FAMILY COURT OF NOVA SCOTIA
Citation: *D.E. v. F.C.*, 2015 NSFC 2

Date: 2015 05 15
Docket: FNGMCA No. 078651
Registry: Bridgewater

Between:

D.E.

Applicant

v.

F.C.

Respondent

Judge:	The Honourable Judge William J. Dyer
Heard	April 22, 2015, in 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 May 13, 2016.
Counsel:	Sinead Russell, for the Applicant Pavel Boubnov, for the Respondent

By the Court:

[1] D.E. ("the mother") and F.G. ("the father") are the parents of a 14 year old son, G.H.. In mid-June 2013, a consent order was approved by another judge which vested joint custody in the parents, primary care with the mother, and reasonable access for the father. There were a variety of terms addressing relocation, spousal support and other matters.

[2] At the time of the last order, the mother was represented by a lawyer; the father represented himself. However, a review of the file discloses that the father had legal representation until at least March 2013, incidental to prior court appearances and interim orders going back to at least September, 2012.

[3] The last order did not recite the father's (then) current or past annual income. However, I am satisfied that it was represented to the court that he was expected to be in receipt of Canada Pension Plan ("CPP") disability benefits. On that basis, child support payable by the father to the mother for their child's benefit was settled at $200 monthly starting July 1st, 2013.

[4] By reference to the ***Child Maintenance Guidelines*** ("***CMG***"), I find a parent with an approximate income of $25,200 annually would expect to pay basic support of $200 monthly for the benefit of one child. With hindsight, it is now known that the father's actual 2013 income exceeded $63,000 and should have attracted basic child support in the $536 monthly range.

[5] The last order contained no term or condition requiring additional or future financial disclosure by the father. Nor was there any provision for confirmation or review of the CPP benefits representation.

[6] Within just a few weeks after approval and issuance of the last order, the mother received information which led her to conclude that the father had left Nova Scotia and returned to Alberta where he had been seasonally employed for several years. She suspected he had misrepresented entitlement to CPP benefits and his employment status; and she soon turned her mind to the questions of recourse and remedies. Her suspicions were well-founded.

[7] The mother sought legal advice and elected to commence variation proceedings under the ***Interjurisdictional Support Orders Act*** ("***ISOA***"). Reports from the reciprocating jurisdiction confirm that a mid-July 2014 court date was set for the father's appearance in Edmonton. However, he did not attend and the case was adjourned pending confirmation of his address and personal service. Subsequent reports from Alberta confirm that efforts to locate the father floundered, despite considerable efforts by process servers.

[8] Weeks and months passed before it was discovered that the father had returned to Pictou County, Nova Scotia. At that stage, the mother abandoned her ***ISOA*** application and started variation proceedings in Nova Scotia under the ***Maintenance and Custody Act*** ("***MCA***") and the ***CMG***.

[9] By early January 2015, the father had been located and personally served at a Nova Scotia residence with a host of documents including routine Directions to Disclose, a Direction to Attend Court, a Response Form for his completion, etcetera.

[10] In mid-January 2015, the mother and her lawyer, and the father participated in a recorded pre-hearing conference. The financial disclosure expectations and requirements were emphasized to the father. On that occasion, the father represented to the court that he was waiting for a CPP benefits appeal decision. He undertook to provide a letter from CPP officials confirming the status of his appeal. He made general reference to his medical situation, whereupon he was also directed to file and serve an affidavit and/or medical reports/evidence if considered (by him) to be relevant to the mother's application. He was encouraged to seek legal advice.

[11] Mr. Boubnov confirmed his retainer by the father during a February 9, 2015 telephone pre-hearing conference call. Mr. Boubnov had not yet reviewed the court file which prompted me to give a summary of the file history and outstanding disclosure issues.

[12] There was another pre-trial conference on February 23rd. Mr. Boubnov participated; his client did not. Outstanding disclosure issues (by the father) were again addressed. I cautioned that a court costs award against the father was a potential consequence for his non-compliance. On this occasion, Mr. Boubnov professed some contact with, but limited instructions from, his client. However, Mr. Boubnov said he expected to soon meet with the father to secure detailed

instructions, to prepare, file and serve a response affidavit, and to complete financial disclosure.

[13] With the consent of both counsel, the matter was set down for a contested hearing on April 2, 2015. That day, Mr. Boubnov attended court; his client did not. Mr. Boubnov provided copies of two medical letters or notes from a physician purporting to address the father's medical situation. (I will refer to these later.) After protracted discussions about further delay, the hearing was rescheduled for April 14th. Court costs against the father were provisionally authorized in the aftermath of the aborted hearing.

[14] Before cementing the day and time for the final hearing, Mr. Boubnov was given an opportunity to consult with the father and to confirm the father's availability. Mr. Boubnov waived this. Before adjourning, I revisited previous directions and orders, and expectations preparatory to the contested hearing scheduled for April 14th. I ventured that if the father persisted with his claims through counsel that his attendance was working a "hardship", that counsel should take the initiative and explore the possibility of accommodating him by arranging a live video link with the Pictou Courthouse so that his evidence (and that of any potential medical witnesses) could be given at a site close to the father's home. I also suggested that (so far) there was no credible explanation for the absence of a response affidavit from him (and other potential witnesses).

[15] The day before the hearing, around mid-afternoon, Mr. Boubnov contacted court officials to advise that the father would not be making himself available for court "due to health issues". Mr. Boubnov then expressed a wish to withdraw as solicitor of record and to make his motion by telephone at the commencement of the hearing. Counsel had not prepared, filed and served a Notice of an Application to Withdraw on the client or the other party. Not surprisingly, opposing counsel was not inclined to consent.

[16] I refused to consider an informal or formal (unperfected) withdrawal motion on the brink of the hearing; and I refused counsel's request to appear by telephone. When court staff inquired about the availability of the father to participate by video, Mr. Boubnov advised that there would be no participation because the father lately advised he would be attending a physiotherapy session at a local hospital.

[17] According to Mr. Boubnov, when he learned of his client's stance, he advised the client that he must participate in the hearing in person or by video. On the record, counsel also declared the father had promised him (counsel) on the last

court date that he would attend. Mr. Boubnov candidly stated that he was not instructed to ask for a further adjournment. And, he reiterated that the father "just said he is not coming".

[18] Mr. Boubnov decided to attend the hearing and participated as best he could – given his limited instructions and predicament. Mr. Boubnov's participation included cross-examination of the mother and submissions to the court on behalf of the father.

[19] The mother introduced affidavit evidence and testified. Her un-contradicted evidence was that the parties were in a common-law relationship from approximately 1998 until 2011. Following the couple's separation, she relocated to Lunenburg County with their son. The child continues under her primary care, as reflected in various prior court orders. In September 2013, the mother went back to college to obtain qualification as a medical receptionist. She secured employment with a local health authority where she continues to work. Based on the limited information available to her after the father reportedly left Nova Scotia without notice in 2013, she concluded that he returned to employment in Alberta.

[20] The mother's ***ISOA*** application and subsequent ***MCA*** application both seek review of the last order and upward variation of the father's child support obligations based on the evidence now available regarding his employment and income circumstances. She seeks variation of the level of basic support and a contribution to special or extraordinary expenses pursuant to section 7 of the ***CMG***.

[21] Based on Canada Revenue agency (CRA) Assessment Notices submitted on behalf of the father, I determine his Line 150 income history to be as follows: 2011 - $94,544; 2012 - $74,392; 2013 - $63,430. The father provided only a single page from his 2014 personal Income Tax Return, for reasons best known by him. Relying on that disclosure and Mr. Boubnov's submissions, I determine the father's Line 150 2014 income to be $52,570.27. The father did not submit proof of his 2015 income from all sources, despite repeated court directions.

[22] I observe that the father's income has historically included both employment income and employment insurance benefits. RSP income was disclosed for some years. CPP benefits are not referenced in any of the returns.

[23] An unsigned and undated document purporting to be from a Bankruptcy Trustee was filed. It is accompanied by nothing. I attach no weight to it.

[24] Photocopies of electronic versions of "reports" from the father's personal physician were filed; the originals were not. The physician did not testify. There was no evidence about the physician's professional credentials; and no attempt was made to establish the doctor's qualifications to offer expert opinion evidence. The highlights follow.

[25] A January 13, 2015 typed letter states the "patient is permanently disabled due to chronic upper body pain, left hemi-pelvectomy related to previous osteo-sarcoma and ulnar neuropathy". The physician stated the father is waiting for a decision regarding disability benefits. There was no elaboration. The physician opined the father in "unable to maintain any gainful employment due to his impairments".

[26] A March 11, 2015 hand written chart states the father is "permanently disabled" and unable to return to work. There are the following notations regarding driving: "occasional only – unable to drive long distances". Walking: "no more than 15 - mins @ a time". Standing: "no more than 10 – 15 mins." Climbing: "unable to perform". Sitting: "requires repositioning after 15 – 20 mins. Bending: "occasional". Lifting: "no heavy or repetitive lifting 10 lbs or less."

[27] A March 31, 2015 typed letter states: "Due to a physical disability impairing the above noted patient from sitting/driving no more than 15 minutes at a time, he is unable to attend a scheduled court appearance on Thursday April 2, 2015".

[28] As mentioned, the father failed to provide any other evidence directed toward his present or past medical circumstances. That the father has had some physical disabilities has been known for many years. However, to his credit, in recent years he has consistently secured and maintained seasonal employment and enjoyed a good annual income (when combined with employment insurance benefits). His income history, now in evidence, underscores the point.

[29] There is no evidence to credibly explain why the father's employment and income circumstances will be any different in the foreseeable future than experienced in the past – other than the brief reports which were filed. With respect, the father had every opportunity to provide more substantial evidence directed to this issue, including more fulsome disclosure of his medical history; but he studiously avoided doing so. The offered reports were not tested in court because neither he nor the physician testified. All of the foregoing has relevance because of arguments advanced by the mother that his episodic medical complaints

have invariably coincided with court action by her to achieve appropriate child support awards. The implication is that tactical evasion and avoidance are standard fare.

[30] The father did not submit a household budget or any other evidence about his financial circumstances. He did not disclose anything about his general circumstances which might have relevance to the section 7 ***CMG*** claims and his ability to pay.

[31] The mother seeks retroactive variation of the table amount of child support, plus a contribution to expenses under section 7. She advanced a generic request for a contribution by the father to health-related expenses exceeding insurance reimbursement by at least $100 annually, plus generic and specific contributions to extraordinary expenses for extra-curricular activities. She broadly wrote that she is ineligible to claim any of the section 7 expenses by income tax deductions or credits, or by subsidies or other benefits but did not enter copies of her income tax returns.

[32] Returning to her son's medical situation, she wrote (in late October, 2014) that she was unable to obtain receipts or other documentation for the following reasons: "G.H. has surgery on October 29, 2014 for ACL Repair and Menisus Reconstruction. G.H. will need physio post-op and cannot provide the Physiotherapist's accounting report as yet for these costs." The hearing did not occur until April, 2015; but the mother did not top up her evidence with any medical reports, expense estimates or receipts, etcetera.

[33] On the evidence, I find the claim for an unstated amount of physiotherapy and other medical expenses is mainly related to a sports injury. When prompted, the mother gave limited evidence that G.H., currently a high school student, is an avid and skilled "BMX" cyclist who aspires to become a professional. She did not offer much elaboration, but I am prepared to judicially notice that "BMX" is an abbreviation for bicycle motocross which I recognize is a specialized and competitive off-road cycle sport with a high public profile. She said their son's injuries were sustained while riding and that surgical intervention was necessary. The circumstances were not explained. She said G.H. needed a brace and cited a (gross) cost of about $1,900. If this expense (and others) were incurred, they were not supported by receipts or other proof of payment. When pressed, she admitted that the father may have remitted some money to help defray the expense - but her evidence was ambiguous and confusing.

[34] There was evidence that G.H. was invited to a one-week professional BMX camp in 2014 and re-invited (for 2015) because of his "high potential". She would like him to attend this year's camp; but she did not specify the cost or file any estimates. Therefore, I confine my decision to the 2014 expenses.

[35] According to the mother, the father is well aware of their son's talents and potential, and that G.H. had been invited to the 2014 Pennsylvania camp. Their son took advantage of the offer and incurred travel, registration, and related expenses – all of which the mother said she paid. G.H. apparently travelled unaccompanied. The evidence included confirmation that the child had the benefit of a small "scholarship" ($400) which was credited against the camp fees. After application of the scholarship, and inclusive of all travel expenses, the mother paid a total of $4,292.81. These expenditures were fully documented.

[36] As noted, the mother did not introduce her personal income tax returns to assist with the section 7 claims assessment by the court. She filed an Income Statement projecting a total of $16,926 for 2014, but did not state her expected 2015 employment income. She also filed a Statement of Expenses in which she purported to list only her expenses (and not the expenses paid by anyone with whom she resides). Under the section 7 caption in her budget, she entered $400 for physiotherapy plus $120 for "extra-curricular activities" - both monthly. I infer the non-medical component represents projections for 2015.

[37] I am unable to reconcile physiotherapy costs (current or projected) of about $4,800 (annualized) from her budget with her testimony - in the absence of any estimates or receipts. At one stage she said her son had fully recovered, for example. There was no mention of an ongoing need for medical appliances or aids, etcetera.

[38] The same may be said regarding $1,440 (annualized) extra-curricular costs and what the figure does or does not include. She offered no clarification or elaboration during testimony. And the connection between that figure and BMX camps, if any, was not addressed.

[39] The objectives of the ***CMG*** are to establish a fair standard of maintenance for children that ensures that they benefit from the financial means of both parents, to reduce conflict and tension between parents by making the calculation of child maintenance orders more objective, to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance orders and encouraging settlement, and to ensure consistent treatment of parents

and children who are in similar circumstances. Determination of the amount of child maintenance is guided by section 3.

[40] Ms. Russell briefed the court regarding retroactive variation, including reference to ***S. (D.B.) v. G. (S.R.)***, [2006] 2 S.C.R. 231. Debate was truncated when Mr. Boubnov conceded that entitlement to retroactive recalculation and adjustment would not be contested. He submitted that it would be appropriate for the court to review and calculate the father's support obligations, based on the income information now available, and also to impute income on a "go forward basis". However, on the father's behalf, it was submitted that retroactive variation should become effective the same date as the first payment stipulated in the last order (i.e., July 1st, 2013). The mother's position was that the requested variation should be effective January 1st, 2013 (i.e., for the full calendar year).

[41] A review of the court file discloses that the application leading to the last order was launched in August 2012. I am satisfied that the last order reflects an expectation regarding the father's income for the entire year – not just the remaining six months of 2013. Child support is usually determined on the basis of annual income. I conclude it would be unreasonable and unjust (not to mention offensive to the purposes of the ***CMG***) to constrain the mother's variation application in circumstances where the payor grossly misrepresented his likely income to his son's detriment.

[42] The father could have presented evidence to dispel the assertions that he misled the mother and the court. However, he chose not to do so. On the evidence, and in law, I therefore see no reason to deny the mother the remedy she seeks or the effective dates requested. Accordingly, variation of the basic amount of support under the ***CMG*** is awarded retroactively effective as of January 1st, 2013.

[43] Section 16 requires the court to direct its attention to Line 150 of the T-1 General Form issued by the Canada Revenue Agency ("CRA"). But, on behalf of the mother, it was submitted that the father's income has varied over the last several years, that the court should average it, and decide that the average is fair and reasonable as contemplated by section 17 of the ***CMG***. To do so would require an opinion that the determination of the father's annual income under section 16 would not be the "fairest determination of that income". Based on the available evidence, I cannot say that the father's income has "fluctuated" or that there is any clear "pattern". At best, I observe that his Line 150 income has steadily

declined from almost $94,544 in 2011 to approximately $52,600 in 2014. In the circumstances, I adopt his Line 150 income for 2013 and 2014 as giving an accurate and fair picture. And, I determine that the father's income for 2015 is likely to be the same this year as last year - approximately $52,600. When imputing that income to the father, I am mindful of section 19 of the ***CMG*** which authorizes the court to impute such amount of income to a parent as it considers appropriate in the circumstances. Those circumstances include several scenarios including one in which a parent has failed to provide income information when under a legal obligation to do so.

[44] The mother has exhausted virtually every avenue [short of an arrest warrant to compel attendance and disclosure] to obtain full financial disclosure pursuant to section 22 of the ***CMG***. This is significant because where there is non-compliance, under section 23, the court may draw an adverse inference against the person who fails to comply, and impute income to that parent in such an amount as it considers appropriate. I will return to this, but note that under section 22(2) there is clear authority for the court to award costs in favour of a parent up to an amount that "fully compensates a parent for all costs" incurred in child support proceedings. (The remedies flowing from non-compliance with orders are also reinforced under section 24.)

[45] I have already set out the father's Line 150 income history. Accordingly, I determine the amount of basic support due and payable for 2013 to be $536 monthly; and for 2014 it is $441 monthly. Subject as follows, the total amounts due and payable for 2013 and 2014 are $6,432 and $5,292, respectively.

[46] Effective January 1st, 2015, basic monthly child support payments shall continue at $441 monthly, with payments to continue on the first day of each and every month thereafter until otherwise ordered by a court of competent jurisdiction.

[47] On a parent's request (in this case, the mother) the court may also provide an amount to cover all or any portion of specified expenses. The specified expenses include certain health related expenses and extraordinary expenses for extra-curricular activities – among other things. [See section 1(a), (b), (c), (d), (e) and (f).] The requested expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, where

the parents cohabited after the birth of the child, to the family's pattern of spending before separation.

[48] The guiding principle in determining the amount of an expense is that it is shared by the parents in proportion to their respective incomes after deducting the contribution, if any, from the child. Also, the court must take into account any subsidies, benefits or income tax deductions or credits related to the expense and any eligibility to claim the same.

[49] There must be a foundation in the evidence for the court to make its decisions. I reiterate that the mother did not submit all of the required income information under section 21 to support her claim for assistance with special expenses - past or current. This is required by section 21(3).

[50] Unfortunately, the mother's evidence foundation comes close to not meeting the threshold. This is not unique to the present case. [See**: *Parnell v. Hubley-Parnell***, 2012 NSSC 437.]

[51] With respect, as Justice Jollimore stated in the ***Parnell*** case: "All too often, 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 expenditure. All too often, as here, the Statement 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".

[52] So too in the present case, although discussed at pre-hearing conferences, there were no tax returns from the mother and no impact calculations. While it may be argued that the father abandoned the legal playing field and that the mother's claims should be expedited to a default award, in my opinion the court's "gatekeeper" role still requires the application of the law to the facts before it.

[53] Allowing the mother did submit a household budget which demonstrates a significant monthly budget deficit, she otherwise offered no evidence regarding her current living arrangements or those of the child – except for a brief reference to the fact she is in a relationship with another individual. It seems likely her partner is subsidizing her budget shortfall and, I infer, he is thereby covering the father's underfunded child support. The mother said nothing about past spending patterns for extra-curricular expenses. For his part, the father offered absolutely no

evidence about his financial or living circumstances, past or present, save and except for some income disclosures.

[54] The mother stated she did not discuss medical expenses before incurring them because she had no way of communicating with the elusive father. However, she added their son has acted as something of an intermediary - in the sense that she understands he alerted his father to the injury and his need for a brace. According to the mother, he has been "cleared to return" to the sport; but, prescribed physiotherapy did not happen because it could not be afforded. The child has follow-up appointments with his surgeon approximately every three months, despite the clearance.

[55] There was some evidence of a contribution by the father to the cost of a brace. There was no reliable evidence about the physiotherapy treatment and related expenses. With respect, I find the evidence too weak to assist with a proper analysis under the ***CMG*** and to sustain this part of the claim. The court cannot fill the void. I decline to make a specific award under the medical expenses heading at this time.

[56] Coupled with the paucity of evidence, I find the request for a prospective award of *pro rata* sharing of unspecified future medical expenses [based on future incomes] to be too speculative to be sustained. And, I judicially notice that generalized orders which are non-specific regarding quantum, payment dates, etcetera regarding section 7 expenses, and which have not otherwise been crystallized by agreement or by court decision, will not be enforced by the Director under the ***Maintenance Enforcement Act***.

[57] There was evidence that the father was aware of their son's 2014 BMX camp. She stated the father may have contributed $200 - $300 toward the expenses by a transfer of money directly to the son, full particulars of which are unknown to her. From the father's financial contribution via the child, I infer his approval of the activity. Allowing that the evidence is modest, I find that the mother has established that the BMX sporting activity is necessary in relation to the child's best interests. Keeping in mind the absence of countervailing evidence from the father, I find the demonstrated expenses were reasonable in relation to the father's means and her means, allowing that her partner may have assisted pending recovery from the father. As mentioned, the child has no independent income. However, the mother's claim takes into account the so-called scholarship the child achieved. It is unclear whether the $500 Children's Fitness Tax Credit was

available and considered. So, I propose to reduce the claim by that amount in order to lay it to rest. Making the best of the evidence, I will reduce the claim by allowing him a $300 payment credit and by another $500 for the tax credit. I therefore fix the net expense at $3,492.81 which I round to $3,493.

[58] Based on the respective 2014 incomes of about $52,570 and $16,926, respectively, I determine the *pro rata* sharing be 75/25. The amount due and payable by the father is $2,620. Absent any evidence of inability to pay from income or capital, I order that this amount be paid within three months of the decision date.

[59] The last order was not registered with the Maintenance Enforcement Program ("MEP"). The mother's explanation was vague on this score. More to the point, the result is that there is no formal record of payments to help determine the amount due under the last order. There was evidence that the father made a few irregular payments and that the usual mode was electronic transfer/deposit to a bank account in the mother's name. However, she did not recapitulate or credibly summarize the amounts received or the dates when they arrived. She conceded that the father should be given credit for his payments, but her testimony on the topic was confusing and incomplete. The father offered no evidence about his payment history.

[60] I repeat that the ordered variation shall be effective January 1, 2013. I direct that MEP's history and record of payments shall start the same date. The father should have (or be able to access) bank records of his support payments. It seems they are few in number. I place the onus on him to provide MEP with proof of payment(s), satisfactory to the agency, for which he claims credit. Proof must be submitted to MEP within 30 days of the date of this decision. Unless and until that occurs, the above awards (for basic support) stand unadjusted. The section 7 award is unaffected by this provision.

[61] No later than June 1st of each year, both parties must provide each other with a copy of his/her complete personal income tax return, with all schedules and attachments, even if the return is not filed with the CRA, and also provide each other with all Notices of Assessment from the CRA, immediately upon receipt, commencing in 2016.

[62] All payments of child support shall be made through the MEP. Pursuant to section 42 (1) of the ***Maintenance Enforcement Act***, if a party changes her/his

address, the party must advise the office of the Director of MEP within 10 days of the change.

[63] The mother seeks court costs of $1,500. Costs are in the discretion of the court. Throughout, the father was on notice that costs were a live issue.

[64] In exercising my discretion, I have considered a host of factors: Although all of her section 7 claims were not sustained, the mother was largely successful. The hearing was delayed for reasons solely attributable to the father. The father added complexity by his failure to comply with directions and orders. The father's position was unknown before the hearing – which prompted more than usual preparation time and work by counsel for the mother. The father balked at offers to accommodate his professed medical circumstances by long distance (video) participation and otherwise refused to engage in the process and deal with the case on its merits. Two pre-hearing briefs were prepared and submitted on behalf of the mother; none were forthcoming from the father. There were multiple court appearances, including a "lost day" plus a final half-day contested hearing. Finally, the father's conduct runs counter to the ***CMG*** objectives at almost every turn. Inexplicably, he even left his lawyer "high and dry". Court costs in family law matters are not imposed to punish irresponsible conduct. However, they may be legitimately awarded to those who proceed responsibly, conscientiously and in good faith, and achieve substantial success. In the circumstances, I order the mother shall have the sum requested as court costs which are due and payable immediately.

[65] Ms. Russell shall submit an order which captures the outcome

Dyer, J.F.C.