IN THE FAMILY COURT OF NOVA SCOTIA
Citation: W.G. v. G.L., 2005 NSFC 7

Date: 20050223
Docket: FKMCA-035035
Registry: Kentville

Between:

W.G.

Applicant

v.

G.L.

Respondent

Restriction on publication

Judge: The Honourable Judge Bob Levy

Heard: January 18, 2005, at Kentville, Nova Scotia

Appearances: Denise Spencer for the applicant
The respondent did not appear.

DECISION

Re: retroactivity of child support

By the Court:

[1] The applicant has since 2002 resided in Nova Scotia with her common law partner and her fifteen year old daughter for which daughter this support application is made. The Respondent resides and is employed in New Brunswick but, having, through his counsel, submitted two affidavits and financial documentation, (although not having appeared for the hearing itself), he is taken to have accepted the jurisdiction of this court.

[2] On the January 18 hearing date the court, on request, made an order for joint custody of the child with primary residency being with Ms. G. and reasonable parenting times with Mr. L.. Mr. L'.s 2003 income tax return and affidavit evidence indicated that his annual income is more or less consistently in the range of $27,716 for which income, per the New Brunswick Tables, his monthly child maintenance obligation is $236. That amount, on request, was ordered payable as of November 1, 2004, (the application having been filed in October).

[3] I reserved decision on two matters. Firstly was the matter of a contribution by Mr. L. toward anticipated orthodontic expenses for the child with Ms. G., (in relation to which I solicited, but did not receive, more information). I understand

that this expense will not be incurred for some time, is for an uncertain amount as is the portion, if any, not covered by the insurance of Ms. G's partner. I believe that it would be best for Ms. G. to make a further application when more is known, and, I remind counsel, that she will need sworn information to the effect that this expense is in fact necessary together with other relevant information that goes with a "section 7" application.

[4] I should also say that mention was made of the need for the child to take a driver training course, but again there is no information before me as to the when and the how much. Whether that would be a "section 7" expense is also less clear, probably, than in the case of the orthodontic expense.

[5] The other matter on which I reserved, and on which I solicited a brief was the application of Ms. G. for the child maintenance order to be made retroactive to June 2002, the date when the child came to reside with her after having lived with Mr. L. since the separation in 2000. I have since received the brief for which I thank Ms. Spencer.

[6] An older daughter of the parties is now 20 years old and attending second year university in Moncton, New Brunswick. I understand that she resided with Mr. L. up until September, 2004, having attended her first year of university near her home. The evidence is neither abundant or clear, but I gather that until September of 2004 that Mr. L. provided substantially toward her needs, or at least, as between the parties, the lion's share. Ms. G. said that there were times even when this daughter was residing in the home of her father that she brought her food. I am concluding though that Mr. L. did support this child and that the occasional food assistance from the applicant was more a testament to him being strapped financially, for reasons he sets forth, than of an unwillingness to help this daughter.

[7] Mr. L. says that the daughter is now independent financially, Ms. G. reports that she still assists her daughter to some extent.

[8] In May of 2004 Mr. L. says that he began paying Ms. G. $175 per month in child support by way of post-dated cheques. He indicates that he knew that the 'tariff' at his income was $236.00 per month but with his having to attend to the considerable 'matrimonial' debts and the cost of his contribution for the younger

child's travel costs associated with access, that he couldn't pay more. I understand that Ms. G. presented the first three cheques together for payment and that they 'bounced'. Mr. L. says that had they been presented separately on their due dates there would have been sufficient funds. Either way, he acknowledges that he owes the money and, since Ms. G. says that she is still without payment for those sums, I will provide for that in this decision. It is common ground that all of his monthly cheques for the $175 since September (inclusive) have been honoured.

[9] The N. S. Court of Appeal has addressed the matter of retroactivity of child maintenance payments in **Conrad v. Rafuse** (2002), 205 N.S.R. (2d) 46 and again in **MacLean v. Walsh** (2003), 219 N.S.R. (2d) 108. In **Conrad** the Court of Appeal made it a point to adopt the position and reasoning of the British Columbia Court of Appeal in **L. S. v. E. P.** (1999), 50 R.F.L. (4th) 302. Justice Roscoe for the N.S. Court of Appeal wrote:

> [18] Based on the jurisprudence reviewed, Justice Rowles enumerates the policy concerns relating to the discretion to award retroactive maintenance, and includes a discussion of and authority for each of the following:
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> (i) equal treatment under the **Divorce Act** and **Family Relations Act**;

(ii) presumption that a previous court order is to be respected;

(iii) presumption against retroactive effect;

(iv) child maintenance is a right of the child, not of the parent;

(v) parents are jointly responsible for child support; and

(vi) encourage negotiated settlement.

[19] Following discussion of the policy considerations, Justice Rowles examines the factors that govern the discretion to award retroactive maintenance, summarizing at ¶¶ 66:

> ¶¶ 66 A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non -custodial parent; (2) some blameworthy conduct on the part of the non -custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non -custodial parent of an intention to pursue maintenance followed by negotiations to that end.
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> ¶¶ 67 Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non -custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

> [20] I agree with the analysis of Justice Rowles and would adopt the policy considerations and factors as listed in **L.S. v. E.P.** as relevant to the review of the exercise of discretion in this case."

[10] The Alberta Court of Appeal has recently released a trio of cases on the issue of retroactivity of child support that could dramatically re-focus the discussion and the law on this issue, (**S. (D.B.) v. G. (S.R.)** (2005), 7 R.F.L. (6th) 373, **W. (L.J.) v. R. (T.A.)** 2005 ABCA 3, and **Henry v. Henry** (2005), 7 R.F.L. (6th) 275). The compelling logic of these cases, their faithfulness to the principles behind child support and practical efficacy and fairness will, one hopes, be found persuasive and be adopted by our Court of Appeal. In the **S. (D.B.)** case Justice Paperny summarized her extensive reasoning and conclusions as follows:

> **IX. -- Summary**
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> 153 The exercise of judicial discretion under the Guidelines must be shaped by its goals and objectives, consistent with the child-focussed approach mandated by the Supreme Court of Canada,[FN54] and the United Nations' *Convention on the Rights of the Child*. In summary, I conclude that the following are valid considerations in determining the amount and extent of retroactive child support:
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> 1. A child is entitled to child support. Need is presumed.

> 2. The Guidelines presume an ability to pay on the part of the payor in accordance with his or her income as established in accordance with s. 16 of the Guidelines.
>
> 3. Blameworthy conduct on the part of the payor is not required.
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> 4. The payee does not need to demonstrate an encroachment on his or her capital.
>
> 5. Notice of an intention to pursue child support is not a prerequisite to a retroactive award.
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> 6. Whether there is an unreasonable burden placed on the payor should not be assumed, but must be established; it must be incapable of alleviation by creative payment options. Further, the reason for or the cause of the inability to pay must be considered and any burden must be balanced against the corresponding deprivation to the payee and the child.
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> 7. A lump sum payment is not precluded merely because it involves a transfer of capital.
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> 8. The date of the increased income as defined by the Guidelines is the presumptive date for the commencement of a retroactive award unless the payor has satisfied the additional financial obligation in some other manner, has taken all reasonable steps to fulfill the obligation, has a previous arrangement for child support that contemplates the provisions of the Guidelines, or the payee fails to act diligently without reasonable excuse

[11] Many of the precepts in **L.S.** have questioned and set aside by the Alberta court and the ‘presumption’ as to retroactivity would be reversed. Either way, the

matter of retroactivity is still a discretionary issue for the court, although less so, one would think, applying the Alberta trilogy.

[12] Having already granted an order that child maintenance in the amount of $236 per month be payable back to the first of the month following the date of the application, I will, for the reasons that follow, extend that back two months further, that is to say to September, 2004.

[13] To September 2004 each parent was providing for, (or, in the case of the older child, substantially providing for), one child in his or her care. (Again I note that this is not entirely clear on the evidence.) Mr. L. asserts, and there is no reason not to accept this, that his income has been reasonably constant at around $27,000 per year. The income of Ms. G. is reported at $15, 491 in 2002 and $30,164 in 2003 from Human Resources Canada, the bulk of which was for tuition for English language training at and travel to and from Acadia University and a $302 weekly living allowance. She now earns an average of $888 per month, but I don’t know for how long she has been receiving this. Her common law partner is with the Canadian Armed Forces at base Greenwood.

[14] Mr. L. is at pains to point out that he has been carrying substantial "matrimonial" debts and that they have simply left him no room to meet his obligations. Thus, he says that the matrimonial home, which might be worth $60,000 had a mortgage against it with a balance of almost $65,000 at the time of separation and has a monthly payment of $690. He has now, he says, moved out of the house and in with his father and has rented out the house because he simply could not afford to live there. (Given the negative equity, it would appear that he couldn't solve the problem by selling the house.) He says he has also carried a $20,000 debt on which he pays $480 per month, and a loan to Citifinancial (for furniture and appliances) with payments he puts variously at $276 and $165 per month. With these debts and his modest income one can see how it is that he has had to move in with his father and why since the separation he has found it a challenge to meet his ongoing obligations.

[15] (I am mindful that the matter of the assets and debts of the parties is, apparently, before the courts in New Brunswick. I have no idea when or how that matter or those matters will be resolved.)

[16] I accept that Ms. G. has, fairly consistently since June of 2002, been pursuing the matter of child support. I make no findings of bad faith on the part of either party. If, and this is questionable, especially since the Alberta cases, an applicant has to show need on the part of the child I accept that it has been. I have no information as to whether Ms. G. has been obliged to encroach upon capital, I rather doubt that she has had any on which to encroach.

DECISION

[17] Applying either approach to retroactivity would, I believe, yield the same result. It is just an unhappy fact that Mr. L. has very little money and has had very little money all along. He attended to the needs of one of the two children until September, 2004, and I find that he has been submerged beneath the weight of comparatively extremely high debt much of it having been jointly incurred by the parties. I cannot conclude that at any material time up to September 2004 he could have shouldered any greater burden. I conclude, under all the circumstances, in the words of Justice Paperny's sixth point, that to require now that Mr. L. shoulder a greater burden than that with which he has been struggling would be 'unreasonable'. Further, even if one might conclude that some retroactive sum is

now appropriate, that it is not realistically achievable by ‘creative payment options’. Lastly, that this overall result is a proper ‘balance’ of the interests of all concerned, including, and by no means least, those of the child. In this respect I am concerned, among other things, that imposing an additional burden could compromise his capacity to exercise access to the child, which access I take to be in the child’s best interests.

[18] Mr. L. will be ordered to pay $236 per month retroactive to September 1, 2004. He has paid the $175 since then and should be credited with that sum. Since he offered, and since in my view it would be appropriate, I am also ordering him to make good the three cheques in the amount of $175 each for a total of $525. All payments, retroactive and prospective, shall be through the Nova Scotia Maintenance Enforcement Office.

[19] I would ask Ms. Spencer to prepare this supplementary order.

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Bob Levy, J.F.C.