IN THE FAMILY COURT OF NOVA SCOTIA
Citation: *B.S.M. v. G.W.W.*, 2008 NSFC 4

Date: 20080122
Docket: FLBMCA-050939
Registry: Bridgewater

Between:

M. (B.S.)

Applicant

v.

W. (G.W.)

Respondent

Judge: The Honourable Judge William J. Dyer

Heard: October 31, 2007, in Lunenburg, Nova Scotia

Counsel: Walter Thompson, Q.C., for the Applicant
Philip Gruchy, for the Respondent

By the Court:

[1] M. and W. are the parents of A., born July 20th, 1994. M. and W. were common-law partners for about five or six years; they separated in late September, 2000. A. is a dependent child within the meaning of section 2 (c) of the **Maintenance and Custody Act** (**MCA**). By way of an originating application, M. seeks current and retro-active support for A.'s benefit under the **MCA** and the **Child Maintenance Guidelines** (**CMG**). There is no claim for spousal support before the court. And, although W.'s real estate has figured prominently in the

debate over his income, M. did not advance claims in any other court regarding the properties.

[2] M. has been A.'s primary caregiver since the separation. W. has enjoyed regular access. Although there have been some bumps along the road, the informal parenting regime has continued and, with the consent of the parties, I will endorse an order upon its receipt from counsel.

[3] During the summer of 2000, M. consulted a Halifax lawyer about the separation. From her legal bill, it appears there were consultations about custody, access, child support, and division of assets and debts; also mentioned is preparation of an Agreement regarding the sale of a specified property. According to her, W. persuaded her that they could settle things without lawyers. She wrote, "I just wanted out of the relationship at that time and could not prove his income, and so I just let it go". But, in a reporting letter to M. in September, 2000, her then lawyer cast a different light on the prevailing circumstances by writing, "You advised me that you have bought a home in Bridgewater and that everything is working out well between you and Mr. W. and that he is being very cooperative".

[4] According to M., W. started to pay $200 monthly for A.'s support. She now says that not only was $200 monthly insufficient, but "every other month or so I would tell him how unfair it was, especially when day care costs alone were at least $170.00 per month". According to her, W. refused to discuss the matter and made her "uncomfortable" when she tried to raise or to pursue the subject. She claims his payments were inconsistent, and that if she asked for help with "extras", he complied - but then deducted his contributions from his regular support payments.

[5] She used $20,000 from her RRSP deposits to make a downpayment on a local home and is still repaying that amount (to herself) under the Registered Home Ownership Plan. She disclosed no other purchase particulars. She returned to a local community college in 2001 - 2002. Upon graduation, she had trouble finding work but she did not otherwise say much else about the intervening years except that she was, and still is, carrying a student loan and that she has dipped into her RRSP's to cover such things as automobile repairs, credit card debt, and residence upkeep. She did not specify or allocate any of these expenditures to the child.

[6] By April, 2005, M. was stressed about her finances to the point that she sent a personal letter to W. and asked for more money, elaborated on her plight, and

threatened legal action. There were no further developments until mid-November, 2005 when M. retained Bridgewater lawyer, James C. Reddy, who wrote to W. and gave notice of a child support claim and threatened proceedings in default of a substantive response.

[7] The initial letter from Mr. Reddy refers to the "child support guidelines" and the **MCA**. It implied that W.'s income for **CMG** purposes may be more than that demonstrated to the Canada Customs and Revenue Agency, and that additional income may be attributed to him when dealing with child support. Queries were made about releasing, or confirming release of, M. from mortgage guarantees on two specified properties.

[8] Peter Crowther, a Dartmouth lawyer, was engaged by W. and confirmed his retainer to Mr. Reddy in late November. There was some telephone discussion between the lawyers. In mid-December, 2005 Mr. Reddy provided Mr. Crowther with additional background information regarding the circumstances of the mother and the child. A "general proposal" to deal with child care and extraordinary expenses was advanced on M.'s behalf.

[9] Importantly for our purposes, it was Mr. Reddy on behalf of M. who first postulated a $40,000 annual income to W. for **CMG** purposes and monthly support of $400 “plus any agreed add-ons”. Reddy concluded with the following: “I ask that you review this correspondence with your client and perhaps we could engage in some constructive dialogue before the parties resort to litigation. I also expressly note that if your client is agreeable to this proposal, that Ms. M. will not seek any retroactive variations in child support, she is simply interested in going forward with an arrangement that is fair to her, and allows her to provide sufficiently for A.’s needs”.

[10] Although Mr. Reddy referred to potential “ retroactive variations”, no proceedings had been initiated between the parties and no written agreements had been registered with the court which could be potentially varied. One assumes the reference to retroactive variations was a miscue.

[11] Mr. Crowther’s quick response indicated the parenting arrangements were not in issue, offered lower amount of basic support, proposed a division of “extraordinary expenses”, and requested particulars of the latter. In a January 4, 2006 letter to Mr. Crowther, Mr. Reddy reiterated the original demand for child

support of $400 monthly, and expressed agreement in principle to sharing extraordinary expenses. There was a demand for payment of an outstanding dental bill; and concern was expressed about confirming an appropriate mode of payment as well as the mortgage guarantee issue.

[12] On January 9th, 2006 Mr. Crowther wrote to counter-offer on the quantum of support ($350 monthly), to confirm that payments had been made against the dental bill, to again request particulars against the extraordinary expenses claim, to confirm a bank deposit mode of payment, and to confirm M. was not on any guarantees.

[13] Mr. Crowther invited a draft Agreement. Mr. Reddy's January 11th, 2006 response included another counter-offer regarding support ($375 monthly) and recapitulated her claim for payment of all outstanding dental bills. He also wrote, "In any case I have confirmed with Ms. M. that she will not be seeking any retroactive child support or retroactive add-ons past January 1st, 2006". Mr. Reddy then itemized M.'s extraordinary expenses. He also stated that annual disclosure of W.'s tax returns and notices of assessment would be needed. This was the first and only reference to financial disclosure which may have been sought on behalf of M..

[14] By a letter dated January 13th, 2006, Mr. Crowther rejected the counter-offer regarding basic support and re-offered $350 monthly, assured that W. would pay the full amount of the dental bill, and confirmed W. would pay two thirds of the net add-ons.

[15] In a January 26, 2006 letter, Mr. Reddy wrote, "it appears now that we basically have an agreement in principle". He went on to raise "a few practical concerns". One was the effective date for support; another was W.'s payment history thus far. He attempted to clarify what his client perceived might be included in non-compensable expenses versus those which she believed were compensable and for which she would be seeking a contribution. He cautioned that his client would not condone W. unilaterally deducting the value of purchases for the child he may have made from his regular support payments. He closed with an admonition that the parents should not be communicating "adult matters" *via* the child.

[16] On February 7th, 2006, Mr. Crowther invited a draft agreement. Mr. Reddy prepared a draft Separation Agreement and sent it to Mr. Crowther on February 8th,

2006. $350 monthly was the child support figure Mr. Reddy employed. He gave his client's bank account particulars and additional information regarding some of the extras. Mr. Reddy did not hear back from Mr. Crowther. So, he wrote again at the end of March, 2006. He pointed out that a dental bill was still outstanding; and that extraordinary expenses had piled up for January, February and March. He gave particulars. Payment of some, but not all, of the child support (at the $350 rate) was acknowledged. The payments were characterized as having been "irregular and in different amounts". Mr. Reddy questioned W.'s interest in concluding matters and re-invited W.'s signature which (since Mr. Reddy had prepared the document) implies his client was in agreement with the contents.

[17] Oddly, after having requested W.'s signature, Mr. Reddy also wrote: ""However, I must stress that we are still willing to except (sic) the Separation Agreement as is and we are still willing to follow the percentage contribution arrangement for extraordinary expenses assuming that your client makes timely child support payments, pays his contribution of the outstanding extraordinary expenses, and satisfies the orthodontist bill. If he is not willing to do these things, perhaps you should advise me accordingly and then I will have to advise my client to pursue other remedies. Obviously it would be regrettable for us to have to pursue

those remedies after counsel negotiating an Agreement in principle".

[18] Another month went by with no response until May 1st, 2006 when Mr. Crowther wrote that it was W.'s intention to "sign-off" on the Agreement. However, he reported there was "some difficulty in the wording relating to extraordinary expenses" because it was "too broad". He noted that W.'s agreement that "he would pay two thirds of the costs of extraordinary expenses provided he was in agreement with the incurring of the expense". He therefore proposed an amendment to the draft document. "Apart from that minor change", he said that the agreement was "satisfactory to Mr. W.". Mr. Crowther asked Mr. Reddy to send along an original and copies for execution.

[19] In a letter dated May 18th, 2006, Mr. Reddy said "I think the dispute is limited to the extraordinary expenses". But his client still had concerns which he summarized this way:

> I have no objection in principle to the wording you have suggested, but I am somewhat worried with regards to a mechanism so that these parties are not constantly in this dispute. I think we need some clarification as to what each party can reasonably expect to be a Section 7 expense. For example, if you go with the wording of your clause without some type of agreement in principle on what the Section 7 expenses are reasonably expected to be, all your client has to do is simply disagree to pay his share. I am not trying to impute that your client will not pay the Section 7 expenses, other than there needs to be some discussion with our respective clients about what they can and can't reasonably expect to be

> a section 7 expense, as I do not want to be constantly disputing and/or eventually litigating the issue.
>
> Based on what Ms. M. has incurred to date, I would think that the medical expenses are a "no-brainer" for Section 7 entitlement. As well your client had agreed to pay the $800.00 orthodontist bill and that may still be outstanding. The main area of dispute seems to be sports related activities. You may recall that Mr. W. agreed in principle early on to pay his respective share of the net expense for day-camp expenses, and Tae-Kwon-Do lessons, as well as prescription and medical expenses, I refer you to your letter of January 13, 2006. I note to date that many of the expenses Ms. M. has submitted to your client have been of that nature.
>
> My thoughts are that Mr. W. should reimburse Ms. M. for the expenses that she has incurred to date, and then we can clarify matters as per your correspondence of January 13. If Mr. W. is limiting his Section 7 liability to one sports activity, plus child-care during the summer and medical related expenses, then that may be satisfactory to my client. However, once again we need some clarity.

[20] Mr. Reddy's concluding words were: "I will check in with my client to make sure there are no more outstanding issues....", thereby implying that his communications to date may not be the final word on everything. This prompted a very brief letter dated May 31st, 2006, from Mr. Crowther who wrote, "I understand that the parties have resolved all outstanding issues relating to extraordinary expenses". Mr. Crowther asked that the "revised Agreement" be sent for W.'s endorsement. But, things were unraveling as evidenced by a letter on June 6, 2006 when Mr. Reddy stated to Mr. Crowther that his client had advised him that all outstanding issues had <u>not</u> been resolved. Mr. Reddy reiterated his understanding of the outstanding balance of some expenses and exemplified M.'s expectation for

some looming expenses. He stated, "We need to reach some agreement on what Mr. W. is or is not going to pay because my client is becoming quite angry with this type of behavior." Mr. Reddy gave a two week deadline for resolution failing which proceedings would be started.

[21] There were no further communications between counsel. Legal proceedings had not been commenced. No further versions of the draft Agreement were prepared. Neither client had signed the Agreement in its original or any revised form.

[22] Most of the foregoing findings by me are based on the affidavits of Messrs. Reddy and Crowther which were entered by consent and without testimony from either deponent. Therefore, there was no opportunity for me to assess the credibility of either potential witness. The clients filed affidavits and testified. Their evidence rounds out the circumstances and provides additional insight.

[23] In his affidavit, W. described himself as a self-employed carpenter who occasionally works in labour and/or trucking jobs. He wrote that the parties made a verbal agreement at separation that he would pay child support of $200 monthly.

He asserted that he also "covered" a variety of the child's expenses on request when he could. He gave a few examples. W. confirmed that he retained Mr. Crowther after getting a demand letter from Ms. M.. He said that Mr. Crowther was retained "to negotiate an Agreement" on his behalf and stated that "At all times during the negotiation of a settlement, Mr. Crowther had the authority to act on my behalf". W. said, "I thought we reached a final agreement on all issues by February 8, 2006 when Mr. Reddy forwarded a draft Separation Agreement to Mr. Crowther".

[24] W. stated that his 2006 income for personal income taxes was only $9,715. But, he said he was told that basic child support of $350 monthly in child support would be the amount normally paid under the **CMG** (Nova Scotia Tables) if one's income was about $40,000 annually. He did not elaborate. W. also wrote that although "there was some debate.....about how many extracurricular expenses I should pay and when I should pay for these items", there was agreement on a formula that would be used to establish his responsibility for day camp, Tae-Kwon-Do, and prescription/medical expenses. He said he also agreed to pay for all of his daughter's dental work at the time ($2,000), and that he did so (although he did not say when). He mentioned he paid $160 to M. on June the 8th, 2006 after learning of Mr. Reddy's comments in his June 6, 2006 letter. He asserted that he

was expecting to hear from Mr. Crowther that month (June) about executing "the Agreement". Since then, W. said he has paid M. $350 monthly, and that he has contributed to "other additional child expenses as agreed". He wants the agreement reached in 2006 "confirmed" by the court.

[25] In her affidavit, M. stated that at separation, "There was no expressed (sic) agreement or court order regarding the terms of custody, access or child support". As noted elsewhere, M. claims she was not happy with the quantum or manner of payment; or W.'s attitude towards the subject of support, especially during late 2005. M. recounted the history of money she received from W. for their daughter's benefit. She said she gave Mr. Reddy particulars of her extraordinary expense claims to forward to Mr. W.'s lawyer because W. historically ignored her until faced with formal demands. While the matter "dragged on through April and May without finalizing the agreement", she alleged W. "continued to play games with me about the payment of expenses". In contrast to W.'s evidence, M. said that by May 1st, 2006 she and W. were personally still in disagreement about the extra expenses. On her instructions, Mr. Reddy communicated this to Mr. Crowther. That said, M. confirmed that W. deposited money to her credit - "bringing the arrears of expenses up to date" - but she did not elaborate.

[26] M. stated that negotiations were never completed. She wrote, "The issue of extraordinary expenses was never resolved". She believed communications were being "ignored". In brief, she was "fed up". Following the disintegration of lawyer-to-lawyer communications, M. said she continued to press W. directly. She wrote that in October, 2006 she gave him a list of expenses plus receipts. She wrote, "he crumpled up the receipts he did not agree with and threw them on the floor". The child was present. (I have disregarded hearsay M. attributed to a friend in July, 2007 about W.'s intention. He submitted no affidavit; he did not testify.)

Discussion/Decision

[27] On behalf of W., it was submitted that he and M. reached a binding agreement with respect to all matters outstanding between them, including child support, as early as February, 2006 or, at the latest, by June 8th, 2006. As noted, the draft Separation Agreement, authored by M.'s lawyer, was never executed by the parties in its original or in an altered state. The draft document covers a wide spectrum of subjects including personal and real property, estates, spousal support, parenting, and child support.

[28] W.'s position is that the lawyers on behalf of the respective parties reached agreement on all fundamental issues. W. concedes that there was a relatively "minor" issue outstanding, namely a mechanism to determine which sporting activities would attract an expense contribution from him. His counsel submitted that the point was so insignificant that a final agreement should be imputed.

[29] On behalf of M., it was submitted that the important (to M.) issue of special or extraordinary expenses under section 7 of the **CMG** was never finally resolved. It was submitted that the section 7 problems had bedeviled the negotiations throughout; and that the parties never reached a true "meeting of the minds". In furtherance of that argument, the court was invited to consider the testimony of W. who struggled to articulate what monies had and had not been paid, what activities should or should not be covered, and his perception of when things were finalized versus the content of the ongoing dialogue between counsel until it collapsed.

[30] On the evidence, I find that the parties did not reach finality in their discussions through counsel on all of the issues perceived by the clients to be key or crucial to them.

[31] Although the Family Court does not have the authority to deal with property issues, it was underlined that under section 21 of the **Matrimonial Property Act** (**MPA**) a marriage contract or Separation Agreement is void unless it is in writing and it is signed by the parties and witnessed. I conclude that in the absence of signatures, the document in the present case, insofar as it purports to finally settle **MPA** items, is unenforceable on its face. Take the **MPA** elements out, and the document certainly does not have much left on its bones.

[32] Section 31 of the **MCA** authorizes the court to consider the terms of any agreement respecting maintenance payable for a party or respecting custody of, or access to, a child and provides that the court is not bound by an agreement if the court is of the opinion that its terms are not in the best interests of a party or a child. (The section is broad enough to cover verbal agreements.) On behalf of M., Mr. Thompson points to one stark reality - an unsigned agreement cannot be registered with the court for enforcement through the Maintenance Enforcement Program (MEP). I agree. However, the remedy is to commence proceedings and to seek an enforceable order - whether connected to an agreement or not.

[33] More importantly, I agree with Mr. Thompson's submission that there is a critical distinction between those files or cases which are before the courts and those which are not. The following appears at page 588 of the Annual Review of Family Law 2007 (Thomson Carswell):

> As a general rule, settlements of pending litigation between counsel acting within the scope of their retainer will be upheld in order to maintain the integrity of the settlement process, regardless of whether the agreement meets the formal requirements under the local domestic contract legislation. While the court may decline to enforce a settlement between counsel, so long as the lawyers acted within the scope of their retainers and there was no obvious overreaching, this is unlikely.

[34] "Pending litigation", in my opinion, refers to those situations in which litigation has been started but has not yet been decided or otherwise finished. During litigation, when it is alleged that counsel have committed their clients to a settlement, courts have been prepared to intervene and to scrutinize the circumstances. The onus is always on the party alleging that a settlement has occurred to establish that litigation was underway and that settlement on all substantial issues was achieved.

[35] I agree with the submission that in the absence of pending litigation, the ebb and flow of negotiations and without prejudice communications in family law, as in many other areas, frequently does not culminate in signed, binding agreements. The

reasons for failure are as diverse as the parties and the lawyers who represent them. I have not been referred to any reported case in which a court was prepared, in the absence of pending litigation, to cut and paste without prejudice communications and draft documents between lawyers over many months, to segregate ostensibly binding from non-binding components, and then impose its final construct on the parties. I certainly do not propose to do so. And, with respect, the submissions on behalf of W. skirted problematic section 21 of the **MPA** despite the fact that the negotiations were in aid of an all-encompassing resolution, before and in lieu of proceedings. Everything else aside, it would be unjust and unfair to the parties, to summarily declare that the provisions of the unsigned written agreement are binding and enforceable under the **MCA** with respect to child support (and by extension, presumably parenting and perhaps spousal support) but they are not with respect to the smorgasbord of matters under the **MPA**.

[36] Moreover, when determining the amount of maintenance to be paid for a child under the **MCA**, the court must do so in accordance with the **CMG**. Under section 10 (3) of the **MCA**, a court may only award an amount that is different from the amount under the **Guidelines** if the court is satisfied that the conditions set out in section 10 (3) (a) and (b) pertain. Sometimes, a court will make an award different

than the **Guidelines'** amount with the consent of both parents if it is satisfied that reasonable arrangements have been made for child maintenance. On the evidence before me, without labouring the point, I find that this case does not fit under any of the exceptions contemplated by section 10.

[37] **CMG** section 3 sets out the so-called presumptive rule for determination of basic child support plus awards under section 7. Quantum is directly linked to the payor's income for basic support; and it is linked to the incomes of both parents for section 7 purposes. As mentioned, even when there is an executed written or oral agreement regarding child support, it is not binding on the court which may examine it and determine whether or not it is in the child's best interests. The corollary to this, of course, is that to conduct such an analysis the court must determine income and decide if the final dollar amount is appropriate and in accordance with the **CMG**.

[38] In this instance, the draft Agreement postulated a basic amount of monthly child support without any tangible reference to W.'s income (which is now disputed). I am unable to determine from the evidence whether Mr. Crowther and Mr. Reddy exchanged their client's respective personal income tax returns or other

background financial information - especially in relation to W.'s income which he mainly derives from his unincorporated business ventures. His lawyers have conceded that his income for **CMG** purposes was (and is) higher than that for **Income Tax Act** purposes; but his former lawyer (and hers) stopped short in stipulating the amount in their letters and there is no mention of either party's income in the contentious draft document. Given the financial disclosure demands subsequently made by Mr. Thompson after the litigation started, and the reluctance and delays by W., a reasonable inference is that there was little in Mr. Reddy's file compared to what is now in the possession of counsel and in evidence. I am satisfied that the ultimate disclosures were necessary to conduct a proper support assessment.

[39] In the same vein, I observe that the draft document has an arbitrary *pro rata* division of section 7 expenses, again without reference to the prevailing incomes of the parties or what might happen if their incomes changed. I judicially notice that the MEP is not in the business of demanding proof of section 7 expenses from the parties or making the appropriate calculations for them. What one is left with in the present case, at best, is a statement of intent. However, without any statement of the amount of annual expenses to be paid by W. or a reasonable estimate, I find this section would likely have been unenforceable in any event, even if the document had

been signed and registered with the court.

[40] In the result, I conclude that there was not a final and binding agreement reached between counsel for the respective parties pending litigation (or otherwise) regarding child support such that M.'s claims on behalf of her daughter should be dismissed. Expressed another way, and allowing that some sort of order is needed for enforcement purposes, I am not prepared to sustain a summary judgment declaring W.'s payments, past and present, to be appropriate. If I am incorrect regarding the finality issue, I would still set aside any agreement in the child's best interests on the basis of inadequate or incomplete financial disclosure by W. and the absence of stipulated incomes to ground the quantum of basic plus section 7 support. A full assessment of the circumstances of the parties and the child is warranted to determine an appropriate award in the child's best interests.

[41] Under a separate release, there will be decisions with respect to M.'s claims for retroactive support and current child support.

Dyer, J.F.C.