

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
[Citation: P.L.M. v. D.J.T., 2007 NSFC 11]

Date: 20070215
Docket: FAMMCA-042076
Registry: Amherst

Between:

P.L.M.

Applicant

and

D.J.T.

Respondent

Judge: The Honourable Judge David A. Milner, a Judge of the
Family Court for the Province of Nova Scotia

Hearing Date: January 2, 2007, at Amherst, Nova Scotia

Decision Date: February 15, 2007

Counsel: Cindy A. Bourgeois, LL.B., for the Applicant
D.J.T., the Respondent, representing himself

INTRODUCTION

[1] This is an application for child maintenance by the mother of a thirteen year old boy.

[2] The mother and the father of the child were not married and never lived in a common law relationship. The father has had no involvement in the child's life and does not intend to become involved.

[3] There has never been a court application in relation to the child until this one.

[4] The mother's application includes a claim for custody. The father does not oppose the claim for custody and, furthermore, he does not want to have any rights of access to the child.

[5] During his entire life, the child has been raised by the mother. When the child was very young the mother married the man with whom she had been in a relationship from some time before the child was born. Since his marriage to the mother, the husband has always acted as the child's father and, until recently, the mother allowed the child to think that the husband was his father.

[6] The father has never paid child maintenance to the mother, and until this court application, the mother has never requested child maintenance from the father.

[7] The mother now seeks an order for the father to pay ongoing monthly child maintenance according to the provincial child maintenance guidelines. She also claims retroactive maintenance, starting from the date when the guidelines came into effect in 1997.

[8] The father opposes the application because it would cause undue hardship for him and his family to have to pay the table amount for ongoing maintenance.

[9] The father also contends that, because the mother chose not to claim maintenance before making her court application, it would be unfair to require him to pay for those earlier years now, and he would be financially unable to do so.

BACKGROUND

[10] The mother and father became involved in a romantic relationship when they were both still in high school. The father finished school before the mother, and he joined the Canadian Armed Forces, where he continues to be employed.

[11] The mother graduated from high school in 1992. She became pregnant the following year, and she told the father. When she was three or four months pregnant, the mother's relationship with the father terminated. Around that same time, the mother had begun another relationship - with the man who later became, and still is, her husband. She had dated him when they were in high school together, even before she dated the father.

[12] The child's birth certificate indicates that he was born January 10, 1994 at Amherst, Nova Scotia. The registration date is stated as January 29, 1994. The mother is named; however, the father's name is "not stated".

[13] Following the child's birth, it appears that the father maintained some communication with the mother. Looking back over the intervening years, however, the mother and father have different recollections about the nature of their relationship at that time.

[14] The father remembers calling the mother after the birth of the child; however, he chose not to become involved in the child's life because he was aware of the mother's relationship with the man (who, a year or so later, became her husband.) The father thought it would be best if he stayed out of the child's life, allowing the child to be raised by the mother and her partner. The father understood that the mother also felt it would be best for the child if the father not become involved in his life.

[15] The mother and her husband are also raising two younger children, of their own marriage - approximately eleven and six years of age.

[16] The father had often wondered if it was he, or the mother's husband, who was the child's biological father. Genetic testing was conducted in May of 2006, after the mother's court application. Even though the testing confirms his paternity, the father still does not plan to be involved in the child's life.

[17] The father believes that it was only because he questioned paternity, after the mother made her application to court, that she decided to claim retroactive maintenance in the proceedings.

[18] As the mother remembers it, she and the father agreed to continue some kind of relationship to raise the child together. She envisaged that the relationship might become a romantic and long term one. The relationship between the father and the mother did not develop, however, and did not continue. The child was brought up by the mother and her husband, and was allowed to believe that the husband was his father.

[19] The mother says that she would have pursued the father for maintenance earlier; however, she was young and afraid of possible conflict between the father and his parents on the one hand, and herself on the other. She knew the father was employed in the armed forces; however, she says that she did not know where he was living, and that he refused to disclose his location. She says that she tried to locate him at one time through the internet; however, her efforts led only to dead ends. She says, therefore, that she would not have been able to pursue him for child maintenance in those earlier years.

[20] The father believes that the mother always knew where he was living. Even if this was not correct, he says that the mother always knew that he was in the Forces, and could have easily contacted him there. He says that she never asked him where he lived when she had the opportunity to do so, and he denies that he ever refused to disclose his location.

[21] The father says that he had always understood (because she told him so) that the mother and her husband wanted to raise the child on their own without interference from him. The father maintains that he was merely abiding by their wishes.

[22] It was not until 2002 or 2003 (when the child was about nine years old) that the mother told him that her husband was not his real father. She says that she did this because she did not want him to find out about it from others, by accident.

[23] Before she told the child, she consulted with others, including the father's parents who live in the same community. She did not, however, consult with the

father. The others agreed that the child should be told, and the mother introduced the child to his paternal grandparents.

[24] The grandparents and the child have since developed a close and positive relationship. Because the father strongly disagreed with the decision, the father's relationship with his own parents has since become strained.

[25] Although she did not consult with the father beforehand, the mother decided she should notify him of what she had done.

[26] For purpose of notifying the father, it was necessary to locate him - something she testified that she had been unable to do up until that time.

[27] The mother telephoned the military base in Halifax and spoke with someone who she said was very helpful. She was given a telephone number in Montreal which she then called. Without any difficulty, the mother's call was put through to the father at his office desk and she was able to speak with him. He confirmed what she expected: that he did not approve of her action in telling the child, and that he still did not wish to have any relationship with the child. There is conflicting evidence as to when this call was made; however, I consider that it was probably in September of 2003.

[28] After that, the mother occasionally contacted the father by email, about the child. In February 2005, she and her husband were taking the children to Florida and were anxious about trying to enter the United States with a child whose father's name was not shown on the birth certificate. Instead of applying to court for a custody order, she decided to ask the father to sign a letter - as the unnamed father of the child on the birth certificate - indicating that he approved of the visit to Florida.

[29] In an email message dated February 16, 2005 the mother wrote the father asking him to provide a letter for purposes of the trip. Her email included the following:

I also feel that you and I need to settle this custody thing, either you are going to be in his life, then thats wonderful. But if you choose to not be in his life then we need to sort out some stuff and get some papers signed off so that you can sign over all your rights to him as a parent.

Just so you know, that I can't let this drop anymore. I certainly didn't expect this kind of issue to happen just because we are taking him on vacation. I also realize that this is just the beginning of issues for him if we don't get this paper work sorted out. If you have any feeling left in you at all, you will do this for him, please email me or call me from work, home, I don't care, but just get ahold of me. I am not trying to threaten you, so please don't take it this way, but **if you don't** do this for [J.] then I will make application to the courts on Monday Feb 21/05. And I will take you for custody /and or child support from now on and back 11 years.

[30] In response, the father promptly provided a letter expressing his approval of the trip to Florida. He also sent the mother a statement confirming his consent to her having custody of the child and his consent to an adoption of the child by the wife's husband.

[31] On October 4, 2005 the mother made her application to Family Court for an order for custody, access and child maintenance. Both parties appeared in court without counsel at the first docket day, and an interim order was issued granting sole custody to the mother, and ordering interim child maintenance of \$454 per month, beginning December 1, 2005, based on the father's reported annual income for the previous year of \$54,900. The order was silent as to access.

[32] Eventually, both parties retained counsel. Affidavit, income tax information, and other disclosure documentation was exchanged with a view to negotiating a settlement. Paternity was confirmed by genetic testing in May 2006.

[33] A further interim order was issued, by consent, effective October 6, 2006 increasing the interim maintenance to \$500 per month, beginning November 1, 2006. Both parties were represented by counsel.

[34] Some time later, the father began to represent himself. No settlement of the child maintenance issues has been possible.

[35] The father has been involved in a common law relationship for something in excess of ten years, with plans to marry his partner. They are mother and stepfather to a twelve year old girl, who has no involvement with her natural father. The natural father does not pay child support.

[36] The father's partner had steady employment when she began the relationship; however, they have since agreed that she would not work outside the home. It appears that one of the reasons for this decision was that the father's employment is subject to frequent transfers by the military.

[37] Because the father is the sole financial provider for his family, including his stepdaughter, he is claiming undue hardship in relation to the payment of ongoing table amount of maintenance.

[38] The father says that he and his partner have found they can no longer afford to pay for activities which his stepdaughter has been involved in, including swimming lessons and French immersion camp.

[39] He also opposes the mother's claim for retroactive payment of child support - which she calculates to be in the vicinity of \$42,000 - because he would have no means to pay such an amount. He also says the claim is unfair, because they had an understanding, for most of the child's life, that the mother would not be involving him in the child's life in any way, including looking to him for financial support.

[40] The father's annual income, during 2005 and 2006 has been approximately \$66,700; however, beginning in early January 2007 it has been reduced to approximately \$61,900 annually, with the elimination of the sea duty allowance because he is no longer posted to a navy ship. His spouse does not have a separate income. They support one child living at home.

[41] The mother and her husband each have an annual income of around \$28,000 and they support three children living in their home.

[42] Although there are considerable extracurricular expenses relating to the child's participation in provincial-level hockey, the mother is making no claim for special expenses for the child in excess of the tables, either prospectively or retrospectively.

[43] The spouses of the parties did not testify in the proceedings.

THE NATURE OF CHILD MAINTENANCE

[44] In our society, when children are born they have the right to be physically cared for, and supervised, and guided by others as they grow up. There are corresponding responsibilities for society in general, and for those particular members of society who act as parents and, sometimes, step parents.

[45] In Nova Scotia, for instance, Section 8 of the **Maintenance and Custody Act** provides that parents and guardians are under a legal duty to provide for the reasonable needs of children in their households.

[46] In circumstances where both of the parents live together with their children, they are usually able to fulfill their responsibilities without formality. Fulfilling their responsibilities requires that the parents spend money. There is usually very little financial accounting or monitoring of those expenditures.

[47] When both parents do not both live together with their children, however, the law recognizes the position of each parent differently.

[48] The parent with whom the children reside will have to spend money to fulfill parental responsibilities. Those expenditures are sometimes taken for granted, or even disregarded, and in most cases are not quantified or monitored.

[49] The other parent is expected to contribute financially to the maintenance of the children, by paying money to the residential parent. Unlike with the residential parent, the amounts required as contribution by the non-residential parent are more likely to be quantified, and monitored. Separated parents can arrange for the payments, by agreement or by court application.

[50] In Nova Scotia, the child maintenance guidelines under the **Maintenance and Custody Act** provide for quantification, and the **Maintenance Enforcement Act** provides for monitoring of child maintenance payments to be made by non-residential parents to residential parents.

[51] Depending on the nature of their relationship, step parents can also place themselves in similar positions of responsibility towards their step children.

[52] Maintenance payments received by a residential parent are not earmarked for any particular expenditures. There is no requirement that the maintenance payments have to be separated from other family resources. There is no required accounting of how the money is spent. As with all money, maintenance payments merely represent goods and services for which money can be exchanged. Residential parents have a discretion in the expenditure of the maintenance payments, as they do in spending all other money which they have. Their discretion will be influenced, of course, by the responsibility which the parents have towards the children in their care. For instance, they should budget to keep the rent paid; to purchase adequate fuel oil and electricity; to buy appropriate clothing for children to wear and toys for them to play with; and to buy food for the family. Payments such as these will benefit the children, directly or indirectly.

[53] It is sometimes said that child maintenance is the “right of the child”, and in a sense, that is correct because it depends on there being a dependent child. In another sense, however, it might be more accurate to say that child maintenance is the right of a residential parent to expect a financial contribution from a non-residential parent to go towards fulfilling the entire obligations of both parents. These obligations continue while the child is dependent - beginning usually with the arrival of the child, and lasting at least through childhood.

[54] An application to court is sometimes necessary for a residential parent to fully exercise the right to receive child maintenance from the other parent. The decision to apply to court, and when to do so, is a decision which the residential parent will exercise in all the circumstances of the particular family.

CHILD MAINTENANCE GUIDELINES

[55] In 1997 the federal child support guidelines changed and standardized the approach to determining the amount of money that a residential parent might expect to receive as a financial contribution from a non-residential parent towards the joint responsibility of both parents to financially support their children. These guidelines were incorporated into Canada’s **Divorce Act** in 1997.

[56] In Nova Scotia, provincial child maintenance guidelines were included in **Maintenance and Custody Act** in 1998.

[57] The guidelines and the tables provide for the non-residential parent to pay a specific monthly amount depending on that parent's gross income.

[58] The court is required to order the appropriate table amount for ongoing monthly maintenance in most cases.

UNDUE HARDSHIP

[59] A court is permitted to order an amount that is less than the table amount if the non-residential parent can establish that he or she would suffer "undue hardship" if the table amount was ordered.

[60] The court has a discretion, in each case, under section 10(1) of the guidelines, to order less than the table amount; however, this may be done *only* if undue hardship (in light of criteria set out in section 10(2) of the guidelines) would result with payment of the table amount, and, *if so*, then only if the court is of the opinion that the standard of living in the household of the residential parent would be higher than the standard of living in the household of the non-residential parent if the table amount was paid.

RETROACTIVE CHILD MAINTENANCE

[61] In Nova Scotia, the **Maintenance and Custody Act** applies to applications, such as this one, for child maintenance when a child's parents are not married.

[62] Section 37 expressly authorizes the Court to vary an existing order (on the basis of changed circumstances since the last order) both "prospectively or retroactively".

[63] Sections 9 and 11 give the Family Court authority to receive and decide an application for child maintenance, where there has not been any previous order made. There is no indication whether, in applications under these two sections, the Court has authority to order maintenance retroactively.

[64] The Court's authority in all three sections arises "upon application".

[65] The current wording in all three of these sections was included in amendments made in 1997, when provincial child maintenance guidelines were being introduced. The provincial guidelines came into effect in Nova Scotia on August 31, 1998.

[66] It is clear from reading these Sections alone that, where there is already an existing order, the court can order retroactive maintenance; however, it is not clear that the court can do so in the first instance.

[67] The Supreme Court of Canada's recent decision on retroactive maintenance, in considering similar wording in the **Divorce Act** and in Alberta's legislation, has confirmed that maintenance can always be ordered retroactively, whether or not there is an existing order, because the right to seek child maintenance arises with the birth of the child, and not with a court order which recognizes the right.

[S.(D.B.)v. G.(S.R.), [2006] 2 S.C.R. 231]

ANALYSIS AND CONCLUSIONS

Custody:

[68] There had never been a court order granting custody of the child to his mother, although she and her husband have assumed responsibility for his upbringing to this stage. It appears that they have done a good job.

[69] The father agrees that the mother should have custody.

[70] The order will therefore grant sole custody of the child to the mother.

Access:

[71] The mother would like to have the father exercise access to the child, depending on what the father and child would be comfortable with.

[72] The child has shown an interest in meeting his real father, and possibly in getting to know him. The child has suggested that the father might like to come see him play hockey sometime.

[73] The father has in the past made it clear that he did not want to exercise access with the child, for reasons that he felt were best for the child at the time.

[74] I think the order should neither require nor rule out access, but should, in the best interests of the child, permit the possibility of a relationship between the child and his father.

[75] There should therefore be a clause in the order granting the father such reasonable access as might be agreed upon from time to time by the mother and the father, while always considering the wishes of the child.

Undue Hardship:

[76] In all the circumstances of this case, the father's claim for undue hardship should be disallowed.

[77] While the father does have responsibilities towards his spouse and stepchild, and the payment of maintenance will always be difficult, it does not amount to an "undue" hardship within the meaning of the guidelines. It appears that he has the means to discharge each responsibility.

[78] He has not shared at all in the financial responsibility of raising the child over the first stages of childhood, either through paying maintenance or in exercising access. It seems unlikely that he will be incurring significant expense in exercising access in the near future.

[79] It is not insignificant to note that the mother and her husband have combined incomes of less than the father's income, and they have had to budget their finances to support the three children living in their home. The father has to support only one child in their home, while the child's mother has chosen to no longer be employed outside the home.

[80] With careful budgeting and frugal living, the father should be able to pay the normal level of maintenance for the child, as he has faithfully done under the terms of the interim orders.

[81] As I see it, the standard of living in the father's household will continue to be at least as high as that in the mother's household.

[82] The interim orders will be adjusted and replaced by the final order in this proceeding. The order will require that the father pay the sum of \$542 each month beginning as of November 1, 2005 and continuing on the first day of every month, to and including April 1, 2006, representing the old table amount for one child based on an annual income of \$66,700. Using the same annual income, and the new tables which came into effect on May 1, 2006, the monthly amount will increase to \$580 per month beginning May 1, 2006 and continuing on the first day of each month to and including December 1, 2006.

[83] Beginning January 1, 2007, and continuing on the first day of each month thereafter until otherwise ordered, the amount will be reduced to the table amount of \$539 per month because the father's income has been reduced by \$409 each month without the extra sea duty allowance, *i.e.* based now on an annual income of approximately \$61,900.

[84] The father should provide a copy to the mother, by June 1st each year, of his income tax return as filed with Canada Revenue Agency, together with the notice of assessment and any reassessment. This will permit each party to consider if the level of child maintenance should be changed, and whether to make application to the court.

Retroactive Maintenance:

[85] In assessing all of the evidence presented by the parties about what has happened over thirteen years, there are some discrepancies and missing pieces.

This is usually a problem when human memory tries to reconstruct a lengthy past, and then organize it to present evidence in a short court hearing.

[86] After considering all the evidence, I believe that the mother could have quite easily made application to receive child maintenance at an earlier time. She decided, however (freely and on her own) not to seek financial support from the father, although she knew she had the right to do so.

[87] She has reasons for not having done so, including a desire or a willingness to raise the child without involvement by the father. She caused the child to believe for many years that his stepfather was his real father. She knew that the father was aware of this arrangement, and she knew that the father understood that was what she wanted.

[88] The mother and father appear to have made an agreement (expressed at least by their conduct over the years) that the mother and her husband would assume all responsibility for the child's upbringing, and that the father would not be involved, financially or otherwise.

[89] It is nevertheless clear that any agreement by a child's parents, even one with more formality, would not restrict the court's authority to order child maintenance, even retroactive maintenance. [See: **S.(D.B.) v. G.(S.R.)** S.C.C., above, and also Section 31 of the **Maintenance and Custody Act**]

[90] I cannot accept the assertion that the mother would have been unable to locate the father, at any time during the child's life, in order to be able to make an application to court. She knew that the father was employed in the Canadian Armed Forces. She would probably have encountered no reluctance by the father's employer to disclose his location. Indeed, she had no problem whatsoever in September 2003 when she located him after a couple of simple telephone calls.

[91] Apart from any such informal approach, Section 29A of the **Maintenance and Custody Act** provides a means for obtaining information from an employer, during a court application, including the location of a respondent's employment.

[92] Even after she had located him, the mother made no court application for over two years.

[93] The father appears to have been acting in good faith, and in a way he considered to be in the child's best interests, by allowing the mother and her husband to raise the child without interference, and to allow the child to know a different father. I consider the father's conduct in this regard not to have been blameworthy.

[94] While the court does have legal authority to order retroactive maintenance, I do not think it should do so beyond the date of the mother's application.

[95] The email in February of 2005 was sent to the father for the purpose of getting a letter from him to facilitate a family vacation to Florida. While there was mention of a possible application for maintenance, it seems to have been more of an incentive to provide the desired letter than notice of the mother's intention to seek maintenance. When he complied with her request, and confirmed his agreement that the stepfather could continue his parental role, the father was reasonable in not considering this as notice of a court application still to come.

[96] It was not until the formal court application was made - that the father had real notice that the mother was going to seek his financial involvement.

[97] If retroactive maintenance were to be ordered in these circumstances, I consider it would be unfair to the father, and extremely difficult for him to pay the resulting arrears. At the same time, it would interfere significantly with his ability to pay the ongoing table amounts of maintenance for the child each month, to say nothing about his ability to maintain himself, and his spouse and stepchild.

Costs:

[98] The court has a discretion to award costs to be payable by one party to the other.

[99] The mother and father both retained lawyers to advise and represent them during this proceeding, although the father represented himself at the hearing.

[100] The parties would also have each incurred other expenses, besides the cost of retaining their lawyers.

[101] There have been no submissions yet made by the father as to costs, although the mother has made submissions in the brief filed by her lawyer. Counsel for the mother, at the hearing, requested that she be able to make additional submissions on costs after receipt of this decision.

[102] If either or both parties wish to make submissions on the question of costs, I ask that they do so in written or printed form by sending them to the court at Amherst. The mother's counsel should do so before the end of February, and send a copy to the father. The father should send his submission to the court, and send a copy to the mother's lawyer, no later than March 16th.

[103] I will then render a supplementary written decision on costs - whether or not there are any submissions received.

[104] The final order summarizing the effect of this decision, and the supplementary decision on costs, will be issued later.

David A. Milner, A Judge Of The Family Court
For The Province of Nova Scotia