessment from the Canada Revenue Agency when received by him. This obligation shall continue until each daughter attains the age of nineteen years, unless otherwise ordered by a court of competent jurisdiction.

[43] A court order and copy of this decision shall be delivered to the mother *via* the reciprocating authority, and to the father at his current address.

Dyer. J.F.C.