IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Jeffrey v Jeffrey, 2009 NSSC 180

Date: 20090615
Docket: S.H. No. 1201-062019
(SFHD-054616)
Registry: Halifax

Between:

Deborah Lorraine Jeffrey

Petitioner

v.

Roy Edmond Jeffrey

Respondent

Judge:	The Honourable Associate Chief Justice Robert F. Ferguson
Heard:	August 12 and September 16, 2008
Written Decision:	June 16, 2009
Counsel:	Mary E. Meisner, Q.C., for the applicant Jodi MacDonald, for the respondent

By the Court:

[1] Deborah and Roy Jeffrey are the parents of Ryan Arthur Roy Jeffrey, born August 11, 1993. The couple married in July of 1976 and ceased living together around the end of August of 2001. Since the separation, Ryan has continued to live with his mother.

[2] In October of 2007, Ms. Jeffrey made an application under the *Maintenance and Custody Act*. She sought an order that would provide: a) parenting provisions as to their son; and b) child maintenance payable to her in accordance with the *Child Support Guidelines* in the form of a table amount and a contribution to special or extraordinary expenses, and that the order would be retroactive to the date of the couple's separation.

[3] In January of 2009, a Consent Order was issued which dealt with most of the issues. As a result, the only remaining issue was, as acknowledged in the Consent Order, the retroactivity of child maintenance (table and section 7 expenses) for the period from August, 2001, to and including December, 2007.

HISTORY

[4] As previously noted, the parties separated in August of 2001. Prior to the Consent Order issued in January of 2009, there was no written agreement or court order dealing with child maintenance.

[5] In September of 2001 – a little over a month after their separation – Mr. Jeffrey began providing Ms. Jeffrey with monthly child maintenance which continues to the date of this hearing. In September of 2001, the amount of such payment was $300.00 per month.

[6] A month later, and continuing to November of 2006, the amount was $350.00. In November of 2006, the amount was increased to $400.00 and continued as such until January of 2008. Beginning in January of 2008, the amount was increased to $660.00. The current order requires a payment of $687.00 a month commencing on the first day of January, 2008.

SUBMISSIONS

[7] Ms. Jeffrey submits that Mr. Jeffrey controlled the amount of child maintenance provided since the separation; that Mr. Jeffrey obtained legal advice prior to making the child maintenance payment and informed her that the amount of such payment was in accordance with his income and the corresponding *Guideline* responsibility; that, on beginning this current application, she became aware of Mr. Jeffrey's income for the years since their separation and, as a result of obtaining this information, it is obvious Mr. Jeffrey has been, for some time, paying less than legally required given his income and the dictates of the *Guidelines*; that this failure to provide income in accordance with the *Guidelines* should be corrected from the date of their separation.

[8] Ms. Jeffrey further stipulates that Mr. Jeffrey, since separation, has basically refused to provide any contribution towards legitimate special or extraordinary expenses related to their son. She indicates the reason she did not take action to be reimbursed for such expenses at an earlier date was Mr. Jeffrey's indicating to her, on numerous occasions, that he did not have sufficient funds to make a further contribution.

[9] Mr. Jeffrey submits that, until very recently, he was unaware of what were his child maintenance responsibilities as dictated by the *Guidelines*. He states his contributions since separation were basically dictated by Ms. Jeffrey's requests. As an example, he notes his initial payment of $300.00 a month went almost immediately to $350.00 by virtue of the request of Ms. Jeffrey that she needed more by way of child maintenance; that in 2006 the amount was raised to $400.00 – again, at her request. He acknowledges he complained as to his ability to provide additional funds but did ultimately concede to her requests. As to special or extraordinary expenses, he submits he was led to believe by Ms. Jeffrey that he was providing an appropriate amount for child care.

[10] To recap, we have Ms. Jeffrey's view that an intelligent and educated parent was aware, or should have been aware, he was not providing child maintenance in accordance with the *Guidelines* either from the point of view of the table amount or as a contribution towards special or extraordinary expenses; further, that such under payment from him from the date of separation is now due and owing.

[11] Mr. Jeffrey's view is that Ms. Jeffrey – also an intelligent and educated parent – asked for child maintenance, received it and, from time to time, requested

an increase which was acknowledged and, basically, left Mr. Jeffrey with the belief that he was providing an appropriate amount of child maintenance; further, that she knew or should have known it was open to her, since their separation in 2001, to take the legal action she finally began in 2007.

RELEVANT LEGISLATION

[12] The relevant sections of the *Maintenance and Custody Act* are:

> Maintenance order
>
> 9 Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child. 1997 (2nd Sess.), c. 3, s. 4.
>
> Powers of court
>
> 10 (1) When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.
>
> (2) The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.

[13] The relevant sections of the *Nova Scotia Child Maintenance Guidelines* are:

> Presumptive rule
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> 3(1) Unless otherwise provided under these Guidelines, the amount of a child maintenance order for children under the age of majority is
>
> (a) the amount set out in the applicable 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; and
>
> (b) the amount, if any, determined under Section 7
>
> . . .

Special or extraordinary expenses

7 (1) In a child maintenance order the court may, on a parent's request, provide for an amount to cover all or any portion of the following expenses, which 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 prior to the separation:

a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

b) that portion of the medical and dental insurance premiums attributable to the child;

c) 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;

d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

e) expenses for post-secondary education; and

f) extraordinary expenses for extracurricular activities.

(1A) For the purposes of clauses (1)(d) and (f), “extraordinary expenses” means

a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse’s income and the amount that the spouse would receive under the applicable table or, if the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

b) if clause (a) is not applicable, expenses that the court considers are extraordinary, taking into account all of the following:

(I) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, if the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities,

(v) any other similar factor that the court considers relevant.

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Subsidies, tax deductions, etc.

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

Note: Section 7 of the Guidelines was amended on November 28, 2005

ISSUES

a) Retroactivity: Should Mr. Jeffrey be ordered to provide child maintenance beginning prior to October of 2007 – the date of Ms. Jeffrey's application?

b) If such an order is to be made, what should be the date Mr. Jeffrey's obligation begins?

ANALYSIS

Retroactivity

[14] It is agreed that Ryan has been, since the date of separation, and continues to be, a dependant "child" within in the meaning of the *Maintenance and Custody Act*.

[15] It is further agreed that this Court has the power to order original retroactive child maintenance awards pursuant to applications made under the *Maintenance and Custody Act*.

[16] Both parties have advanced *D.B.S. v. S.R.G.* [2006] 2 S.C.R. 231 as being the leading case on the issue of retroactive child support. They further acknowledge the five factors to be considered when determining this issue to be as follows: 1) the status of the child; 2) reasonable excuse for delay – why support was not set earlier; 3) conduct of the payor parent; 4) circumstances of the child; and 5) hardship occasioned by the retroactive award.

Reasonable Excuse for Delay

[17] Ms. Jeffrey submits she was under an incorrect assumption as to Mr. Jeffrey's income while being over extended given her responsibilities as to caring for Ryan and her aging parents. Further, she was consistently being told by Mr. Jeffrey he did not have the financial ability to provide additional child maintenance. Mr. Jeffrey counters by suggesting that Ms. Jeffrey has not discharged the onus of establishing the reasonableness of such a delay in seeking maintenance.

Conduct of Payor Parent

[18] On this point, Ms. Jeffrey, in her pre-trial brief states:

> **Conduct of Payor Parent**
>
> The majority of the Supreme Court of Canada takes an expansive view of what constitutes blameworthy conduct and defines it generally at paragraph 106 as '*anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support'*. Regarding this factor, the majority of the Supreme Court of Canada has stated, in part, as follows:

> [105] This factor approaches the same concerns as the last one from the opposite perspective. Just as the payor parent's interest in certainty is most compelling where the recipient parent delayed [page278] unreasonably in seeking an award, the payor parent's interest in certainty is least compelling where (s)he engaged in blameworthy conduct. Put differently, this factor combined with the last establish that each parent's behaviour should be considered in determining the appropriate balance between certainty and flexibility in a given case.
>
> [106] Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" -- rather than their "right to an appropriate amount of support" -- were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; *S. (L.)*. A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.
>
> [107] No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; *Chrintz.* [Emphasis added]

[19] Mr. Jeffrey, on the same point, submits that the evidence does not show that his actions since separating from the applicant amounted to blameworthy conduct

nor did he intentionally hide his income from Ms. Jeffrey or intimidate or attempt to intimidate her from seeking more child maintenance.

Circumstances of Child

[20] Ms. Jeffrey acknowledges that, by her sacrifices (financial and otherwise), Ryan has benefited from an adequate standard of living since the separation. She submits that these sacrifices on her part do not absolve the respondent from his past responsibilities in providing for his child.

[21] Mr. Jeffrey suggests that, since the parties' separation, he has provided for his son in a manner similar as to how he would have done had the couple remained together.

Hardship Occasioned by a Retroactive Award

[22] Ms. Jeffrey acknowledged that a retroactive award such as she requests would be "inconvenient" for the respondent but falls short of creating a hardship for him.

[23] Mr. Jeffrey submits a retroactive award in the amount claimed by Ms. Jeffrey would be equal to one-third of his annual income and amount to a financial hardship to him.

Date of Retroactivity

[24] As stated by the majority of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, supra:

> [121] Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair, and his/her interest in certainty becomes less compelling
>
> . . .

> [123] . . . Thus, even if effective notice has already been given, it will usually be inappropriate to delve too far into the past. The federal regime appears to have contemplated this issue by limiting a recipient parent's request for historical [page285] income information to a three-year period: see s. 25(1)(a) of the Guidelines. In general, I believe the same rough guideline can be followed for retroactive awards: it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.

[25] The applicant submits the decision of Abella J. in *D.B.S. v. S.R.G.*, supra, allows for consideration in making a retroactive order beyond the "three-year limitation period."

DECISION

[26] Ms. Jeffrey applied for relief pursuant to the *Maintenance and Custody Act* in October of 2007. A Consent Order dated January 9, 2009, provided relief to almost all of the issues raised in the proceeding, including ongoing child maintenance beginning January 4, 2008. What remains for decision is what responsibility, if any, Mr. Jeffrey has to retroactively provide child maintenance since the couple separated in August of 2001 up to the end of 2007.

[27] As noted earlier, *D.B.S. v. S.R.G.*, supra, identified five factors for consideration when considering a retroactive child maintenance award.

Status of the Child

[28] There is agreement as to the status of the child.

Reasonable Excuse for Delay

[29] Ms. Jeffrey has, since the separation, made overtures to Mr. Jeffrey for increased child maintenance. Mr. Jeffrey has resisted such requests indicating a lack of income to provide any additional amount. However, in spite of such reluctance, he did, on numerous occasions, increase his monthly payment. The evidence does not support a conclusion Ms. Jeffrey was pressured or intimidated by Mr. Jeffrey to the extent it would be a reason for her to delay her application to seek formalized child maintenance.

[30] On this point, it should be noted that Ms. Jeffrey acknowledged that she and Mr. Jeffrey continued to see one another from November of 2006 to July of 2007, both as a couple and a family. This included a family trip to Cuba in April or May of 2007.

Circumstances of Child / Hardship Occasioned by a Retroactive Award

[31] I have considered both of these factors and have previously mentioned the parties' submissions on these points.

Conduct of the Payor Parent

[32] Mr. Jeffrey provided child maintenance on a monthly basis almost from the beginning of the family's separation. He increased the amount of such maintenance on at least three occasions at the request of Ms. Jeffrey. He provided further financial assistance when requested by Ms. Jeffrey. However, prior to making his initial payment, Mr. Jeffrey received legal advice as to how the *Child Support Guidelines* would affect his obligation. In other words, in the fall of 2001 he was aware his obligation was directly related to his annual income. Since that time his income has significantly increased. I find his increase in income, which he did not disclose to Ms. Jeffrey, together with the knowledge it affected his support obligation, put him in a position of a person who knowingly avoided or diminished his child maintenance obligation.

[33] I find it appropriate to consider a retroactive obligation.

Date of Retroactivity

[34] When Mr. Jeffrey began his payment he had an annual income of just less than $50,000.00. Over the next few years, his income increased. In 2004, it was in the vicinity of $53,500.00. In 2005, it increased to more than $78,000.00. At that time, given his knowledge that his obligation was equated to his income, I find Mr. Jeffrey had "effective notice" that his current payment was deficient.

Guideline Table Amount

[35] In 2005, Mr. Jeffrey's income was $78,270.00 which, according to the *Guidelines*, would attract a payment for one child of $625.00 a month or $7,500.00

per year. During that period, he paid $350.00 a month or $4,200.00 for the year, leaving a shortfall in his obligation of $3,300.00.

[36] In 2006, Mr. Jeffrey's income was $75,272.00. The *Guideline* table amount for the first four months of that year was $603.00 a month or $2,412.00 for that period. For the remaining eight months his obligation was $649.00 a month or $5,192.00 for that period, for a yearly amount of $7,604.00. During that year, he paid $350.00 a month for ten months, for a total of $3,500.00 and an additional two months at the rate of $400.00, bringing his yearly contribution to $4,300.00 and leaving a deficit for 2006 in the amount of $3,304.00.

[37] In 2007, Mr. Jeffrey's income was $77,760.00 attracting a *Guideline* table amount of $669.00 a month or $8,029.00 for the year. He contributed during this period $400.00 a month or $4,800.00, again, leaving a deficit in the amount of $3,229.00.00

Section 7 or Special or Extraordinary Expenses

[38] Given the conclusion the child maintenance order would apply to the years 2005, 2006 and 2007, only expenses attributed to those years are being considered.

[39] Ms. Jeffrey submitted the following expenses:

- Child care (Landry) for the years 2005, 2006 and 2007;

- Excel child care lunches for January to June, 2005;

- Ryan's birthday parties;

- School pictures;

- Vision Camp;

- Dental and medical premiums

[40] In reply to this request for relief, Mr. Jeffrey, in his affidavit sworn on July 28, 2008, stated:

17. With respect to paragraph 16 of the Applicant's affidavit, Ms. Jeffrey has not shown me receipts for the child care expenses she is claiming. Nevertheless, I did contribute to child care provided by Mary Smith. I have attached as Exhibit "A" to this my affidavit a table of payments that I made to Ms. Jeffrey for child care expenses while Ryan was in Mary Smith's care. The figures in Exhibit "A" were compiled from Exhibit "B", photocopies of pages from my bank book covering the period of March 2003 to January 2006, "C", bank statement from the Credit Union for 2003, "D", bank statement from the Credit Union for 2004, and "E", bank statement from the Credit Union for the months of January to November, 2005, excluding July.

18. In 2005, Ms. Jeffrey began to pay Maurice Landry to look after Ryan. She told me she was paying a very low amount for his care and she did not ask me to contribute to this expense. I believed if she needed my contribution she would ask as she typically would. Over the years, I paid what she asked and had she asked me to contribute to this expense I would have. She did not tell me what she was paying, all she said was that she was paying very little.

19. With respect to paragraph 36 of the Applicant's affidavit, I too contributed to Ryan's spending money for his school trip. I made a crib board and donated it and a new junior golf bag to sell at his school auction. Ryan told me that these items were sold for around $130.00. I was told that the money was to go to Ryan for spending on his trip.

20. With respect to paragraph 38 of the Applicant's affidavit, I too paid for a medical and dental plan that covered both Ms. Jeffrey and Ryan. Attached as Exhibit "F", to this my Affidavit is confirmation from Elaine A. Descoteaux, HR Compensation Team Leader, of my participation in the Public Service Health Care Plan. Ryan has always been covered under my medical and dental plan and that will continue for as long as I am able to cover him.

21. Ms. Jeffrey encouraged me to use her medical plan and even gave me a card of my own. She never asked me to contribute to or reimburse her for the premiums she paid.

22. I may have complained to Ms. Jeffrey when she asked for a contribution to something, but I still paid. Since our separation I have bought many things for Ryan, including three mountain bikes, golf lessons, cameras, a computer, and many other items. I also paid for computer repairs when necessary.

23. With respect to paragraph 56 of the Applicant's affidavit, I do buy him (sic) items of clothing for Ryan when he needs them. On March 24, 2008 I purchased a pair of sneakers for Ryan at a cost of $101.69 from the Shoe

> Company as can be seen in a copy of my bank statement for 2008 attached to this my Affidavit as Exhibit "G". This is not an isolated purchase and has happened quite often since my separation from the Applicant. I have taken him shopping for school supplies and clothing. If Ryan needs something and I am aware of it I provide it for him.
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> 24. With respect to paragraph 57 of the Applicant's affidavit, Ms. Jeffrey did not ask me what I was earning, nor did I ask her.
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> 25. With respect to paragraph 64 of the Applicant's affidavit, Ms. Jeffrey used my medical and dental plan for visits to an eye specialist and an orthodontist for Ryan. Attached as Exhibit "H" to this my Affidavit is a printout of my medical plan summarizing usage of the plan for the period of January 1, 2001 to June 30, 2008.

[41] Mr. Jeffrey questions if some of these submitted expenses would fit the definition of section 7 of the *Guidelines*, as amended. He questions if the court has been provided with sufficient evidence to conclude that these expenses occurred. He further submits he has, when requested, provided additional support over and above the table amount.

[42] I found that Mr. Jeffrey's dramatic increase in salary was in and of itself "sufficient notice" his child maintenance obligation (table amount) had to be increased.

[43] I am unable to come to the same conclusion with regard to the section 7 expenses. He did, on occasion, make additional payments with regard to some of the items put forward by Ms. Jeffrey. Again, it is relevant to mention that these parents, during the relevant periods, were, on occasion, acting as a family.

[44] Ms. Jeffrey's request for a retroactive award with regard to the section 7 expenses is denied.

[45] It is ordered that Mr. Jeffrey has a responsibility to provide child maintenance to Ms. Jeffrey for their child, Ryan, beginning January 1, 2005, and ending January 31, 2007; further, that he is in arrears with regard to this obligation in the amount of $9,833.00.

[46] I assume, as a result of this decision, the Nova Scotia Maintenance Enforcement Program will be in contact with Mr. Jeffrey to make arrangements as to repayment of the arrears.

[47] I would ask counsel for the applicant to prepare the order.

J.