Date: 20010518
Docket No.: CA 167490

NOVA SCOTIA COURT OF APPEAL

[Cite as: Lee v. King, 2001 NSCA 86]

Flinn, Cromwell and Oland, JJ.A.

BETWEEN:

NORMA CECILIA DIXE LEE

Appellant

- and -

JOSEPH ELDRIDGE CLIFTON KING

Respondent

REASONS FOR JUDGMENT

Counsel:	Robert G. McNeil, for the appellant The respondent on his own behalf
Appeal Heard:	May 18, 2001
Judgment Delivered:	May 18, 2001
THE COURT:	Appeal allowed in part as per oral reasons for judgment of Flinn, J.A.; Cromwell and Oland, JJ.A. concurring.

FLINN, J.A. (Orally):

[1] At issue in this appeal is whether the trial judge erred in principle by deciding, in effect, that he had no jurisdiction, under the **Family Maintenance Act**, R.S. c. 160, (the **Act**) to order the respondent to make child maintenance payments for any period of time prior to the date on which blood tests confirmed that the respondent was the father of the child in question.

[2] The law appears to be settled that the trial judge has the discretion, on an original application for child maintenance, to make the order effective at least to the date of the filing of the application. See **E.T. v. K.H.T.** (1996), 25 R.F.L. (4th) 98 (B.C.C.A.); **L.S. v. E.P.** (1999), 50 R.F.L. (4th) 302 (B.C.C.A.) (leave to appeal to the Supreme Court of Canada dismissed [1999] S.C.C.A. No. 444); **S.D.B. v. P.W.** (1998), 47 R.F.L. (4th) 228. In light of the conclusion we have reached on the facts of this case, it is not necessary to address the question of whether, under the **Family Maintenance Act** the court has jurisdiction to order child maintenance to commence at an earlier date.

[3] It is apparent, from the decision of the trial judge, that he considered this to be an appropriate case to exercise his discretion and make a retroactive order. The trial judge noted that the appellant, upon separation from the respondent, went on social assistance; that the respondent has ongoing income of $24,300.00 per annum, and that while the respondent's expenses are close to what he is earning, there was no undue hardship application before him.

[4] However, in reaching his decision as to the extent of the retroactive order he should make, the trial judge concluded that no order could come into effect until the blood tests determined that the respondent was the father. That determination, he found, was made in April 2000 when the blood test results were made available to the parties. The trial judge ordered that the respondent pay child maintenance retroactive only to April 2000.

[5] It is clear that the respondent is the father of the child and, with respect, the trial judge erred in principle in concluding that he could not make an order which predated the results of the blood tests. This is not a case where the trial judge, in the exercise of his discretion, decided not to make a retroactive order for the period prior to April 2000. The trial judge clearly concluded that he was unable to make such an order until paternity was established by the blood tests, and in that regard he erred in principle.

[6] Given that error in principle, and since the judge thought this was a proper case for making the order effective at an earlier date we vary the trial judge's order accordingly, and make it effective the date of the filing of the appellant's application.

[7] Assuming without deciding that there is jurisdiction to make the order effective prior to the date of the filing of the application, the record here does not support its exercise.

[8] In the result, the appeal is allowed in part. The operative paragraph in the trial judge's order providing for the payment of retroactive maintenance is amended by including the additional amount of $1,746.00 for the nine month period from July 1999 to March 2000 at $194.00 per month. The method by which the respondent is to pay the retroactive maintenance payments which is provided for in the order; namely, $50.00 per month remains unchanged.

[9] There will be no order as to costs.

Flinn, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.