

2000

Date: 20000816
Docket: 1205-001795

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Dooley v. Dooley, 2000 NSSC 153

BETWEEN:

DENISE LYNN DOOLEY

PETITIONER

- and -

MICHAEL ALEXANDER DOOLEY

RESPONDENT

Justice Walter R.E. Goodfellow

Pictou, Nova Scotia

DECISION

HEARD: Before the Honourable Justice Walter R.E. Goodfellow, at
Pictou, Nova Scotia

DATE HEARD: August 10th, 2000

WRITTEN RELEASE

OF ORAL: August 16th, 2000

COUNSEL: Kathy A. Briand, counsel for the Petitioner
Michael Alexander Dooley, self-represented

GOODFELLOW, J.:

[1] **BACKGROUND**

[2] Denise Lynn Dooley, now 30, and Michael Alexander Dooley, now 29, were married August the 29th, 1992, and separated July the 20th, 1998. They are blessed with two children; Katelyn Nicole Dooley, born January 28th, 1994; and, James Franklin Dooley, born February the 22nd, 1996.

[3] The matter comes before the court as an uncontested divorce and custody of the children is to go to Denise Lynn Dooley, with specific spelled out access for the children to Michael Alexander Dooley. The parties wish an order that requires no child support by Michael Alexander Dooley. Michael Alexander Dooley is in receipt of social assistance and Canada Pension Plan disability. His total present annual rate from both sources is \$8,091.00.

[4] **CANADA PENSION PLAN**

Canada Pension Plan

Chapter C-8 An Act to establish a comprehensive program of old age pensions and supplementary benefits in Canada payable to and in respect of contributors

Short title

1. This Act may be cited as the Canada Pension Plan.

DIVISION A
BENEFITS PAYABLE

Benefits payable

44.(1) Subject to this Part,

- (e) a disabled contributor's child's benefit shall be paid to each child of a disabled contributor who
 - (i) has made contributions for not less than the minimum qualifying period,
 - (ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or
 - (iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1, had not been made; and
 - (iv) [Repealed, 1997, c. 40, s. 69]

Disabled Contributor's Child Benefit and Orphan's Benefit Amount of benefit

59. A disabled contributor's child's benefit payable to the child of a disabled contributor and an orphan's benefit payable to the orphan of a contributor is a basic monthly amount consisting of

- (a) in the year 1991, one hundred and thirteen dollars and fourteen cents;
- (b) in the year 1992, the aggregate of
 - (i) one hundred and thirteen dollars and fourteen cents, multiplied by the ratio referred to in subparagraph (c)(ii), and
 - (ii) thirty-five dollars;

or

- (c) in the year 1993 or any subsequent year, an amount calculated by multiplying
 - (i) the amount of the benefit that would have been payable for a month in the year preceding that yearby
 - (ii) the ratio that the Pension Index for the year in which the benefit commences to be payable bears to the Pension Index for the year preceding that year.

R.S., 1985, C-8, s. 59; R.S., 1985, c. 30 (2nd Supp.) s. 27; 1991, c. 44, s. 13.

74.(1) An application for a disabled contributor's child's benefit or orphan's benefit may be made on behalf of a disabled contributor's child or orphan

by the child or orphan or by any other person or agency to whom the benefit would, if the application were approved, be payable under this Part.

- ...
- (3) Where a disabled contributor's child's benefit has become payable to a child under this Act or under a provincial pension plan in respect of any contributor thereunder or an orphan's benefit has become payable to an orphan under this Act or under a provincial pension plan in respect of any contributor thereunder, no disabled contributor's child's benefit or orphan's benefit is payable to that person under this Act in respect of any other such contributor except another parent of that person, and in no case shall such a benefit be paid to that person in respect of more than two contributors.

[5] DIVORCE ACT

11.(1) In a divorce proceeding, it is the duty of the court

- (b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made;

[6] ISSUES

- [7] 1. Is the payment of the child benefit under the Canada Pension Plan a payment by the disabled parent for which the parent receives credit pursuant to the Child Support Guidelines?
2. Is the receipt of social assistance to be considered income of a payor parent

recipient in calculating that parent's obligations pursuant to the Child Support Guidelines?

[8] ISSUE No. 1

Is the payment of the child benefit under the Canada Pension Plan a payment by the disabled parent for which the parent receives credit pursuant to the Child Support Guidelines?

[9] Moir, J., in *Corkum v. Corkum* (1998), 36 R.F.L. (4th), pp. 371-372:

[12] Parliament did not choose a scheme by which the pensioner's entitlement increases where the pensioner has dependants. Rather, the entitlement belongs to the dependant, and is not even placed in the hands of the pensioner unless the pensioner has custody. To establish an automatic set-off of the child's entitlement against the pensioner's support obligation, is to defeat this scheme by turning the child's entitlement into a benefit of the pensioner.

[10] Mr. Dooley is under the mistaken impression that he is making Canada Pension Plan benefit payments to the custodial parent for his children. The amount Mr. Dooley receives by way of Canada Pension Plan disability is neither diminished or increased by the existence or non-existence of dependant children. It is a separate distinct statutory entitlement that arises under the Legislation and cannot be considered in any way as contributing to or meeting the responsibility of a noncustodial parent to provide support in accordance with the Federal Child Support Guidelines. Based upon his total income of \$8,091.00, he is required to

pay for the support of his two children, \$40.00 per month and the court cannot fulfill its duty pursuant to *Section 11(1)* of the *Divorce Act* without Mr. Dooley paying at least the basic Guideline amount which would constitute a reasonable arrangement in the circumstances.

[11] Accordingly, a stay of the divorce is granted pending receipt of a corollary relief judgment requiring payments for child support at the rate of \$40.00 per month commencing the 1st of September, 2000. I use that starting date on the belief that with his limited resources there is no capacity to pay retroactive child support.

[12] ISSUE No. 2

Is the receipt of social assistance to be considered income of a payor parent recipient in calculating that parent's obligations pursuant to the Child Support Guidelines?

[13] This issue was effectively determined in *Briand v. Briand* (1996), 153 N.S.R. (2d) 157, where it is stated at pp. 159-160:

[10] This factual situation where the custodial parent obtains the majority of

her “income” from Social Assistance highlights a problem that has been with us for a long time, namely, the reality that any child support paid by the noncustodial parent to the recipient of Social Assistance will not have a direct benefit to the children due to the Provincial Government policy of reducing Social Assistance dollar for dollar for the amount paid by the noncustodial parent. Matters of policy are for the Provincial Government, and it is not for the court to differentiate between parents and effectively relieve a parent of her/his responsibility because all or a major source of “income” comes from the public through Social Assistance. To do so to begin with will differentiate between those custodial parents who earn relatively low incomes, i.e. \$10,000 or \$11,000 of a comparable amount to Mrs. Briand’s Social Assistance. Why should a noncustodial parent earning \$10,000/\$11,000, be required to comply with the Child Support Guidelines and a noncustodial who is not employed but receives Social Assistance of an identical amount escape the obligation of compliance with the Child Support Guidelines. In any event the courts are bound by the direction of the *Divorce Act* to enforce the responsibility of parents for their children to the extent of their capacity.

[14] Parents have the same responsibility to their children whether or not their income comes from limited sporadic minimum wage income or where they receive a cheque in the mail.

[15] Divorce stayed.

J.