IN THE FAMILY COURT OF NOVA SCOTIA
Citation: Foley v. Foley, 2012 NSFC 6

Date: 2012 03 28
Docket: FLPMCA-036625
Registry: Bridgewater

Between:

Frances Joan Foley

Applicant

v.

Ryan James Foley

Respondent

Judge:	The Honourable Judge William J. Dyer
Heard:	January 24, 2012, at Bridgewater, Nova Scotia
Counsel:	Shawn D'Arcy, for the Applicant Ryan Foley, the Respondent, on his own behalf

By the Court:

Legal History

[1] Ryan James Foley (the father) and Frances Joan Foley (the mother) have been embroiled in Family Court litigation since early 2005.

[2] In March, 2010, with the assistance of a lawyer, the father made an application to vary his child support obligations under the **Maintenance and Custody Act (MCA)** and **Child Maintenance Guidelines (CMG)**.

[3] Previously (in January, 2006), there had been an interim order approving joint custody of the parties' three children (Rachel, Jenna, and Patrick), with day to day care vested in the mother, subject to reasonable access by the father. An interim, current child support order was made; and payment of already accumulated child support arrears was structured.

[4] In late September, 2007 there was another interim order which suspended the father's access to his children for reasons placed on the record at the time. He was represented by a lawyer. The order was consensual.

The Father's Application

[5] The thrust of the father's 2010 application was that his income had declined and that his child support arrears had climbed to almost $8,000. He requested termination of his support obligations and forgiveness of the outstanding arrears, although the latter may only be accomplished by retroactive variation. [See. **Lamarche v. Lamarche** 2011 NSSC 72.]

The Mother's Application

[6] By the end of May, 2010 the father had retained new counsel. The case was delayed to allow discussion on how the matter would proceed.

[7] By early August, the mother had submitted her own application to vary in which she sought sole custody of the children and asked for contributions by the father for specified medical expenses (past and present), to specified tutoring expenses (past and present), to child care costs (past and present). She also requested ongoing or current child support in keeping with the father's income.

Case Delay and Resumption

[8] The parties agreed to adjourn the case "without date". It languished for about a year. In August, 2011, the mother brought the case back to court. The father was reminded of the importance of providing timely and full disclosure of his income so that the proceeding (including his own application) could be advanced to hearing if there was no settlement.

[9] By mid September, 2011 the father's financial disclosure was still incomplete. By the end of October, 2011, there was still no progress.

[10] Near the end of November, 2011 it was disclosed that there had been a breakdown in the father's solicitor/client relationship. Counsel for the mother, reiterated his concern about the lack of full financial disclosure. And, before Christmas, 2011, the court endorsed an order relieving the father's lawyer of her responsibilities. The case was then set down for a contested hearing.

The Hearing

[11] On the scheduled hearing date, the father appeared without a lawyer and requested a further adjournment. The mother objected to the motion. For reasons stated on the record that day, I denied the father's motion. I explained the hearing procedure to the father, but he declared he was not going to participate. He remained in the courtroom.

[12] I mention again that there were two applications before the court. After hearing brief representations, I adjourned the father's application to vary without date.

[13] After hearing testimony by the mother, I gave a summary judgment vesting sole care and custody of the children in the mother and confirmed that the father's access to the children shall be kept in suspension.

[14] After the hearing, it was learned that the father had consulted a lawyer. Attempts to cooperatively schedule a date and time for an oral decision were unsuccessful - through no fault of the newly engaged lawyer (who has yet to appear as solicitor of record for the father.) Her professional courtesy was appreciated, however.

[15] This (written) decision is confined to those aspects of the case which were not concluded at the hearing.

Legal Framework

[16] The **MCA** and the **CMG** are relevant to child support applications, whether original or variation. I will briefly highlight some of the relevant principles and rules.

[17] Every parent of a child under the age of majority is under a legal duty to provide for the financial needs of his/her children except where there is a lawful excuse for not doing so. The burden of establishing lawful excuse is on the individual who advances that defence. When deciding the amount of maintenance to be paid, the court must do so in accordance with the **CMG.**

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

[19] Generally, the amount of child support maintenance is that set out in the applicable provincial Table, according to the number of children under the age of majority to whom the order relates and the income of the parent against whom the order is sought, plus the amount (if any) determined under section 7 of the **CMG**.

[20] Under section 7, the court may order payment of an amount to cover all or any portion of certain listed expenses. Expenses may be estimated.

[21] When deciding on entitlement and the amount, the court must take 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.

[22] These so-called extraordinary expenses include, but are not limited, to such items as child care expenses incurred as a result of the custodial parents employment, illness, disability or education or training for employment; that portion of the medical and dental insurance premiums attributable to the child; health related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist, or any other person; physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses; extraordinary expenses for primary or secondary school education or for any other educational programs that meets the child's particular needs; extraordinary expenses for extra-curricular activities.

[23] "Extraordinary expenses" has a definition. It means those expenses that exceed those that the party requesting an amount for such expenses can reasonably cover, taking into account that person's income and the amount that person would receive under the applicable Table.

[24] The guiding principle in deciding the amount of an expense is that the expense is shared by the parents in proportion to the respective incomes after deducting the contribution, if any, from the child. And, in deciding the amount, the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense and any eligibility for the same. However, in deciding the amount, the court must not take into account any universal child care benefit or any eligibility to claim that benefit.

[25] Occasionally, a payor parent will seek relief from paying the full requested amount of basic support, and/or helping with section 7 expenses, by advancing what is commonly called an undue hardship defence under section 10 of the **CMG**. There are limited circumstances in which the defence is available. They are set out in section 10 (2) of the **CMG**. Notice must be given when the section is going to

be raised. Relief is discretionary. There is a technical exercise involving comparison of household incomes. The jurisprudence suggests the defence does not succeed very often.

[26] In the present case, despite the passage of many months (during which he had legal counsel most of the time), the father did not give notice of an undue hardship application. Moreover, the father did not disclose his household income, past or present; and he did not submit an Income and Expense Statement (Budget) which might throw some light on his ability to respond to an award.

[27] When financial disclosure by a payor is incomplete (as was the case here), there are remedies. In most cases, a payor's annual income can simply be determined by using the total income figures set forth in personal income tax returns. However, if the court is of the opinion that the determination of income in that manner would not be the fairest approach, the court may have regard to the parent's income the last three years and decide an amount that is fair and reasonable in light of any pattern of income, or fluctuation, during those years.

[28] There are a number of situations in which income may be imputed, but a couple of them come to mind. One is where a parent is intentionally underemployed or unemployed. Another is where it appears that income has been diverted which would affect the level of child support to be decided. Yet another situation is where a parent fails to provide income information when under a legal obligation to do so.

[29] As will appear from the file and court records, in the past, income has been imputed to the father under section 19 of the **CMG**.

[30] In situations where a parent fails to comply with disclosure requirements, a recipient may apply to have the support application set down for hearing or simply move for judgment. Additionally, the court may award costs in favour of the recipient. Lastly, in appropriate circumstances, the court may draw an adverse inference against a parent who fails to comply with disclosure orders and impute to him or her an amount of income that the court considers appropriate.

The Mother's Case

[31] The mother's evidence was that at the time of the last order the father had imputed to him income which had not been disclosed to the Canada Revenue Agency. Specifically, for **CMG** purposes, it was the modest sum of $11,639. On that basis, monthly child support was ordered at the rate of $182.

[32] The mother asserted that the father continued after 2006 to receive, but not report, some of his income. Indeed, her evidence was that throughout her relationship with him he worked doing carpentry jobs for cash which he did not disclose.

[33] The mother said she learned at one stage that the father had left the Province, was working, and still being paid in cash. Reportedly, he returned to Nova Scotia some time in mid 2009 when it was learned through one or more of the children that he had secured work in the local area. The mother then notified the Maintenance Enforcement Program (MEP). MEP, in turn, started to garnishee the father's wages.

[34] The mother said she was informed directly by the father that he quit his job in December, 2009 as a result of the garnishment. She claimed he threatened that she would not receive any more money from him. Notwithstanding the threat, the father resumed employment in early 2010 and informed the mother he would be starting an application to vary. As was noted elsewhere, he did so.

[35] Included in the father's financial disclosure to the mother and to the court was a sample paystub from one of his 2010 employers. On its face, it indicates an hourly rate of $9.10. Assuming a 40 hour work week, the mother postulated an annual income to him of about $18,900. By contrast, the mother's 2009 income consisted of part-time employment plus some income assistance. It was less than $16,100.

[36] A Record of Payments from MEP disclosed child support arrears of over $8,600 by the end of June, 2010. And, the mother said the father has provided little financial help outside of court orders for the benefit of the children.

[37] One of the couple's children, Jenna, has been seriously ill since birth. Her medical condition in 2010 was serious enough that consideration was given to placing her on an organ donor list. Her complex medical circumstances are set forth in the mother's first affidavit.

[38] I accept the mother's evidence that to help pay for Jenna's medical expenses, she has tried working multiple jobs. Her current partner (with whom she lives) also holds down two jobs. He helps pay the expenses of the family unit.

[39] Because Jenna requires a lot of specialized care, the mother said she was eventually forced to give up one of her jobs. She elaborated on her daughter's special medical needs and the requirement for close care and supervision.

[40] The upshot of this very serious situation was that the mother could not cover all of Jenna's medical expenses from the family's resources. She entered into an agreement with the Department of Community Services whereby some financial help would be provided for the medical bills, provided her maintenance collection rights were assigned to the Department. In practical terms, this means that the Department has first claim to money received from the father until its contribution to medical expenses has been recouped.

[41] At present, the Department covers about half of Jenna's actual medical expenses and the mother is responsible for the balance. Coverage includes some travel costs for doctor's appointments and some medications.

[42] The mother stated that Jenna requires many trips for doctor's appointments - for assessment and testing, sometimes as frequent as five times per week. During those times when Jenna has medical appointments outside the local area, the mother places her other two children in private care. In the past, the mother has also needed private care when she is working if and when Jenna is at home. On average, she said she requires such care four times a week at the rate of $30 a day. Apparently, the day care provider does not provide formal receipts.The mother provided a Statement in support of the amounts.

[43] Given Jenna's medical condition and her inability to leave home to attend school on a regular basis, Jenna has required a tutor to meet basic educational needs. (She is now in grade 3.) A tutor started in October, 2009 and continued until June, 2010. The child was being tutored every Saturday and Sunday, for one hour at each session, at a cost of $15 per session. After July 1st, 2010, Jenna received tutoring three days per week. Tutoring was to continue until June, 2011.

[44] In a supplemental affidavit (filed in January, 2012), the mother said Jenna's health continued to deteriorate and that she had "more sick days than well days". The child has reached the point that she now meets the criteria to be placed on an organ transplant list.

[45] Jenna now remains at home most of the time and is unable to participate in physical activities. However, to her credit and to her mother's credit, arrangements have been made for Jenna to attend school when her illness permits. Most days, she is only able to stay at school for a couple of hours. As of January, 2012 she had missed about two thirds of her academic year.

[46] Because of Jenna's deteriorating medical condition and the amount of care and specialized knowledge required to meet her needs, the individual who was looking after Jenna when the mother was at work, or otherwise occupied, is no longer prepared to look after Jenna. As a consequence, the mother had to stop all outside employment. She is now at home, full-time, with her daughter.

[47] After she left work, the Department of Community Services agreed to pay for all of Jenna's medical expenses, except for travel and associated costs. Before then, the Government was covering one half of the expenses. Currently, the mother pays $35 per trip for parking and gas when Jenna attends for appointments in Halifax. According to the mother, she requires about four trips monthly. On some occasions, Jenna stays at the hospital for several days. Not surprisingly, the mother seeks a contribution from the father to those expenses.

[48] The mother bracketed her various claims with an effective date of January 1st, 2010. Since this is approximately when the litigation started, the result is that she seeks a "current" support award. Any potential remedies she may have for the other intervening years since the last order were waived. And, as mentioned at the outset, the father's retroactive claims are on hold.

[49] Moreover, the mother wrote that she no longer is asking the father to contribute to Jenna's medical expenses - except for travel. The mother's understanding is that the medical expenses will now be covered by the Government until she is able to return to work. In court, she reaffirmed that the Department usually covers hotel expenses when they are in Halifax for appointments or longer stays. However, she also reaffirmed that her actual out of pocket expenses are still $35 per trip on an average of four times monthly.

[50] As previously mentioned, Jenna requires tutoring. From July to September, 2010 there was tutoring three days per week at a cost of $15 per session. The total cost for those months was $540. October through December, 2010 saw tutoring of twice per week at a total cost of $360. In 2011 there was tutoring starting in September. The mother paid for two sessions per week for the months of September, October and November. The total cost was $285. Thereafter, Jenna's school started to cover the cost of ongoing tutoring. In summary, the mother said that she has incurred costs totalling $1,935 since January, 2010 to and including mid November, 2011. She seeks a contribution from the father to those expenses.

[51] Rachel, who is the eldest child, is very sensitive to Jenna's medical circumstances and tends to worry a lot about her. Rachel has been enrolled in various activities for her physical and mental well being. She exemplified by saying Rachel attended choir at no cost. Soccer attracted fees of $65 annually, gymnastics $272 annually, and cheerleading $300 annually. There are other activities the mother would like Rachel to be involved with but the family can not afford the expense. Rachel, is a straight A student at the highschool and doing very well.

[52] More recently, the mother wrote that both Patrick and Rachel continue to be involved in extra-curricular activities. Rachel is still active in gymnastics and cheer leading. The mother incurred cheer leading costs in 2010 and 2011, the amount of $943.65. Rachel also played soccer in 2010 but did not return to the sport in 2011. The cost that year was $39.

[53] Patrick plays hockey. The mother confirmed that hockey "is his sport" and that that particular activity helps give him respite from the unique circumstances within the home. The related expenses in 2010 were $200 and in 2011 $250. There is an expectation that the expense will increase in 2012.

[54] The mother's affidavit was accompanied with invoices or statements from the respective activity officials.

[55] Based on the father's 2010 income as disclosed by documents previously filed by him and based on the financial documents, albeit incomplete, filed for 2011, the mother believes that the father's income includes money from work and also money from employment insurance. She asks the court to impute to the father

an income of not less than $15,800 for 2010 and that the same figure be relied upon for projecting responsibilities for 2011 and thereafter.

[56] Based on that figure, the mother submits that the father should have paid basic child support for the benefit of his three children at the rate of $310 monthly for 2010 and 2011. Using the same income for 2012, she submits that basic current child support (i.e. for 2012) should be set at the rate of $226.86 in accordance with the **CMG** Tables, as recently amended.

[57] The mother's 2010 income was $13,653. In 2011 her total income dropped to $10,956. The mother anticipates her 2012 income to be about the same as it was in 2011.

[58] The mother submits that based on the respective incomes of the parties, that the court should apportion past eligible expenses under section 7 of the **CMG** on a ratio of 54% to the father and 46% to the mother for 2010. On a "go forward" basis, and in light of the mother's slightly reduced projected income, it was submitted that the section 7 **CMG** allocation should be 60/40. I accept those submissions.

[59] Before concluding her case, the mother said she does not know where the father resides and has not been provided by him with any contact information. However, the mother and children reportedly continue to get along well with the paternal extended family. The mother has no knowledge of the father's lifestyle or recent employment history.

Result

[60] I reiterate that the father's application was adjourned without date. This should be reflected in the new order. Should the father decide to pursue his application, the parties may find the following cases informative:

> **D.M. v. S.A.**, 2008 NSFC 15
> **J.D.G. v. J.A.B.**, 2012 NSSC 20
> **Smith v. Oake**, 2012 NSSC 100

[61] Returning the matters at hand, and applying the **MCA** and the **CMG** to the evidence, I find that the mother has made a solid case for her variation claims, both for basic support and under section 7 of the **CMG**. Without labouring the point, I find that all of the mother's section 7 claims for the children's benefit meet the entitlement threshold previously discussed.

[62] I determine the father's 2010 income to be $15,806; and I impute the same income to him for 2011 and 2012, respectively. The Nova Scotia Table amount due and payable as basic support (for three children) is $310 monthly for 2010 and 2011, and slightly less under the revamped Tables at $226.86 monthly for 2012. The mother requests that the variations speak as of January 1st each year, and that payments continue to be due and payable on the first day of each and every month thereafter. My understanding is that the same payment regime (ie., monthly), unless the parties otherwise agree, is intended for both the basic and the section 7 components of the award. I will so order.

[63] For section 7 purposes, I order that the father contribute 54% of all eligible expenses for 2010 and 2011; and 60% for 2012 and subsequent years, unless and until otherwise ordered.

[64] I determine Jenna's total section 7 eligible tutoring expenses for 2010 to be about $1,650. The father's proportionate share for 2010 (54%) is set at $891 and is now due and payable by him. Tutoring expenses for 2011 are set at $285. The proportionate share due and payable by the father (54%) is $153.90. Any potential claim for 2012 has not yet been crystallized. I therefore make no order at this time but preserve the mother's right to later advance a claim.

[65] I determine Jenna's eligible medical and related expenses for 2010 and 2011 to be about $140 monthly ($1,680 annually). Using the same ratios, the father shall pay $907.20 for 2010 and $907.20 for 2011. For 2012, and until otherwise ordered, the father's contribution to those monthly expenses of $140 shall be $84 (60%).

[66] The remaining eligible expenses are modest. 2010 soccer was only $39. I fix the father's share (54%) at $21. Hockey was only $200 in 2010. The father's share (54%) is set at $108. For 2011 the father's share (54%) of $250 is $135; for 2012 and onward, the father's contribution (60% of $250) shall be $150 annually.

[67] Cheerleading attracted costs totalling $943.65 in 2010 and 2011. The father's share (54%) is set at $510. For 2012 and onward, the estimated expense is about $472 annually. The father's share (60%) is set at $283 annually.

[68] The mother could have asked for assistance with child care expenses incurred by her incidental to former employment and for occasions when Jenna's situation, in particular, necessitated third-party care. Despite all the evidence led on this topic, she ultimately waived this aspect of her application.

[69] I would be remiss if I did not say I am satisfied that the mother has exhausted most, if not, all of her personal resources and avenues of government financial help in an effort to meet the children's financial needs, both direct and indirect, and especially those associated with Jenna's special needs. With respect, there is no evidence that the father has demonstrated the same kind of effort and dedication. If he has gone on to another relationship and taken on other financial responsibilities, he did so knowing that he had (and would continue to have) significant financial responsibilities for his first family.

[70] To the extent that government agencies, and the mother's current partner, have pitched in financially there is a sad irony that the father's responsibility, if not liability, is likely less than might otherwise be the case.

[71] In the same vein, another point that is sometimes lost is that (strictly speaking), under section 30 of the **MCA**, evidence that the applicant (mother) has received or is receiving aid from any government or agency is <u>not</u> to be considered by the court when making an award. Presumably, this section was designed to head off any thought by payors of a defence that there is no legal entitlement if there is public or other third-party assistance covering some or all of the recipient family's expenses.

[72] In the case of the father, the file history points to a parent who is adept at avoiding responsibility and accountability; and who may see himself as something of a victim rather than one who can and will step up to the plate in the best interests of his children. He has had the benefit of legal advice most of the time, but I sense he still may not fully appreciate what is expected of him or why. May I suggest he think about the purpose of the **CMG**, discussed elsewhere.

[73] As a result of my award, the father will have additional support arrears. The MEP Director has the authority to help negotiate and structure plans for the payment of arrears, failing which there is a battery of enforcement options. I will therefore leave the collection issue to the parties and to the Director.

[74] Given the result, the mother would ordinarily be entitled to court costs - perhaps higher than usual because of the delay and inconvenience occasioned by the father, and his failure to submit full and timely financial disclosure. However, costs were not sought; and therefore none are ordered.

[75] Mr. D'Arcy shall submit an order for approval.

Dyer, J.F.C.