IN THE FAMILY COURT OF NOVA SCOTIA
Citation: Wile v. Wile, 2013 NSFC 25

Date: 20131125
Docket: FLBMCA-086681
Registry: Bridgewater

Between:

Katherine Mae Wile

Applicant

v.

Chad Wile

Respondent

Judge:	The Honourable Judge William J. Dyer
Heard:	October 24, 2013, in Bridgewater, Nova Scotia
Decision:	November 25, 2013
Counsel:	Tabitha Webber, for the Applicant, Katherine Wile Chad Wile, Respondent, unrepresented

By the Court:

[1] In late June 2013 Katherine Wile ("the mother") applied under the **Maintenance and Custody Act** ("**MCA**") for joint custody of her two children, with primary residence to be vested in her and access to the father, Chad Wile ("the father"). She also asked for retroactive basic child support under the **Child Maintenance Guidelines** ("**CMG**") and a contribution to expenses under section 7 of the Guidelines.

[2] The father had been represented by lawyers since 2011, but the last retainer ended when settlement negotiations broke down in June 2013. That is when the mother started the court case.

[3] Included in the mother's application was a standard Notice to the father that he must disclose his current income and personal income tax returns for the past three years. (Apparently, he had not done so during the negotiations.)

[4] Because the father was not represented by a lawyer when the case got underway, documents were sent to his last known address. Although it was not returned to the court office, he later claimed that he did not receive the court document package.

[5] The father did not attend the first scheduled court appearance. So, I ordered that he be personally served; and I ordered that he make the necessary financial disclosure under the **CMG.**

[6] The father was served by mid August. In late August, he attended court. He claimed he had been trying to engage a Legal Aid lawyer and that he had not provided his income tax returns, etc. because they were lost during residential moves. However, he assured the court that he had contacted the Canada Revenue Agency (CRA) to obtain the needed income tax returns or tax summaries. The father was cautioned about the importance of providing this information and was informed about the court's authority to impute income to him if he defaulted on disclosure.

[7] By early October 2013, there was still no disclosure by the father. During a court appearance, he reasserted that he would be represented by a lawyer whom he

named. But, after informal discussion outside the courtroom with that lawyer, it was disclosed that she had not been retained. He then alleged the CRA had mailed his tax information to an incorrect address and therefore it had to be re-requested.

[8] Against this background, I set the matter down for hearing.

The Mother's Case

[9] The mother's evidence was that the parties married in early September 2001 and separated in mid September 2010. Since then, the children have lived primarily with her and the father has exercised access, generally every second weekend. Since the separation, the mother said her relationship with her spouse had been tumultuous. She recounted that there had been numerous incidences of confrontation and name-calling, and that the father had been quite vocal about his dislike for her new partner.

[10] Regarding the father's access to his children, the mother said that the father relocated briefly to the Halifax area and that he requested that she be responsible for the children's transportation, to and from there, to facilitate his parenting time. She claimed that while in Halifax, he refused to provide her with full particulars of his address or other contact information.

[11] The father has returned to the local area. From the evidence, it appears that things have settled somewhat and the parties have agreed that the mother will be responsible for transportation to and from the father's home - if for no other reason than he is unlicensed to drive a motor vehicle.

[12] The mother has been employed as a continuing care assistant at a local facility since 2010. She was unemployed as a result of a motor vehicle accident in mid September 2012, but returned to work in April 2013 after she recovered from her injuries.

[13] The mother's evidence was that the father has not paid any child support since the separation nor contributed to other expenses (until very recently).

[14] She retained a lawyer in February 2011. I accept her evidence that negotiations were soon underway when the father also engaged counsel. It is unclear from the evidence whether there were any formal demands for an exchange of income tax returns etcetera, but I find that child support was a central issue - particularly retroactive support. The mother asserted that the parties were able to sort out workable parenting arrangements - although they never achieved a written agreement or a court order. Appended to one of her affidavits is an outline of the basic understandings. According to the mother, although there have been lingering communication difficulties, both parents have generally followed the outline informally agreed upon (last Spring). As at the hearing, the arrangements still seemed to be working reasonably well for the parents and for the children.

[15] Currently, when the mother is at work, the children have the benefit of child care at a private home. This happens a couple of days each week after school and occasionally before school, depending upon her work schedule. By August 2013 the mother's child care costs had stabilized at approximately $200 monthly. She asked for a contribution to that expense, effective as of August 2013.

[16] The father did not challenge the necessity of child care incidental to the mother's employment. Nor did he challenge the quantum.

[17] The mother has a family medical plan through her employment which covers both children and the father. Although covered by her plan, the father does help pay the premiums. She also expects a dental plan will be added starting in January 2014, but she was uncertain about what it will cover and the amount of an expected premium adjustment. Currently, the cost is about $46 monthly.

[18] The father did not challenge the necessity of the group medical coverage or the current premiums.

[19] Earlier this year the mother was informed by her dentist that Shelby had chipped three of her adult teeth and that they need repair. The repair work is expected to go ahead; however, the actual cost is currently unknown; and there is some question as to whether the new dental plan will cover some or any of it. The father did not question the need for dental work.

[20] The children are engaged in jiu jitsu classes three days weekly at a cost of $40 monthly, per child. The parents informally agreed that each parent would contribute $40 monthly directly to the service provider so that the children could continue their participation. They agreed this could be enshrined in an order.

[21] During testimony, the mother reaffirmed that the father has not contributed to any of her extraordinary expenses (with the exception of the sporting activity). She also reaffirmed - notwithstanding the terms of the informal agreement to the contrary - she has assumed responsibility for transportation of the children to and from their parenting times with their father. She also clarified that she seeks a contribution to child care expenses starting effective August 2013 - but she does want retroactive basic support, effective as of May 1, 2011when settlement discussions were already underway.

[22] After all the evidence was in, the father stated he would abide by an order to pay basic maintenance - provided the award is not retroactive.

[23] Although somewhat in the dark about how the court would decide the mother's net costs and his contribution, the father effectively conceded that she had established valid section 7 **CMG** claims. That she announced she would not pursue these claims into past years likely expedited his approval.

[24] At this juncture, I will mention that neither parent seemed to be aware of the Child Fitness Tax Credit or other potential relief for some other expenses - such as child care, dental work, health care premiums, etcetera. In fairness to them, many parents are unfamiliar with these matters or their importance when claims are presented or challenged.

The Father's Case

[25] In testimony, the father gave assurances he would pay basic child support pursuant to the **CMG** tables on a "go forward" basis. He acknowledged that he has not paid any basic support before now, but he strongly resists a retroactive award.

[26] The father said his position from the outset has been that he would contribute child support upon the execution of a formal agreement. Because no such agreement was signed, he now takes the position a retroactive support award cannot and should not be imposed. Moreover, he insists that if the court makes such an award he could not pay it. He offered no explanation of his own role in the failed settlement talks; and he did not offer any insight into why he did not sign off on the settlement which he largely adopted at the hearing. The impression left was that he believed the longer the parties limped along without a signed agreement or court order, the less support he would ultimately have to pay.

[27] The father submitted no affidavit evidence and, as previously mentioned, provided no financial disclosure with the exception of some recent pay stub information from his current employer. Although there is no way to verify the father's assertions, he briefly recounted his employment history from 2010 onward. He has worked for various employers in the local area for relatively modest wages. For the years 2010, 2011 and 2012 his evidence was that his total income from all sources was between $18,000 and $19,000. He stated that he had no income those years from employment insurance benefits or other sources.

[28] For the early part of 2013, the father struck an arrangement with a local landlord that he could reside in an apartment "rent free" provided that he committed to using his skills to repair, maintain and improve other premises at the location. The understanding was that the father would not be paid for his labor. Were it otherwise, the father said that his rent would have been as much as $600 monthly. In addition to the free accommodations, the landlord apparently also agreed to give him $100 weekly. The arrangement lasted for several months. (Counsel for the mother suggested this scheme opened the door to a finding of some extra imputed income, but did not pursue the subject in her calculations.)

[29] The father subsequently obtained employment at a local tavern. He still works there. Since approximately June of 2013 he has earned about $4,600 and, according to him, expects to remain with this employer for the foreseeable future. His current hourly wage rate is $10.30; he works 30 - 32 hours weekly. Based on his employment record for 2013, his total income for 2013 may be slightly less this year than in previous years.

Discussion/Decision

Parenting

[30] For his part, the father confirmed that the parenting arrangements as proposed by the mother are acceptable to him. He mentioned that he learned the children have recently demonstrated some behavioral issues which the babysitter, not the mother, alerted him to. However, he confirmed his agreement that the parties could move forward with an order that provides for joint legal custody of the children with his parenting times as set out by the mother and which I adopt by reference. (These may be incorporated almost verbatim in the order, modified by the prevailing transportation scheme.)

Basic Child Maintenance

[31] The **MCA** makes it clear that parents must contribute to the financial support of their dependent children unless a lawful excuse for not doing so is established. When deciding on the amount of support, the court must apply the **CMG**.

[32] I find the father's income has been relatively stable for the last three years. Working with the limited evidence, under **CMG** section 17 (1) I resort to averaging and impute to him a total income of $18,500 for each of the years 2010, 2011 and 2012. Counsel postulated a slightly lower 2013 income of about $17,130 which I will adopt.

[33] Although the parties' separation occurred in mid-September, 2010, the mother asks that I establish an "effective date" of May 1, 2011.

[34] As claimed, basic support for the two children (to the October hearing) may be summarized as follows:

2011 - 8 months x $277	= $2,216	["Old Table"]
2012 - 12 months x $270	= $3,240	["New Table"]
2013 - 10 months x $248	= $2,480	["New Table"]
Total:	$7,936	

[35] Without opposition from the father, current basic support shall be paid to the mother for the children's benefit in the amount of $270 monthly, starting effective November 1, 2013, and continuing to be due and payable in that amount until otherwise ordered. The pre-November $7,936 total is disputed.

[36] This is an originating application. The children's entitlement to maintenance arises upon separation: **S. (*D.B) v. G. (S.R.)*** [2006] 2 SCC 23. The case maps out the factors governing retroactive awards. For our purposes, I will characterize the total amount accumulated before the hearing as "retroactive". The mother has waived any claim for about the first eight months following the separation.

[37] I am mindful that the "retroactive" component, strictly speaking, only applies to that portion of the claim pre-dating the court application. However, given that no support has been paid, the analysis and outcome is not really affected by a broad brush approach.

[38] I conclude that the mother's claim should be sustained. Without laboring the evidence, I find: that the father was put on timely notice of a pending child support claim to be effective as of the separation; that the father had independent legal advice for much of the time and knew (or ought to have known) his legal duty to support his children; that the mother was diligent in her pursuit of support by negotiations; that legal action was delayed only because of negotiations in aid of settlement; that the father had income (albeit modest) above the minimum **CMG** Table threshold for payment at all material times; that the father could have directed support from his income for the children's benefit, or set money aside, but chose not to do so; that the children had ongoing financial needs which the mother met from her own resources while she pursued remedies; and that the father has not demonstrated by evidence an inability to respond to a retroactive award or that it would cause financial hardship to him. In brief, there was no lawful excuse for non-payment before; there is no lawful excuse now.

[39] In my opinion, the father should not be permitted to deliberately set up a scenario whereby he pays nothing, makes little or no financial disclosure, stalls the claims on behalf of the children - thereby accumulating significant arrears - and then paint himself as a victim and hold up the arrears amount as a shield. I do not

accept his assertion that this very predictable outcome is unfair or unreasonable to him. This case is about his children and his legal responsibilities as a parent.

[40] I fix and enter the award at $9,875 but will leave the payment scheme to the parties and the Director under section 17 of the **Maintenance Enforcement Act**. I know that structuring payment will not be an easy task. But, the father should understand that the Director has broad collection and other remedies should a satisfactory arrangement not be forthcoming.

Section 7 CMG

[41] The importance of a careful reading of **CMG** section 7, the presentation of adequate evidence (to support or defend), and "running the numbers" cannot be over-emphasized. That message rang loud and clear throughout Justice Elizabeth Jollimore's decision in **Parnell v. Hubley-Parnell**, 2012 NSSC 437.

[42] Some excerpts from that decision warrant the attention of the parties in the present case (and perhaps others who will follow in their legal footsteps):

> [14] According to subsection 7(1) of the *Guidelines*, one parent can ask that I order the other to pay all or any portion of certain enumerated expenses in addition to the child maintenance due pursuant to clause 3(1)(a) of the *Guidelines*. The amount of the expense claimed may be estimated. In making an order under section 7, I am to consider the necessity of the expense as it relates to the child's best interests and the reasonableness of the expense in relation to the parents' and child's means and the family's pre-separation spending pattern.
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> [15] In *L.K.S. v. D.M.C.T.*, 2008 NSCA 61 at paragraph 27, Justice Roscoe, with whom Justices Saunders and Oland concurred, said that it's "preferable to deal first with s. 7(1) to determine whether the expenses are necessary in relation to the child's best interests and reasonable in relation to the means of the parents before dealing with the definition of extraordinary expenses in s. 7(1A)." Leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was denied at *D.M.C.T. v. L.K.S.*, 2009 CanLII 1998 (S.C.C.). While *L.K.S. v. D.M.C.T.*, 2008 NSCA 61 dealt specifically with a claim for a contribution to extraordinary secondary school expenses, the requirements of subsection 7(1) apply to all the expenses listed in section 7.

> [16] It's important for those seeking a contribution to special or extraordinary expenses to adduce evidence of the necessity of the expense as it relates to the child's best interests, the reasonableness of the expense in relation to the means of the parents and the child and the family's pre-separation spending pattern. All too often, a Statement of Special or Extraordinary Expenses is partially completed and filed as if this, alone, is sufficient to meet the requirements of subsection 7(1) of the *Guidelines*. It is not. A Statement of Special or Extraordinary Expenses merely identifies the categories in which claims are advanced and the amount of the expenditure. All too often, as here, the Statement does not does not identify the available subsidies, benefits and tax deductions or credits and no effort is made to calculate their impact on the gross cost.
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> [17] So, before I may order a contribution to an expense, I must be satisfied the expense is necessary as it relates to the child's best interests. I must also be satisfied the expense is reasonable in relation to the means of the parents and the child, and to the pattern of spending that existed for the family prior to the separation. Once I have completed that analysis, if I determine the expense is necessary and reasonable pursuant to subsection 7(1), I must then look to whatever additional requirements exist. For example, child care expenses must be incurred as a result of the parent's employment, illness, disability, education or employment training. Health-related expenses must exceed insurance reimbursement by at least $100.00 annually. Educational expenses (other than university costs) and extra-curricular activity expenses must be extraordinary, as defined by subsection 7(1A).
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> [18] The guiding principle in ordering a contribution to special or extraordinary expenses is that it be in proportion to the parents' incomes, according to subsection 7(2) of the *Guidelines*. Once I've determined which expenses are to be shared and the amount to be shared, I'll determine how the parents shall contribute to the cost.

[43] The significance of apportioning the net cost of allowable expenses (no matter how modest) and of factoring in the income tax implications, is amplified by these brief passages in **Parnell**:

> [57] In total, I find that Jasmine had health related expenses of $162.80 for dental care and an eye exam that were necessary in her best interests and reasonable in light of the family's financial circumstances. This amount is after any insurance reimbursement.

[58] Clause 7(1)© limits sharing to those expenses which exceed insurance reimbursement by $100.00. Accordingly, where Jasmine's health related expenses were $162.80, I consider only $62.80.

[59] I must also consider the medical expense tax credit as required by subsection 7(3) of the *Guidelines*. Because the federal and provincial tax brackets are not identical, calculating this tax credit must be done in two steps. The federal credit applies to eligible medical expenses that exceed the less of $2,052.00 or three percent of the taxpayor's net income. The Nova Scotia credit applies to eligible medical expenses that exceed the lesser of $1,637.00 or three percent of net income.

[60] Net income is found on line 236 of the individual tax return. Where I have imputed income of $19,000.00 to Ms. Hubley-Parnell, her net income is calculated by deducting child care expenses of $751.50.

[61] Ms. Hubley-Parnell's 2011 net income is $18,248.50. Three percent of this figure is $547.45, an amount less than both the federal and the provincial threshold: the tax credit applies to those medical expenses which exceed $547.45. On her 2011 tax return, Ms. Hubley-Parnell didn't make any medical expense claim for herself. Jasmine's 2011 medical expenses total $460.30 (her osteopathic treatments, her uninsured dental costs and her eye exam), an amount too low to qua1ify for the medical expense tax credit. This means that Jasmine's dental care and eye exam expenses are not discounted by this tax credit and the amount that's the subject of Ms. Hubley-Parnell's claim is $62.80.
...

[63] According to Ms. Hubley-Parnell's Statement of Special or Extraordinary Expenses and the receipt for Jasmine's soccer, it cost $150.00. Again, no reference was made in the Statement of Special or Extraordinary Expenses to available subsidies, benefits, tax deductions or credits which would have an impact on the expense. Had that been done, it would be apparent that the Children's Fitness Tax Credit of $500.00 would entitle Ms. Hubley-Parnell to a tax credit equivalent to the entire cost of the soccer registration, with the result that there is no cost to be shared.

...

[75] Jasmine participated in voice lessons for approximately three months in 2012. The cost of these lessons was $426.00. The Children's Art Tax Credit of $500.00 means that, effectively, there was no cost for the lessons.

[44] During the hearing, we got to the stage where there was consensus that the mother had established entitlement to her various claims under section 7. This cut short the first part of the analysis contemplated by **Parnell**. That good news was followed by some bad news: the parties had not turned their thoughts to the calculations needed for the last phase.

[45] I know there is often a disconnect between the preferences and expectations of judges and those held by individuals without legal representation. They usually do not know the law and do not have the benefit of sophisticated computer software programs to help crunch the numbers. However, if counsel are retained, it is reasonable to expect there will be evidence directed entitlement to the standard suggested by **Parnell** and that there will be section 7 calculations tailored to the actual or anticipated financial evidence. Should that not happen, family law judges will continue to see repetition of what must have been a tedious, if necessary, exercise by Justice Jollimore in **Parnell** over modest sums.

[46] In the present case, the calculations came post-hearing at my direction. Ironically, they undercut the amount of money originally sought.

[47] To drive the point home, the mother's claim for help with sports' expenses evaporated when there was (agreed) shared responsibility for payment coupled to the Children's Fitness Tax Credit. In the same vein, the mother's claim for help with $200 monthly (gross) child care costs fell to nil when her net, after-tax cost was determined.

[48] That left the claim for a contribution to the net cost of the medical premiums. The mother calculated the father's 36% proportionate share of the net cost at just $21 monthly which I find he is capable of paying. I order the father to pay $21monthly toward that expense, starting at her request, effective August 1, 2013 and continuing to be due and payable (with basic support) on the first day of each month thereafter until otherwise ordered. There will be a small sum owing for August through November.

[49] It was also argued that I should prospectively impose the same sharing of an expected small to modest increase in the health insurance premiums. While this is a tempting shortcut, I am not prepared to do so because it is hollow from an

enforcement point of view - as between the parties, and through the Maintenance Enforcement Program ("MEP") - unless and until the quantum is established by receipts, estimates, etcetera and reinforced by written agreement or court order.

[50] Even more problematic is the request for help with dental work for one child's chipped adult teeth. All we known is that "some work will need to be done in the coming months". No report from the dentist about the necessity or anticipated cost was introduced. The extent of insurance coverage is unknown. And the tax implications have not been considered.

[51] With respect, a principled analysis demands more. With so little evidence, the latter claims are speculative. They should be quantified. (Under the **CMG**, estimates may be considered.) And the father should have an opportunity to consider the requests and perhaps get advice.

[52] In my opinion, a prospective *pro rata* order based solely on the parents' present comparative incomes - and not much else, for unknown amounts of money - is too great a leap. I decline to order any additional contributions under **CMG** section 7, at this time.

Mode of Payment and Income Disclosure

[53] All payments due and payable by the father shall be made through the MEP.

[54] The father is re-ordered to immediately provide copies of his personal income tax returns and proof of his 2013 income from all sources.

[55] Annually, by June 1st, starting in 2014, the parties shall provide to each other true copies of their personal income tax returns for the previous year, and their Notice(s) of Assessment(s) when received from the Canada Revenue Agency.

Court Costs

[56] There were no submissions about court costs. It is not clear whether that was by accident or design. So, the mother shall have three weeks within which to make written submissions or waive the same. The father shall have equal time to respond to any submissions.

Court Order

[57] Ms. Webber shall prepare an order which captures the result (with reservation on costs, if need be).

Dyer, J. F. C.