FAMILY COURT OF NOVA SCOTIA
Citation: W.L. v. S.W., 2010 NSFC 31

Date: 2010 12 07
Docket: FLBMCA-070192
Registry: Bridgewater

Between:

W.L.

Applicant

v.

S.W. and T.L.

Respondent

Judge:	The Honourable Judge William J. Dyer
Heard:	October 7, 2010, at Bridgewater, Nova Scotia
Revised Decision:	The text of the decision has been revised to protect the identity of certain parties. This revised version is released on February 8, 2011.
Counsel:	Erica Green, for the Applicant, W.L. Johnette Royer, for the Respondent, T.L. S.W., self-represented

By the Court:

The Issues

[1] T.L. ("the mother") and S.W. ("the father") are the parents of W. L. ("the son") who is now 16 years old and lives with his maternal grandmother, D. L. ("the grandmother").

[2] The son has applied for current and retroactive support orders against both of his parents.

[3] The father had been paying court-ordered support for his son's benefit, and has agreed to continue payment based on his present income. The mother asks that no award be made against her.

[4] Both parents want directions regarding an admitted mistake by the Maintenance Enforcement Program (MEP).

Background

[5] In 1996, the mother was granted sole custody of her son. She has two other dependent children in her care, a daughter who is 15 years old and another son who is 13 years old.

[6] There is a litigation history between the parents dating back to 1995. The last support order was in April, 2006 when the father was ordered to pay $266 monthly to the mother for their son's benefit. By that time, the father already owed the mother about $12,550 in unpaid support, but the parties agreed upon a reduction to $8,500; and the father was ordered to repay that sum at the rate of $50 monthly.

[7] In January, 2008 the mother was living with all of her children in rental accommodations in the local area, but she lost her job and could not afford to stay where she was. By May, 2008 she and the children were living with the maternal grandmother, out of necessity.

[8] Unfortunately, the grandmother/daughter relationship broke down and the mother left the residence with her two youngest children. She lived with a boyfriend, briefly. She subsequently moved to a local women's shelter with the

youngest children, again out of necessity. The son went to another community to live with his great-grandparents. He stayed with them for a short time and then he went to live with a friend. By early October, 2008 he had returned to the area and decided to live with his grandmother.

The Evidence

[9] **The mother** explained that her son could not stay at the shelter because of shelter policy or rules - not because of any lack of interest on her part. Indeed, she thought and hoped her son's unsettled living arrangements were only temporary - that is, until she secured suitable, permanent housing for herself and all three children.

[10] In September of 2008, the mother was enrolled as a full-time student at a local community college. She had obtained temporary, student housing at a local hotel where she and her youngest children lived in one large room. The mother's evidence was that the son did not want to live under those conditions, even temporarily. Eventually, the mother was able to obtain a larger room at the same location, but, by then, the son had decided to stay with his grandmother.

[11] According to the mother, she did not insist that the son immediately return to her care because she understood and appreciated that even the larger accommodations were less than ideal; and, in any event, his stated preference was to live with his grandmother.

[12] The mother observed a marked deterioration in her son's behaviours and attitude. He eventually disclosed that he was regularly using illegal drugs and that he had done so since he was 13 years old. Things became so conflicted during the Fall of 2008 and into the early part of 2009 that she and her son resorted to communicating mainly through an internet message service. The mother's evidence included sample communiques between them. Sadly, there was virtually no communication between the mother and her own mother [the grandmother].

[13] During this time, although the son was not living with his mother, she continued to receive child support payments from the father. She did not redirect the money to the grandmother or to the child. To round out the picture, there is no evidence that the grandmother asked for any financial help from the mother.

[14] Nonetheless, according to the mother, she financially helped her son by paying for (and/or providing) food, personal items, taxi fares, medications, cell phone service, haircuts, spending money, etcetera. I accept her testimony in this regard.

[15] The mother said that in June, 2009 she again confronted her son with her concerns about his chronic drug use and attitude. She made it clear that his return to her home would necessarily require (among other things) that he not smoke cigarettes or marijuana in her residence. And, she proposed that they deal with the issues as a family. However, her son flatly rejected her concerns and proposals. I accept her evidence on these matters. In July, she alerted MEP to the evolving circumstances and expressed (to MEP) her hope that her son would return home.

[16] According to the mother, all communication between her and her son had stopped by the end of June, 2009. By July, she had managed to find suitable rental home accommodations. She used the ongoing child support payments from the father to help renovate and improve a basement room for her son's use. Although she provided no receipts, she estimated she spent $600 to $700.

[17] But her son did not return. So, in December, 2009, the mother again wrote to MEP and informed them about the circumstances, and suggested she should not receive current child support in her son's absence. Given the time needed to accomplish the improvements, and for her son to give things more thought, I find the delay in giving notice was reasonable. By then, I also find that the grandmother still had not approached the mother for financial assistance.

[18] Despite the letter to MEP, the mother continued to receive varying amounts of support from January, 2010 to May, 2010, inclusive. The mother's evidence was that she believed the amounts remitted to her were on account of the father's outstanding arrears. I accept her testimony on this point. Later, in the Spring, MEP discovered its mistake. Then, the mother was contacted and informed by MEP that the Record of Payments would be adjusted so that the 2010 payments she received would be credited against the father's arrears.

[19] The mother was employed from January, 2010 until August, 2010. At the time of the hearing, however, she was enrolled as a full-time community college student. Her present income includes support being received for her other dependent children, plus her student loan proceeds. Her annual income history is as

follows: 2008: $16,500; 2009: about $7,500; 2010: $12,700 (estimated). It was agreed that by September 1, 2010, the mother's income (because of schooling) had dropped so much that her support obligation could be suspended.

[20] The mother testified she continues to be ready, willing and able to have her son return to her care, provided he adheres to what she believes are reasonable conditions.

[21] **The son** has been represented by a lawyer since the case started in late April, 2010. He testified on his own behalf. His evidence was that he is enrolled as a full-time student in a specialized grade 9 program at a local high school. He said he is passing his subjects, but did not enter proof of his marks or progress by written reports from the school.

[22] Referring to his mother's evidence about their communications, or the lack thereof, he questioned whether his mother's electronic message records were complete but he otherwise offered nothing to counter them. He volunteered that he may have been under the influence of drugs when he authored some of his text messages. He allowed that at one point he directly asked his mother for money for drugs, drug paraphernalia, and tobacco or cigarettes. (She refused.) He added his father does not subsidize his use; and that his grandmother does not provide any paraphernalia, but she has been giving him a weekly cash allowance. The son also admitted his relationship with his younger half-brother was conflicted and that he tried to avoid interacting with him as much as possible. This was another factor in his choice not to return home.

[23] The son spoke freely and candidly about his marijuana use which he said started while he was in grade six. He stated that he pays $10 per gram for marijuana and smokes two to three grams each week. He declared he would not stop smoking marijuana, that he was not willing to receive counselling for drug use, and that he does not want to return to his mother's home.

[24] On the last point, the son claimed that he has not returned to his mother because she once told him, during a telephone conversation, that she did not want him to live with her. He said she had described him as selfish and greedy. He went on to say that "mom is the only problem"; and that there is nothing wrong with his drug use. He did not credibly refute the evidence of overtures and efforts she said she made.

[25] The son claimed that he has only received a minimal amount of financial help from his mother and alleged that her contributions were limited to about $40 in cash since their estrangement. However, he conceded she and his grandmother shared the cost of a personal computer which was bought for him; and he did not rebut his mother's recapitulation of what was spent for his benefit.

[26] The son is not employed at this time. Now that he is sixteen years old, I find he may be able to find part-time work. In the meantime, he is financially dependent on his grandmother. However, he admitted that he purchases his drugs from the spending money regularly given by his grandmother. He also smokes cigarettes but, according to him, he does not buy them. (He did not elaborate.)

[27] The son confirmed his grandmother is employed away from their residence as a personal care worker, and that she often works evenings and overnights. Asked about house rules and expectations, he said they included "no smoking weed" in the house, that he should help clean dishes and clean up after himself - but not much else. He is not subject to any curfews because he usually goes to bed early and because "he is a responsible person". Much of his time is apparently spent alone. He uses his computer regularly. He claimed he has not been in conflict with the law.

[28] Should there be a support award, he foresees it being channeled through his grandmother who would spend it for his benefit.

[29] **The maternal grandmother** also testified. She and her grandson occupy a one bedroom apartment. She would like larger quarters so that he can have his own room; but she cannot afford to move. She said she struggles to meet her grandson's basic needs for food, clothing and shelter.

[30] She characterized her daughter as having been a rebellious teenager who was a challenge to parent. The obvious implication was that the mother is in no position to criticize anybody. Nonetheless, the grandmother claimed she always helped and supported her daughter and exemplified ways she tried to do so.

[31] For all practical purposes, contact with her daughter ended in June, 2008 when she and the other children left her residence for the final time. She receives

her grandson's child tax benefits plus monthly support from the father. Support payments were redirected to her by MEP, starting in August, 2010.

[32] I find the grandmother accepted the teenager's story - that he was unwanted by his mother - at face value. And, she made an extraordinary decision not to speak to her own daughter to get her version of the events or to discuss the situation or to obtain any other perspective. Without hesitation or qualification, the grandmother aligned herself with her grandson and thereby, I find, drove a solid wedge between mother and son. Her motive for that stance is a mystery. When asked if she had made any attempt to facilitate a reconciliation she declared "No way!"

[33] The grandmother has not applied for custody of her grandson, nor has she made any applications for maintenance on his behalf. Therefore, strictly speaking, legal custody remains vested in the mother, subject to the father's access rights.

[34] The grandmother said that most of the money she now receives is spent on groceries, and that she has also purchased clothing, school supplies and a computer. She provided no receipts. She did not submit any tax returns or income statements. From her vague testimony, it appears her annual employment income is in the $12,000 to $15,000 range. She filed no household expense budget or expense summary and, surprisingly, she was unable to give a reliable estimate of the monthly or annual expenses associated with his care. She made no attempt to explain why the Table support being received (from the father) was (and is) inadequate to meet the child's needs.

[35] When confronted in court with the content of electronic messages to and from her grandson, the grandmother conceded she gave only cursory attention to those records and the mother's affidavit. Asked to explain why she decided not to read them fully, she bristled and alleged the documents were being employed "to make us look bad".

[36] With respect, I also find the grandmother's evidence that her grandson lives with her "full-time" was undermined to some extent by his testimony that he spends every weekend at his girlfriend's home (usually from Friday after school until Monday morning when he goes back to school), and that he spends approximately half of each summer at his girlfriend's home.

[37] The grandmother was asked about household rules and expectations for her grandson. She admitted she does not impose any curfew, but claimed that he is at home most of the time in any event. The difficulty with that proposition was her concession that she works away from the home and is unavailable to supervise him much of the time. She weakly asserted that she contacts him by telephone from her workplace to ensure he is there when he should be. She did not elaborate on what happens if he does not answer her calls or if emergencies or other unforeseen events occur.

[38] Like her grandson, she said there are very few other rules - except that he not smoke cigarettes or marijuana in her residence or in her car, and that he do some minor chores. She claimed she was unaware until recently of the full extent of his drug use, but stopped short of saying she did not know about it. When the information was disclosed, she chose not to broach the subject with him. More importantly, the grandmother was unable to articulate a strategy for dealing with her grandson's frequency of use, the quantity consumed, and payment sources. She asked rhetorically, "What can I do?" When pressed, she "guessed" that she would not give the child any spending money (which might go to drug use).

[39] The grandmother insisted she checks schoolwork, but conceded she does not attend parent/teacher meetings or other functions. School officials have contacted her regarding attendance, cigarette smoking, and other issues which she could only vaguely recall and explain. On those occasions, she said she did not confront him "because he says very little"; and she did not initiate any follow-up with the school. She traveled to Newfoundland for two weeks after a death in her family and admitted she left her (then) fifteen year old grandson "home alone" on the understanding that a friend of hers would check in on him from time to time. (The friend did not testify.) She did not notify the father, the mother, or school officials that she would be out of the Province. She later learned that her grandson did not attend school while she was away and was suspended temporarily, as a result.

[40] **The father** confirmed he has been paying child support to the grandmother for his son's benefit since August, 2010. He also said he knew by December, 2008 that his son was with her. He acknowledged he did not apply for review or variation of his child support obligations or the parenting arrangements when the grandmother stepped into the picture. The father admitted he knew there were grounds for him to make a variation application. However, he did not qualify for Legal Aid; and said he could not afford to hire a private lawyer. So, to achieve the

same ends, the father encouraged his son to obtain Legal Aid qualification and pursue a claim against his mother.

Discussion/Decision

[41] Under Section 8(a) of the **Maintenance and Custody Act (MCA)** parents of children under the age of majority must support them except where there is a lawful excuse for not doing so. Under Section 9, the court may order a parent to pay support for a dependent child in response to parent-initiated or child-initiated applications.

[42] The son is living with his maternal grandmother - not with either parent - by his own choice. But, residency with a parent is not a prerequisite to entitlement. Because the child is under the age of majority, he falls within the definition of "dependent child".

[43] In my opinion, when it is raised, the lawful excuse defence must be addressed head on and, absent any qualifiers in section 8 (a), the lawful excuse may embrace both entitlement and quantum.

[44] The grandmother is not a party to the application; and she did not seek to be added as one. There is no written agreement or court order vesting her with the child's care and custody. The father has been paying support by virtue of past orders, albeit inconsistently, and still owes the mother money. However, he agreed to continue to pay support based on his current income under the **CMG** and the Nova Scotia Tables; and this shall be ordered.

[45] The most crucial question is whether the mother established, by a preponderance of evidence, a "lawful excuse" for not contributing to her son's support, at least when she may have had some ability to do so.

[46] I have previously written that the financial support of children by parents of those under 19 years of age is not a legal absolute - otherwise, "the lawful excuse" phrase would not be in the **MCA**. Despite the passage of time and several court decisions on the subject, there is still no statutory definition for the phrase and no statutory guidance on the factors to be considered.

[47] **Re Scott** (1996), 150 N.S.R. (2d) 72 (Fam. Ct) is a decision in which Levy, J.F.C. ordered support for a 16 year old youth who left his parents' home on his own initiative. He was living in foster care under strict rules, attending school and receiving counselling, but he refused to return home although welcome to do so. Judge Levy ordered support - but made it conditional on the child's compliance with specified services and supports.

[48] The facts in the present case are distinguishable from (but have some similarities to) those in **Re Scott** in which both parents had the financial means to pay support and were willing to have their son return home and to financially support him. However, they did not want to pay if their son was not prepared to live at home. Although the prospects for family reconciliation seemed poor, Judge Levy found the child was taking initiatives and doing well.

[49] In **Re Scott** Judge Levy recognized that other Family Court Judges have taken varying approaches to the "lawful excuse" question. I agree with the general proposition that many, if not most courts, have ultimately focused on the presence (or absence) of economic dependency of underage children, and tried to steer away as best as possible from notions of "fault" and whether or not, for example, a child is compliant with household rules and expectations. I agree that it is not always necessary to assign, or attempt to assign, fault - whatever that means - to craft an outcome.

[50] On the facts, Judge Levy concluded that **Re Scott** was "one of those cases where it is just too difficult to determine who is "at fault" and a case "where one can legitimately ask what would be solved by such a finding". He wrote that the only questions that could be answered were whether the child would have the chance to continue his schooling, and, if so, whether the entire burden would fall on taxpayers. By implication, and in the result, the lawful excuse defence was dismissed.

[51] Concern that a child may be unsupported or left to fend for her/himself or fall prey to harm if an award is not made does not arise in every case. There are not always implications for taxpayers. Indeed, there is no basis for such fears in the present case - because one parent is paying support; and the grandmother voluntarily assumed some financial responsibility by providing shelter and helping with ordinary living expenses. Unfortunately, as noted, the maternal grandmother's

intercession, endorsed by the father, has likely foreclosed the prospects of family reunification which she unilaterally decided is not in her grandson's best interests.

[52] Judge Levy's call to move inquiries away from assessment of fault as between parent and child is still compelling. But, with respect, I continue to believe courts have a responsibility to apply the statute as it is, not as it might, or perhaps should be written. It is true that the "lawful excuse" qualifier is not found in the **Social Assistance Act** or the **Children and Family Services Act**. And, it is still hard to reconcile concepts of child support among various provincial statutes. Nonetheless, it is my opinion that parents have a right to avail themselves of any potential defence offered by the **MCA.**

[53] In the present case, the son has basic needs for food, clothing, and shelter (although they were not quantified). Currently, as mentioned, his financial needs are being met by his father and grandmother, both of whom have condoned, if not actively encouraged, the mother/son estrangement. By agreement, the (self-represented) father is paying support under the **CMG** to the grandmother for his son's benefit. In fact, it is the same amount he would pay if his son was under the mother's roof.

[54] I recognize the son cannot be forced back to the mother's home, even if most observers would consider her household rules and expectations to be simple and fair. Practically speaking, there may be little, if anything, she can do about "off site" or outdoor cigarette smoking and illegal drug use. However, in my opinion, it is reasonable for the mother to have taken the position that his chronic drug use, largely unsupervised care and lifestyle, and rocky education status are very serious concerns which she likely could address if he returned to her care but which will not be corrected or improved while the son is under the grandmother's care unless the court weighs in.

[55] The mother believes that unless the court imposes some basic terms and conditions on her son that support will be squandered and the child's best interests will not be advanced. This proposition is reinforced by the fact that the grandmother is not a party to the proceeding, and she cannot be ordered to do anything. Accordingly, the court was asked to keep in mind the day-to-day realities and the consequences of imposing an unqualified award.

[56] The son has decided to live independent of his parents, to retain legal counsel, and to sue his parents for support. I find he is at the age and stage where he will understand and appreciate an old maxim that sometimes one must give something to get something. This is one of those situations.

[57] Looking at all the circumstances, I order that until such time as the son engages in services and supports to address the key issues identified by his mother (ie., drug use, individual and/or family counselling, and education) there will be no support award against the mother. I conclude that her case falls within a very narrow range where lawful excuse can and should be sustained. The son's application is dismissed.

[58] I am mindful that the father has not taken the same position as the mother; and he did not ask that any support order against him be similarly conditional. Therefore, the practical outcome is that the child has the benefit of the same level of support that would likely have been ordered if he was successful against both parents. That is so because of my thoughts on the usefulness of the **CMG** in these situations.

[59] I do not believe the **Guidelines** help much - because the son is not in the care of either parent. Such a circumstance is not contemplated in the **CMG.** Others scenarios are foreseen - for example split custody, and shared custody. And, in my opinion, there is nothing in the **CMG** to sustain the proposition that an independently living child is entitled to a combined award of full Table support from each parent based on their respective incomes. If that were so, the potential, total monthly benefit for such a child would nearly always be greater than for a dependent child still living with one parent.

[60] In other cases, I have suggested one approach may be to look at the incomes of each parent and postulate the amount due under the **CMG** if the child was with one or the other. An average of the two results may be reasonable in some cases, but not always. By that approach, the child does not achieve a windfall but gets the benefit of support that bears some relation to his parents' respective incomes and the Tables, if a benchmark is needed.

[61] If the **CMG** are set aside, it is my opinion that the traditional tests may be invoked. By this method, the court would look at the child's financial needs and ability of each parent to contribute to the needs. In some cases, the child's ability to

contribute to his/her own support may be a factor. Unfortunately, in the present case, the child's financial needs have not been clearly stated. Which may bring us back to the **CMG** under which only the father has agreed to make payments.

[62] In the end, these exercises are moot (at least for now) because of my decision on entitlement.

[63] So there is no misunderstanding, the entitlement decision extends back to October, 2008. Counsel for the son invoked the leading Supreme Court of Canada authority for situations involving requests for retroactive originating orders (and for upward variation of ongoing support orders): **D.B.S. v. S.R.G.; L.J.W. *v.* T.A.R.; Henry *v.* Henry; Hiemstra *v.* Hiemstra** 2006 SCC 37. However, those cases deal with rights and responsibilities as between recipient and payor parents when support has not been paid or claimed when supposedly due. The trilogy does not contemplate child applicant situations in the legal analysis or the application of the stated principles to scenarios like the one before the court. So, with respect, unless one arbitrarily picks and chooses from among the many stated principles, little guidance can be taken from the trilogy for our purposes.

[64] That said, in exercising my discretion not to declare retroactive entitlement, and adopting at least some of the trilogy language, my finding is that the mother's actual notice of a claim or demand by her son was one-and-the-same as effective notice to her - in or about May, 2010. Long before May, the father (who was no stranger to litigation) and the grandmother were both available to offer the child guidance and advice regarding financial and legal matters. Yet, no credible evidence was offered to explain the delays in requests for financial help and starting legal action. There is nothing blameworthy in the mother's conduct. Moreover, she has limited income, no significant assets, and is supporting two other children. Her student loan exceeds $8,000. I find she could not respond to a significant award [the claim exceeds $5,000], and that to impose one would cause financial hardship to her and her other children.

[65] Insofar as the MEP is concerned, I am satisfied that the mother acted reasonably and in good faith at all material times. Some money received from the father went to legitimate expenses intended to encourage and support the child's return. And the mother made other financial contributions, even though not under an order to so. In that sense, she came to court with "clean hands". Therefore, after bitterly complaining about the family's living conditions and using them in large

measure to justify his departure, the son is hardly in a position to now argue she made the wrong financial choices and owes him retroactive support.

[66] In the same vein, the timing of the mother's notice to MEP of changed circumstances was coincidental with the mother's acceptance of the reality that her son would not be returning, despite her best efforts. She should not be penalized for that.

[67] From October, 2008 until December, 2009, I find the father's monthly support payments for his son's benefit under the prevailing order continued to be due and payable, despite the son's departure, and was satisfied by his payments to the mother *via* MEP. MEP shall give him credit for all verified payments. Given my decision on entitlement, no support is due and payable by the mother to the son for this time frame.

[68] Payments received in error by the mother in early 2010 after notice to MEP were accepted by her in good faith. The error was not occasioned by anything she said or did. In the circumstances, I order that the amounts so received shall be credited against the father's outstanding support arrears. In so ordering, I am mindful that in practical terms no money actually reached the child. However, the mother was entitled to receive "back support" to recoup her past expenses incurred for their son's benefit.

[69] The parties shall bear their own court costs.

[70] Counsel for the mother shall submit an order which captures the dismissal outcome and the directions for MEP. Counsel for the child shall submit an order regarding the father's (agreed) support.

Dyer, J.F.C.