FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Maintenance Enforcement) v. S.C.T., 2010 NSFC 25

Date: 2010 10 12
Docket: FLBMCA-058777
Registry: Bridgewater

Between:

Director of Maintenance Enforcement
For the Province of Nova Scotia

Applicant

v.

S. C. T.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge William J. Dyer

Heard: June 23, 2010, in Bridgewater, Nova Scotia

Counsel: Megan Farquhar, for the Applicant
S. T., the Respondent, self-represented

By the Court:

The Issues

[1] Many months ago, the Director of Maintenance Enforcement (“the Director”) started legal action against S. T. (T.) for an order or orders finding him in default of child maintenance payments, for payment of the arrears by a specified date, for payment of all fees charged and due under the **Maintenance Enforcement Act** (**MEA**), for possible imprisonment, and for other unspecified remedies.

[2] The Director assumed responsibility for enforcing orders which originated in the Supreme Court in Divorce proceedings between T. and S. J. M. (“the recipient”). In the absence of a “Unified Family Court” in Lunenburg County, enforcement jurisdiction is vested in the Family Court. (**MEA** section 4.)

[3] In this instance, the bulk of the litigation has been in the Supreme Court where the case may return yet again. The M./T. case in the other forum has been highly conflicted, complex, and probably expensive for the parties.

Legal and Enforcement History to 2009

[4] **Bonnie Meister** is an enforcement officer employed by the Maintenance Enforcement Program (MEP). Her evidence regarding the background circumstances was not seriously challenged. Accordingly, I have borrowed heavily from her affidavits in presenting the following summary.

[5] A Corollary Relief Judgment with Minutes of Settlement attached, was issued on June 11, 2001. T. was ordered to pay $500 monthly starting August 1st, 2001 for the support of his two children. T. was also ordered to pay $100 monthly to a registered education savings plan for the children’s benefit.

[6] By virtue of an “interim interim” consent variation order issued February 26th, 2008, arrears of support flowing from the Corollary Relief Judgment were set at $9,500. T. was ordered to pay $1,000 toward the arrears by January 31st, 2008 and the balance by June 30th, 2008. T. was also ordered to pay ongoing child support at the rate of $536 monthly starting effective January 15th, 2008.

[7] A variation order issued December 4, 2008 confirmed several clauses in the “interim interim consent variation order” and additionally varied child support effective November 1st, 2008 to $588 monthly for the benefit of the two children. Additionally, T. was required to pay

$175 monthly for section 7 expenses under the federal Child Support Guidelines starting November 1st, 2008. The court also fixed $15,000 in full and final satisfaction of any section 7 expenses outstanding by T., effective November 1st, 2008.

[8] The MEP attempted to enforce the support orders on behalf of the recipient mother but had little success. Meister elaborated on the efforts in considerable detail. These are the highlights:

•Notice of Default Letter to T. on October 11, 2001

•Federal Garnishee action in late October, 2001 intended to intercept and garnishee all federal sources of income which might be due to T.. (The garnishee was renewed in late October, 2006.)

•Notice of Garnishment sent to T.'s then employer in mid January, 2002

•Demand upon a chartered bank in late January, 2004

•Notice of Garnishment to another employer in mid March, 2004

•Demand on a Labour Union in mid March, 2004 to disclose names of companies which had employed T. since early January, 2003

•Disclosure demands on two chartered banks in mid March, 2004 requesting financial information regarding T.'s circumstances

•A demand on a trust company in late November, 2004 regarding T.'s financial circumstances

•A demand under section 34 of the MEA upon T. to provide full and complete financial disclosure in mid September, 2006

[9] As a result of some or all of the foregoing actions, it was learned that T. had not been filing his personal income tax returns on time. In late November, 2006 T. contacted the MEP and asked for a Record of Payment and informed officials that he was going to be seeking legal advice in order to make a proposal to the recipient and/or to make an application to vary (in the Supreme Court).

[10] By mid July, 2007 the MEP determined that T. had not initiated any court applications and T.'s financial disclosure was still incomplete. T. was given notice of the MEP's intention to proceed with default action.

[11] In mid August, 2007 it was learned that T. was taking action at the Supreme Court level with anticipated hearing dates in September or October, 2007.

[12] In early October, 2007 T. contacted MEP directly and disclosed that he was working in Alberta; but he refused to disclose the name of his employer. He gave certain assurances regarding payment toward the arrears and also indicated that he had a lawyer working on his legal case in the Supreme Court. T. did not make the promised payments.

[13] The MEP received a copy of T.'s application to vary in early November, 2007. However, after the matter was dealt with, T. failed to comply with the orders made in the Supreme Court.

2009 Supreme Court Proceedings

[14] T. engaged a veteran family law lawyer to represent him for the purposes of a 2009 application to vary in the Supreme Court, while at the same time trying to stave off the enforcement proceedings in the Family Court. In the course of several pre-hearing conferences in Family Court, T.'s lawyer kept the Family Court and the MEP Director, through its solicitor, informed as to the progress of matters in the other setting.

[15] There is an extensive Supreme Court file which need not be summarized. However, important for our purposes, is what occurred in mid November, 2009. A Supreme Court Justice approved a variation order which, on its face, was consented as to form and content by the recipient and by counsel for T.. The order was not issued until mid January, 2010.

[16] This last Supreme Court order recites that the parties' two children were in the care of the recipient from February 1st, 2009 until March 29th, 2009; and that the parties' son continued to be in the recipient's care from March 30th, 2009 until June 1st, 2009. There was an acknowledgment that the parties' daughter was not in the care of either parent starting October 1st, 2009 – rather in the care of another individual. There was a recital to the effect that T.'s 2008 gross income was $32,892 and that the recipient's income was $35,330.

[17] Taking into account the changes in the residence of the children in 2009, T. effectively achieved a credit of $1,105 to be applied against his child support arrears. The order went on to provide that starting October 1st, 2009 T. would pay for his son's support the sum of $290 monthly based on his disclosed 2008 income. Starting October 1st, 2009 T. was to pay support for his daughter at the rate of $150, to be directed to another individual with whom his daughter was said to be living.

[18] For the period of January 1st, 2009 until September 30, 2009, the recipient was to pay to T. as a "return of special expenses" the sum of $275 to be credited against his arrears. The Supreme Court approved a clause providing for disclosure, calculation of contributions, etcetera, toward future section 7 expenses. If he was able to obtain health/medical insurance through any future employers for the children's benefit, T. was to do so and notify the recipient. Among other things, T. was also ordered to pay to the recipient his ongoing share of special expenses for the children in the sum of $150 monthly based on a 50/50 sharing of total expenses.

[19] It was also ordered that the recipient pay to T. the costs of transportation of the children for access during visits when she was residing on an offshore island the sum of $1,000. This again was to be credited towards any child support arrears owing by T..

2010 Supreme Court Activity/Inactivity

[20] The last Supreme Court order should have been the end of the matter. But, it was not.

[21] During the course of the Family Court hearing, T. asserted that interpretation of the last order was being questioned (by him). He referred to one of the recitals in the last order which includes an acknowledgment, by him and by the recipient, that both of their children were in his care from February 1, 2009 until March 29, 2009 and that one child remained in his care from March 30, 2009 until June 1, 2009. T. submitted that for the February through May time span he has not received full credit against his obligations as contemplated by the presiding justice.

[22] Putting the best light on T.'s arguments, the Director conceded that the sum involved is $2,952. However, the Director correctly postulated that clarification and/or confirmation by the Supreme Court would be needed if T.'s position is to be sustained.

[23] For his part, T. agreed that the Director's recapitulation of the amounts due and payable by him were correctly stated as $12,282.97 as of June 22, 2010. When the Director agreed to deduct the disputed amount for the purposes of the current hearing, T. agreed that the tentative or revised balance outstanding was $9,342.97 as of June 22nd. As at the hearing, there was an additional $238.75 in fees outstanding and due to the Director.

[24] With those understandings in place, the Director sought payment of the lower amount plus the fees on the understanding that T. would immediately take steps in the Supreme Court to further clarify the last order. Although the payment order was issued back in January, 2009, as of the hearing date, T. had taken no formal steps to advance his case in the Supreme Court. And, although release of this decision has been delayed for systemic reasons, there still has been no notice to the Family Court of any activity in the Supreme Court. Coupled with T.'s past record (documented above), I therefore find that little or no reliance can be placed on his assurances or promises to the MEP or to the court.

Current Enforcement

[25] On behalf of the Director, I was reminded that the evidence was that T. has never made any voluntary payments and that all receipts have been as a result of enforcement actions. At the time of the hearing, there was one active garnishee order in place lodged with a local employer plus a federal government garnishee order. Although not working at the time of the hearing, T. was expected to return to work.

[26] Currently, the Director is collecting current support by garnishee at the rate of $290 for current child support, plus $150 toward section 7 expenses, plus 25 percent of gross wages or

income toward the arrears. (The Director is constrained to a 25 per cent cap under **MEA Regulation 9**.)

T.'s Position

[27] In response to a submission on behalf of the Director that he had made no proposals to settle the present case, T. stated that he would be prepared to pay $5,000 - but that he cannot and will not pay approximately $9,000 or the higher sum, if it is reaffirmed. With respect, however, a Supreme Court justice has already decided what he should pay; and the order was imposed with T.'s consent when he was represented by legal counsel. His payment history was known at the time; and it was his lawyer who prepared the order.

[28] T.'s evidence was that to obtain even $5,000 he would have to do some "fund raising" but did not elaborate. He claimed that he could not borrow from his banker or from family members. He brought nothing from his banker(s) to confirm his statements. No family members or other witnesses testified on his behalf. He said he was in bankruptcy at one stage; but he did not elaborate. He stated he is currently unlicensed to drive, for reasons unrelated to the enforcement by the Director.

[29] T.'s evidence regarding his income was that in 2008 it was $32,000 in total, inclusive of some cottage rental (discussed below). He did not provide a copy of his 2009 personal income tax return which he said had not yet been filed. He estimated his 2009 total income at approximately $35,000. When pressed for more details, T. said his employment income was about $30,000 (net). In addition, there was cottage income (gross) of about $5,000 and $2,100 (gross) from another employer. No further particulars were disclosed. There were no documents entered to support his claims.

[30] T.'s evidence was that he usually lives in a cottage on property owned by his father who allows him to live there rent free. T. sometimes rents out this ocean front property but he claimed this did not happen in 2010. Against any income earned from the cottage rental, T. said he incurs, and charges against income, expenses to repair and maintain it. No documents or records were produced. When the cottage is rented, T. stated he lives elsewhere - in a shed or wherever else he can find shelter.

[31] T. maintained that his father allows him to live in and on the property rent free provided that he supplies the labour and the materials to keep the cottage habitable. The cottage is reportedly assessed at about $69,000; but he vaguely suggested other properties may be included. Should he rent the property, he conceded it can attract as much as $900 weekly, perhaps only $500 if there is a long term rental involved. He said that there were 10 weeks of rental income in 2009. The maximum time that he would rent the property out for would be five months. T. said that payments are made in cash.

[32] T. said that when he files his 2009 personal income tax return, he will include any rental money he received and it will include reference to any expenses which he has incurred. Although he has engaged an accountant from time to time, he characterized the accountant as "uncooperative". I took from this that he found working with this unnamed accountant to be a not particularly good experience; but he offered no explanation as to why he has not changed professionals.

[33] T. firmly denied that he has had the benefit of any unrecorded deeds to the cottage or any other properties from his father; and he said there are no assurances that he will inherit the property in question upon his father's death. But he did not rule out the possibility or expectation. Asked about other assets, T. said that he has a derelict 48 foot boat which is unseaworthy and needs repairs. It was bought for $500 cash and is kept in a shed.

[34] T. submitted no formal financial statements demonstrating his income or expenses. As mentioned, he lives in the cottage most of the year. It is heated electrically, which is reportedly expensive; but he provided no bills.

[35] T. is an admitted cigarette smoker. On his own testimony, this habit consumes approximately $300 monthly. That this money might be better directed to child support has not received any serious consideration.

[36] T. is a self taught carpenter. He says he is very good at his trade and that he has many "high end" customers. He is a member of a prominent Nova Scotia family and it appears that much of his income derives from family connections. With respect, his reputation as a skilled and reliable tradesman is difficult to reconcile with his irresponsibility when it comes to child support and his disrespect for the MEP and court processes.

Discussion/Decision

[37] With respect, I observe that use of the words "gross income" in the Supreme Court, and during the present case is unfortunate. I say that because T. does have gross income or receipts from self employment from which he may legitimately deduct business expenses to arrive at his net income which is then properly included in his total income for **Child Support Guidelines** purposes. The last Supreme Court order stipulates T.'s 2008 "gross income" was $32,892 and the recipient's "gross income" was $35,330. In the total context of the last order, I am satisfied the figures were intended to stipulate the parties' respective total incomes for **Guidelines** purposes.

[38] More to the point, on behalf of the Director, it was stressed that on the evidence T.'s total 2009 income was actually higher than disclosed in 2008 with the result that pleas of inability to pay should not attract much weight. I agree.

[39] The Director was prepared to give T. time to go back yet again to the Supreme Court to seek clarification of the last order. However, it was made clear that if T. did not move quickly

or was unsuccessful, then payment of the full amount of almost $12,300 plus fees was wanted. That concession was reasonable in the circumstances.

[40] It was submitted on behalf of the Director, and I agree, that there was an onus on T. to provide full and accurate financial disclosure, including an Income and Expense Statement together with an Asset and Debt Statement. He gave virtually no evidence regarding his ordinary living expenses - let alone those which might be legitimately assigned to and credited against his business income. Because T. did none of the foregoing, the court is left with an unclear and unreliable picture of his capital and his income positions. That said, I agree with the submission on behalf of the Director that T. is in no worse position than he was when last before the Supreme Court; and that the issue is not whether he should pay, but how payment will be structured and enforced.

[41] The Director seeks a number of remedies including a Judgment for the lower amount claimed (at least for the time being), plus Judgment for the higher amount if T. does not obtain the desired credit in his favour. The Director seeks immediate payment, or alternatively, payment in full by a date certain in the future.

[42] The court was reminded that payments could be by way of lump sum or periodically, or a combination thereof; and it was suggested that there be a further review in several months time. Finally, the Director submitted that this is an appropriate case for an order for imprisonment – if not immediately, then in the event of future default of payment.

[43] In considering the submissions, I find the sincerity of T.'s initial declaration during the hearing that he would try to pay $5,000 towards any award as soon as possible was undermined by a later, fervent declaration that "it will be a sad day in May" before he pays anything; and by his accusation that the recipient is "nothing but a thief". My courtroom cautions to him that the purpose of the hearing was not to determine the merits of any past court awards in the Supreme Court - rather how and when payment was going to be enforced – were obviously lost on him. I find his words only served to underline the general impression he left that his defaults are largely grounded in a stubborn unwillingness to pay unless forced.

[44] Under the **MEA**, the Director has a duty to take all measures determined to be advisable to enforce the maintenance order in question. Garnishment of income sources by the Director is a powerful enforcement tool; several **MEA** sections are devoted just to it. And the Director may pursue other remedies such as pension attachment, the seizure of personal and real property, lien action, and suspension of driving privileges. There are wide-sweeping powers to compel payors and third-parties to disclose information, and to require the payor to appear for examination.

[45] The Director may also seek remedies in the Family Court under **MEA** section 37. At the hearing, the Director has the benefit of a presumption that the payor has ability to pay the arrears owing and to make subsequent payments under the prevailing order. The Director's statement of arrears is also presumed to be correct and may be summarily admitted in evidence.

[46] The court's task is to determine whether the payor can pay or whether she/he cannot pay "for valid reason". In the present case, with or without presumptions, the Director easily met the threshold requirements by evidence. In the absence of demonstrated inability to pay, the court may resort to a wide spectrum of possible orders as set out in section 3, subsections (a) to (r), inclusive.

[47] On the evidence, I find that T.'s has not exhausted all reasonable means at his disposal to meet his known obligations. Nor has he acted in good faith or promptly, even when there has been some potential advantage to him – for example, to settle or clarify the order which creates his obligations. Despite assurances to the Director and to the court that he would immediately take action in the Supreme Court in regard to the last order, he has not done so.

[48] Because T. has been unwilling to pay voluntarily, the recipient's only hope of recovery has been through the Director whose principal strategy has been garnishment.

[49] The evidence is that the payor is for all practical purposes "judgment proof". He has no significant assets; he is self-employed. Extra income from third parties (cottage rental) is managed on a cash basis. When he files tax returns, they are late. He does not have a driver's license which might be suspended.

[50] Garnishment has not yet resulted in full payment, despite the Director's best efforts. Not surprisingly, therefore, the Director asks that consideration be given to a term of imprisonment which could be imposed continuously or intermittently for not more than six months unless the arrears are sooner paid [subsection 3 (j)], or, alternatively imprisonment for not more than ninety days as an immediate consequence for default, should the court direct specific future payment(s).

[51] I judicially notice that the imprisonment options will likely run afoul of the present-day realities, including the absence of a local jail in Lunenburg County or nearby. Should an intermittent imprisonment order be authorized, for example, T. would have to travel to and present himself at the Burnside Correctional Facility, in Dartmouth at the appointed times, failing which he would be arrested. Assuming he presented himself as ordered, he would likely spend little, if any, time in custody because of chronic overcrowding at that facility and the low priority a civil incarceration order would likely receive. I suspect a continuous imprisonment order would likely suffer the same fate. Without some assurance that a custodial sentence will be carried out, if ordered, the wrong message would be sent to T. and others who may conclude the remedy is hollow and therefore not bring themselves into compliance. In such circumstances, there would be no new or additional incentive to comply with court orders to pay maintenance.

[52] Whether, as a matter of principle, individuals should be jailed for child maintenance debts has been addressed by the Legislature in the **MEA**. Although many would agree that imprisonment is a last resort, it is not without precedent. [See **Ontario (Director, Family Responsibility Office) v. Kilpatrick**, 2008 CarswellOnt 5772 (S.C.J.)]

[53] I conclude that the present case, while undoubtedly aggravating and frustrating to the recipient, is not so extreme that immediate imprisonment can be justified in legal or practical terms. "Imprisonment in default" of future payments may be authorized by statute, but I would be inclined to give any payor an opportunity to explain the default(s) before jailing her/him. And, I would prefer to have some evidence regarding the likelihood of an imprisonment order being carried out before imposing it.

[54] In the present case, the best short-term prospects for enforcement still appear to be by garnishment. While T. is working and under garnishment, at least some money will be recovered. In the long term, there is some prospect that T. may inherit real or personal property and, with that in mind, under **MEA** section 38, I order that the Director shall have immediate Judgment for the amount of $9,342.97 plus fees to the hearing date of $238.75.

[55] Unless T. provides the Director, by the end of November, 2010, with a certified copy of a Supreme Court order which would have the effect of reducing his outstanding child maintenance debt by $2,939.97, the Director shall have Judgment for that amount - in addition to the $9,342.97 plus fees.

[56] I also order that T. immediately submit to the Director, a true and complete copy of his 2009 personal income tax return, whether filed or not, together with written proof of his 2010 income to date from all sources.

[57] On the strength of T.'s statement that he may be able to raise $5,000, I order that he do so and pay it by December 31, 2010. This payment is in addition to his periodic current support payments, section 7 contributions, and arrears garnishments; and it shall be credited against the arrears, when paid.

[58] The Family Court Officer, in consultation with the parties, shall schedule a review hearing to be held before the end of February, 2011. At least one month before the hearing, T. shall submit to the Director and to the court, an updated written summary of all of his 2010 income from all sources, plus a written statement of all business expenses and/or cottage expenses he intends to claim, a written statement of his assets and liabilities, and a written statement of his household income and expenses – using the prescribed Forms.

[59] At the review, the parties may make further submissions about payment of any amounts then outstanding and about other remedies or relief. I will also entertain submissions on the issue of court costs incidental to the current application.

[60] Counsel for the Director shall submit an appropriate order.

Dyer, J.F.C.