

FAMILY COURT OF NOVA SCOTIA

Citation: *A.B. v. C.D.*, 2016 NSFC 10

Date: 2016 04 14

Docket: SFHMCA No. 080349

Registry: Bridgewater

Between:

A.B.

Applicant

v.

C.D.

Respondent

Judge: The Honourable Judge William J. Dyer

Heard March 9, 2016, in Bridgewater, Nova Scotia

Revised Decision: The text of this decision has been revised to protect the identity of certain parties. This revised version is released on May 13, 2016.

Counsel: A.B., the Applicant, on his own behalf
Franceen Romney, for the Respondent

By the Court:

[1] This is a case under the **Maintenance and Custody Act (MCA)** which dates back to June, 2014 when the father started an application for custody of his children and was met with cross-applications by the mother to deal with parenting and child support. (The underlying issues and conflict between the parents actually goes back to 2012.) Much of the time, both parties were represented by lawyers.

[2] The case languished until early December, 2014 when neither the father nor his lawyer attended a scheduled court appearance. On the available evidence, I approved an interim “without prejudice” order, dealing with parenting, child support, and outstanding financial disclosure by the father.

[3] Neither the father nor his counsel of record attended a subsequent court appearance scheduled for early April, 2015. The case was adjourned without date.

[4] A couple of months later, the father discharged his lawyer. Along the way, he launched allegations of incompetence or professional misconduct on the part of his former lawyer. Despite the passage of time, there is no evidence that the father sought recourse or relief directly with the former lawyer, through the Nova Scotia Barristers’ Society, or otherwise.

[5] By mid-August, 2015, there had been minimal progress on all fronts, except for parenting time through the local Supervised Access and Exchange program.

[6] The father was also unable, or unwilling, to distinguish between the court’s role and that of the Maintenance Enforcement Program (MEP). So, he was provided with additional information to assist his understanding. Nonetheless, by early December, 2015 he was still engaging in discussions and debate about MEP.

[7] The father was repeatedly referred to a wide spectrum of resources, including, but not limited to the www.nsfamilylaw.ca website. But, during the present (contested) hearing, he continued to lay the blame for his inadequate preparation and incomplete financial and other disclosure at the doorstep of his former lawyer.

[8] In the face of the father’s opposition to what the mother was seeking for child support, I set the matter down for hearing on January 26, 2016. At the eleventh hour, the father advised that he could not attend and he requested an

adjournment. A new date was set. But, once again, at the eleventh hour, the father sought another adjournment to deal with what he perceived to be outstanding issues connected to MEP. The mother objected to any further adjournments. So, I instructed court staff to inform the father that his adjournment request was being denied and that the matter would proceed to hearing as previously scheduled.

[9] The principle focus of the current hearing was child support. When the father testified, he referred to the *Step by Step Federal Child Support Guidelines* publication by the Department of Justice, Canada. Unfortunately, it soon became apparent that he mistakenly believed the publication was a template for courtroom process and presentations. It is not. When pressed, he conceded that he had not read the publication in its entirety, and that he had made no serious effort to tap into the various and extensive resources for self-represented litigants that he had been given. Perhaps not surprisingly, the result was that the father became quite frustrated and agitated at the hearing in which he (again) portrayed himself as a victim of his former lawyer and “the system”. He resorted to finger-pointing, literally and figuratively, as the hearing wound to a conclusion.

[10] Both the father and the mother offered evidence. However, the father submitted no recent affidavit evidence and no updated financial disclosure.

[11] The mother filed a copy of her 2015 T4 slip, in addition to other materials previously filed and served. Also introduced into evidence was a relatively recent Record of Payments from MEP. As at February 1st, 2016 the father’s outstanding arrears under the interim order were \$3,985.86.

[12] The two children, now six and five years old respectively, continue to reside primarily with the mother. She is looking for basic support to be determined under the **Child Maintenance Guidelines** plus a contribution toward childcare expenses. At present, one child is in grade one and the other attends part-time, preschool. Soon the youngest will have additional childcare expenses.

[13] The mother is employed outside the home and needs assistance with her childcare expenses so she can continue that employment. Her line 150 income for **Guidelines** purposes is approximately \$32,000. The mother was not able to state with any precision the income tax relief, if any, she will achieve by claiming her childcare expenses. However, she does claim a deduction in her tax returns and relies on the court to do the calculations, if needed. Keeping in mind that the mother has a child by another relationship, total child care expenses claimed for 2014 (for three children) was approximately \$3,600.

[14] By contrast, the father's line 150 income history is as follows: 2011 - \$23,382.90; 2012 - \$25,629.02; 2013 - \$30,632.12; 2014 - \$20,184.32. Based on a paystub to the end of November, 2015, projecting to the end of the calendar year, and referring to the father's testimony, I find his 2015 line 150 income will be approximately \$40,500.

[15] The father claimed that his 2015 income tax slips, etcetera, were given to an income tax preparer and he had no access to the documents. I do not accept that testimony. He knew, or ought to have known, that proof of his 2015 income was critical for the hearing. He offered an unsatisfactory explanation as to why he did not keep photocopies of the documents sent to the service provider.

[16] The father introduced some evidence suggesting that his income under an employment contract will be the equivalent of \$39,447 annually. However, this does not include pay for overtime which he conceded that he sometimes gets. In any event, to his credit, he admitted that his income likely would exceed \$40,000 in 2015; and I will rely on that assertion. Also, I find his 2015 income is a reasonably reliable guide to what he is likely to earn in 2016.

[17] The father had been directed to submit a financial statement (or household budget) on the prescribed forms, but he did not do so. Instead, he pulled together a one page document which purports to give a summary or outline of his current expenses. Because it is not on the prescribed form, it does not give a fulsome picture of his budget.

[18] That said, the father demonstrated several recurring monthly expenses such as rent (\$850), power (\$100 - \$140 bi-monthly), phone/internet (\$118); food/household products (\$150 - \$200 bi-weekly), other "necessities" (\$422). He does not have cable television, but needs phone and internet services for employment. He claimed that his parents sometimes help with his food and other expenses. (They did not testify or submit affidavits.)

[19] The father testified that all of his GST, income tax refunds, etcetera, are subject to garnishee by MEP. At this stage in the hearing he disclosed, for the very first time, that he is under an obligation to pay support for another child. He presented copies of a brief series of court orders approved by another Family Court Judge at another location. The last order speaks as of June 10, 2014 and requires him to pay support for another dependent child at the rate of \$233 monthly through MEP.

[20] The father did not present an MEP Record of Payments regarding the other order. On its face, that support order was approved based on representations made by the other parent and by a lawyer on behalf of the father. (As it happens, the lawyer involved in that case is the same lawyer who previously represented the father in the present case.)

[21] The father did not explain why he did not mention or disclose the other orders to the mother, her counsel, or the court before the start of the present hearing. But, suffice it to say, the father's other obligation does have some importance in deciding whether he is in a position to pay the Table amount of support plus a contribution toward the section 7 expenses.

[22] I note that in arriving at a monthly budget deficit exceeding \$400, the father has taken into account garnishees of \$425 monthly for current support, plus \$20 towards arrears insofar as the present case is concerned, plus an additional \$233 monthly directed to his other child.

[23] During testimony, the father referred to motor vehicle expenses associated with his parenting time in the local area and also in the Truro area (where his other child lives). In the present case, he said that he makes approximately two round trips every month, travelling close to 500 kilometers on each occasion. He postulated gasoline expenses in the range of \$30 to \$40 per weekend. Insofar as the Truro child is concerned, the return distance is about 380 kilometers and, according to the father, attracts expenses of about \$40 per weekend, twice monthly. Additionally, the father testified he is incurring automobile insurance expenses which he stated are costing him \$283 monthly.

[24] The father provided no invoices or receipts to support any of these claimed expenses. And, on close questioning, it turns out that the vehicle (in relation to which he is claiming expenses) is not owned by him – rather by a female “friend”. He said his own vehicle is in disrepair at this time and that the projected expenses relate to his use of her vehicle.

[25] The father made a broad submission that based on his current income and expenses, he is not in a position to pay any greater amount for child support and, if ordered to do, he will experience a decreased standard of living and “inability to exercise access to the children, causing them grief and separation anxiety”.

[26] In direct testimony, the father claimed that he has no roommate or girlfriend, and that he has no savings, emergency funds, or other income sources. He testified

that he offered group medical and dental, etcetera through his employment for the benefit of the children, but that the mother declined the coverage because she has similar benefits through her employment.

[27] However, by rebuttal evidence, the mother named the father's female friend and testified that he told her directly that this person was cohabiting with him. She testified that this individual usually accompanies the father when he picks up and returns the children and, indeed, occasionally this person has actually assumed sole responsibility for transportation and transition of the children for the father's benefit. The mother stated she does not know the father's female friend or her family. She recalled that the father also told her more than once that the other woman had lost her job at some point. In any event, she insisted that he disclosed that this person is living with him. Suffice it to say, this is significant because she should be contributing to their ordinary household expenses.

[28] Importantly, for our purposes, the female friend did not submit an affidavit or testify to corroborate the father's version of the prevailing circumstances or to rebut the mother's evidence. In the result, I find it more likely than not that the mother's version accurately portrays the father's living circumstances.

[29] **Discussion/Decision**

[30] The father acknowledged that there is entitlement to support, but he questioned the amount to be paid.

[31] Under the **Guidelines**, the amount of support ordered for children under the age of majority is usually the amount set out in the applicable Table, according to the number of children under the age of majority and the income of the parent against whom the order is sought plus the amount, if any, determined under section 7 of the **Guidelines**.

[32] With the benefit of hindsight, it is now known that the income imputed to the father for 2014 was somewhat higher than his actual income. The interim order was without prejudice to the rights of each parent. The Table amount for an imputed income of \$29,300 annually was \$428 monthly. Basic support using the father's actual 2014 income of \$20,184 is \$288 monthly. The period in question is from September 1st to December 31st, 2014.

[33] The father was previously ordered to pay a total of \$1,712 for 2014. The actual amount due and payable was \$1,152. I find he is entitled to a credit of \$560 for 2014 (September – December).

[34] The Table amount for two children, utilizing the father's 2015 income figure of \$40,400, is \$576 monthly. On the evidence, I find there is no lawful excuse for the father not paying this amount starting effective January 1st, 2015, due and payable on the first day of each and every month thereafter until otherwise ordered. In the same vein, as discussed elsewhere, the father's income is likely to continue at that level through 2016. Accordingly, his child support payment should continue at the same level. I will so order.

[35] I am mindful that under section 10 of the **Guidelines** the court may award an amount of support that is different than might otherwise be the case if the court finds that the parent making the request would otherwise suffer undue hardship. The circumstances that may cause such hardship are set out in section 10(2) of the **Guidelines**. However, in the present case the father gave no notice of an application or intent to invoke section 10 of the **Guidelines**; and he presented insufficient evidence, in any event, to sustain (for example) a finding of undue hardship under sections 10 (2)(b) and (d). Moreover, there is insufficient evidence before the court to apply the tests called for under section 10(3) and (4) respectively. With respect, both the father and his former lawyer had many months to mount a defense under section 10, if warranted; but neither did so.

[36] More problematic is section 7 of the **Guidelines**. Briefly, the court may, on a parent's request, provide for an amount to cover all or any portion of certain expenses, taking into account the necessity of the expense in relation to a child's best interests and the reasonableness of the expense in relation to the means of the parents. In particular, as mentioned previously, the mother seeks a contribution to the child care expenses connected principally to her employment. There is no question that the threshold for entitlement has been met. However, the means of the father to respond to the request is a legitimate issue.

[37] I incorporate by reference the approach and analysis of Justice Elizabeth Jollimore in *Parnell v. Hubley-Parnell*, 2012 NSSC 437 when considering claims under section 7.

[38] The father has financial responsibilities to three children under two separate court orders. On the child support front, in my opinion, the court should strive not to advantage or to disadvantage the children who primarily live in two different households.

[39] So too is it legitimate for the father to argue that the court should take into account the fact that neither mother is sharing transportation expenses incidental to

his access or parenting time, and that he is shouldering significant expenses to regularly take advantage of his parenting rights and responsibilities pursuant to court orders.

[40] Whether the father's transportation expenses are incidental to use of his own motor vehicle, or someone else's, is really beside the point. I find that the amounts claimed for gasoline are not unreasonable. Although the monthly amount claimed for insurance seems high (in the absence of any proof of the premiums), he has not claimed anything for wear and tear on vehicles, routine maintenance and repairs, etcetera – all of which would normally be entitled to consideration.

[41] The father now faces a hefty increase in the Table amount of basic support for the children in the present case. Potentially, he faces demands for an increase in relation to his other child - if and when the other parent learns of his improved income circumstances.

[42] I find that there is little or no room for the father to trim his household budget at this time. There may be room for him to improve things somewhat by seeking a contribution to household expenses from his female companion. However, looking at the evidence as a whole, I find he does not have the means at this time to make any meaningful contribution to the mother's child care expenses. Indeed, he likely will have his hands full in meeting his basic support obligations plus paying toward the support arrears.

[43] I exercise my discretion and dismiss the mother's application under section 7 of the **Guidelines**.

[44] Ms. Romney shall prepare an order that captures the outcome. The order should include the standard clauses for annual disclosure by the father of his personal income tax returns and notices of assessment, commencing June, 2016 for the taxation year, 2015. In the absence of a section 7 award, the mother shall not be under a similar disclosure requirement at this time. Child support payments shall continue through MEP.

[45] Nothing was said about court costs. If sought on behalf of the mother, three weeks are given from issuance of the order to make written submissions. The father shall have two weeks thereafter to reply. A supplemental decision, if needed, will be released.

Dyer, J.F.C.