

SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)

Citation: *Conway v. Parfitt*, 2016 NSSC 368

ENDORSEMENT

Susan Conway v. Jeffrey Parfitt

2003; FW-MCA-029149

June 3, 2016

Application:

Susan Conway wants to change the amount of child maintenance that Jeffrey Parfitt pays each month. As well, she wants him to pay retroactive child maintenance from June 2012 to the present.

Decision:

Beginning on June 30, 2016 and continuing on the last day of every following month, Jeffrey Parfitt shall pay monthly child maintenance of \$370.00 to Susan Conway for Sydney Conway, based on his annual income of \$44,129.00. This shall be subject to administrative recalculation.

Jeffrey Parfitt shall pay retroactive child maintenance of \$6,616.00 to Susan Conway by paying her the additional sum of \$1,654.00 in each of 2016, 2017, 2018 and 2019. This additional amount must be paid before December 31 of each year.

Beginning in 2017 and in each following year, Jeffrey Parfitt must provide Susan Conway with a copy of his personal income tax return and all schedules and attachments. This must be done by June 1.

The Maintenance Enforcement Program shall enforce Justice MacDonald's order that Jeffrey Parfitt pay Susan Conway \$100.00.

Reasons:

Introduction

1. Sydney Conway is the daughter of Jeffrey Parfitt and Susan Conway. Sydney lives with her mother, Susan Conway. In 2004, an order was granted requiring Mr. Parfitt to pay Ms. Conway monthly child maintenance of \$200.00.
2. I must decide how much child maintenance Mr. Parfitt will pay for Sydney in the future. Ms. Conway wants both the table amount of child maintenance, calculated under section 3 of the *Nova Scotia Child Maintenance Guidelines* NS Reg. 53/98, and a retroactive amount to account for the increased amount of child maintenance which she said Mr. Parfitt should have paid in the past.

3. Mr. Parfitt said that he'd experience undue hardship if he's ordered to pay the table amount, and said that he's also unable to pay a retroactive amount.

Analysis

4. I'll address Mr. Parfitt's undue hardship claim first because if I decide that Mr. Parfitt would suffer undue hardship by paying future child maintenance calculated under section 3 of the *Guidelines*, this could have an impact on my decision about retroactive child maintenance: *Staples v. Callendar*, 2010 NSCA 49.

First issue: would Mr. Parfitt suffer undue hardship if I ordered him to pay child maintenance calculated under section 3 of the Nova Scotia Child Maintenance Guidelines?

5. Mr. Parfitt has the burden of proving he will suffer undue hardship if I order him to pay child maintenance calculated under section 3 of the *Guidelines*.
6. Mr. Parfitt says that he must support the children in his new family with his partner, Charlee Grady. There are two children in this family, Jackson and Carter, who are both under four years of age.
7. There are two steps in deciding undue hardship claims. First, there must be some circumstance capable of creating undue hardship. Only when this circumstance exists can I consider the second step. Second, the standard of living in Mr. Parfitt's household must be lower than the standard of living in Ms. Conway's household.

Step one: Is there a circumstance that might cause undue hardship?

8. Mr. Parfitt claimed that his support for his two other children is a circumstance that might cause undue hardship if he was ordered to pay child maintenance under section 3 of the *Guidelines*.
9. To qualify as a circumstance causing undue hardship, the obligation to support other children is "**a legal duty** to support a child, other than" the child who is the focus of this application: clause 10(2)(d) of the *Guidelines*.
10. It is clear that Mr. Parfitt has a legal obligation to support Jackson and Carter.
11. This is not enough: Mr. Parfitt must prove that his obligation to support these children would cause undue hardship if he was ordered to pay child maintenance calculated under section 3 of the *Guidelines*.

12. Mr. Parfitt and Ms. Grady testified. Together, they prepared a Statement of Expenses showing all the expenses for their household, including their two children.
13. According to his 2015 income tax return, Mr. Parfitt earned \$44,317.00. He testified that his current income is approximately the same. He testified that the income shown on his Statement of Income was not correct, so I have ignored it.
14. Mr. Parfitt provided me with four recent weekly paystubs (April 2, April 9, April 16 and April 30), showing he earns \$27.04 per hour and works between 29 and 40 hours each week. Extrapolating these four weeks of earnings (\$3,677.44) over one year, his annual income is \$44,129.28, assuming Mr. Parfitt works 48 weeks each year.
15. There's little difference between the income I calculated (\$44,129.28) and the income shown on Mr. Parfitt's 2015 tax return (\$44,317.00). I'll use the lower amount of \$44,129.28 as his annual income. His monthly income is \$3,677.44.
16. Ms. Grady has been employed in the past. She has tried to return to work but this hasn't been financially worthwhile: her income would not cover the cost of childcare. Ms. Grady brings \$485.00 into the household every month through the Child Tax Benefit.
17. Between Mr. Parfitt and Ms. Grady, the household's total monthly income is \$4,162.44, which equals \$49,949.28 each year.
18. At an annual income of \$44,129.28, Mr. Parfitt would pay monthly child maintenance of \$370.00 for Sydney.
19. The sworn Statement of Expenses which outlined Mr. Parfitt's household's expenses showed monthly expenses of \$3,122.19 before income tax. I am increasing this amount by \$70.00 to represent the extra amount Mr. Parfitt would pay for Sydney under the *Guidelines*. So the household expenses (lines 1 – 39 of his Statement of Income) now total \$3,192.19.
20. Every year, too much income tax is deducted from Mr. Parfitt's pay so he receives a tax refund. I have calculated the proper amount of income tax Mr. Parfitt should be paying, based on his 2015 income tax return. His monthly payment of tax should be approximately \$560.00.
21. Using his current household expenses of \$3,192.19 and \$560.00 in monthly income tax, there are monthly expenses of \$3,752.19 in Mr. Parfitt's household.

22. There is monthly income of \$4,162.44 in Mr. Parfitt's household. After paying monthly expenses of \$3,752.19, there is a monthly surplus of \$410.25. This equates to an annual surplus of \$4,923.00 in his household.
23. Mr. Parfitt filed a Property Statement which shows he owes no debts. This is consistent with his Statement of Expenses which showed he and Ms. Grady have no debt payments.
24. Based on the income and expenses of Mr. Parfitt's household, he has not proven there would be undue hardship if he was ordered to pay \$370.00 in monthly child maintenance. The evidence he has provided showed that his household still operates with extra money each month (a surplus of \$410.25).
25. My analysis stops there because only if there is a circumstance which would cause undue hardship am I required to compare household living standards: see *Gaetz*, 2001 NSCA 57 at paragraph 15. Having found that there is no undue hardship circumstance, I am not required to go any further.
26. I dismiss Mr. Parfitt's claim of undue hardship because he has not shown that a circumstance exists which would cause undue hardship if he was ordered to pay child maintenance under section 3 of the *Guidelines*.
27. Beginning on June 30, 2016 and continuing on the last day of each following month, Jeffrey Parfitt shall pay Susan Conway monthly child maintenance of \$370.00 for Sydney.

Second issue: Should I order retroactive child maintenance?

28. Ms. Conway asked that I order Mr. Parfitt to pay retroactive child maintenance from June 2012 to date. This date is three years before the date her application was filed: *DBS v. SRG; LJW v. TAR; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, at paragraph 123.
29. In deciding whether to exercise my discretion to award retroactive child maintenance, I must consider Ms. Conway's delay in seeking to change Mr. Parfitt's child maintenance payments; whether Mr. Parfitt has acted in a blameworthy way; Sydney's circumstances when the child maintenance ought to have been paid; and whether a retroactive award would cause Mr. Parfitt any undue hardship.
30. While the words "undue hardship" are used in the context of a retroactive child maintenance claim, they don't have the strict meaning provided by section 10 of the *Child Maintenance Guidelines* in this context.

Ms. Conway's delay

31. Ms. Conway said that she had asked for disclosure of Mr. Parfitt's yearly income and his employer information "on a number of occasions". Mr. Parfitt did not challenge this evidence.
32. Ms. Conway has shown that she did not unreasonably delay seeking increased support from Mr. Parfitt.

Mr. Parfitt's conduct

33. According to Ms. Conway, when she asked Mr. Parfitt about his income and child maintenance, he would tell her it was none of her business or that his income was only \$20,000.00 and her child maintenance payments would be less. Mr. Parfitt did not challenge this evidence.
34. His tax returns from 2012 to date show his annual income has been more than \$20,000.00. In fact, during this time, his annual income was more than \$35,000.00.
35. Mr. Parfitt was directed to provide Ms. Conway with his Statement of Income in the summer of 2015. He was ordered to provide it to her in the fall of 2015.
36. In October 2015, Justice MacDonald ordered Mr. Parfitt pay costs of \$100.00 for failing to disclose his Statement of Income. He has not paid this.
37. Mr. Parfitt didn't provide his Statement of Income until February 2016, after he was ordered to provide it (for a second time) in January 2016.
38. Mr. Parfitt has been in arrears for almost the entire time that he has been required to pay child maintenance. He never voluntarily increased his child maintenance payments when his income increased.
39. Mr. Parfitt has also advanced his interest over Sydney's by failing to make payments when due or voluntarily. The Maintenance Enforcement Program has been compelled to collect child maintenance through garnishment, meaning that Ms. Conway had no regular income stream, no way to plan for expenditures or to budget for them. Ms. Conway could expect to see money from Mr. Parfitt's tax refund, but there was no certainty when she'd have money or how much.
40. In 2004, when he began to pay child maintenance, Mr. Parfitt paid \$200.00 each month, though his income would have required him to pay \$84.00. For some unknown period of time, he paid more child maintenance than he was legally required to pay. I do not know

how long he did this. From the evidence I have of his income in the past four and one-half years, I know that he has paid less than he was legally required to pay during that period of time.

41. I conclude that Mr. Parfitt's conduct has put his interests ahead of his daughter's in failing to disclose his income and increase his child maintenance amount.

Sydney's circumstances during the retroactive period

42. Ms. Conway's Statement of Expenses noted that she is unable to provide health insurance for Sydney. As well, her ability to afford clothing, extracurricular activities, hair and grooming and gifts is limited. Entertainment expenses are incurred only when they can be afforded.
43. Ms. Conway has a monthly income of \$2,432.02. This is exhausted after she pays her rent, fire insurance, heat, electricity, water, phone, cable, food, toiletries, laundry and car payment.
44. In contrast, Mr. Parfitt's home has a budgetary surplus after all the bills are paid.
45. Mr. Parfitt argued that Sydney "is not hard done by". He said his parents provided Christmas gifts, clothing and school supplies. His family took her on a trip to Walt Disney World in 2012. His parents paid for her swimming lessons and her soccer. He said that, as he can, he repays his family for these costs.
46. According to Mr. Parfitt's affidavit, Sydney played soccer in 2009 and 2012. I was not told what this cost.
47. Sydney took swimming lessons in 2012 - 2015. The receipt for 2015 shows this was paid for by Mr. Parfitt's family and cost \$60.00.
48. Mr. Parfitt said that every summer, he supplied Sydney with her summer clothes. He provided receipts (for expenses incurred by others), showing an expenditure of \$74.47 in 2014 and an expenditure of \$48.30 in 2015 for girls' clothing.
49. I was provided with receipts for school supplies from 2013 – 2015. In 2013, a tablet was purchased for \$186.39. In 2015, a backpack was purchased. The receipt doesn't show its price, but suggests it was less than \$20.00. In 2015 there are two other receipts for school supplies which total \$151.47. These itemize the purchase of 50 pencils, 50 pens, 5 binders, 3 erasers, 3 glue sticks and more than a dozen report covers and double pocket folders. The volume of items suggests that purchases were for more than one child.

Since Mr. Parfitt didn't do the purchasing, it isn't possible to know why so many items were being bought.

50. The receipts Mr. Parfitt has provided suggest that, annually, \$500.00 was spent on Sydney's clothing, activities and school supplies. Additional amounts were spent on Christmas gifts but I don't see that expenditure as relating to Mr. Parfitt's child maintenance obligation. I would expect Mr. Parfitt or his family to purchase gifts for Sydney in any event. Gifts, as well, do not meet Sydney's needs.
51. Ms. Conway's taxable income during the retroactive period has been low: in 2012 it was \$10,911.00 (she received social assistance); in 2013 it was \$7,905.00 (she received social assistance); and in 2014 it was \$4,489.00. Until 2015, Ms. Conway's income was below the Statistics Canada low income cut off for a single person.
52. I recognize the additional provision that Mr. Parfitt has made for Sydney through his family. However, this spending failed to ensure that Sydney's most basic needs could be met in her mother's home.
53. I find that Sydney's circumstances during the retroactive period support making a retroactive award.

Whether Mr. Parfitt would experience undue hardship if he was ordered to pay retroactive child maintenance

54. Mr. Parfitt said it would cause undue hardship if he was forced to pay the correct amount of child maintenance from July 2012 to the present.
55. Based on his annual income in 2012, 2013, 2014, 2015 and 2016, Mr. Parfitt's past child maintenance obligation would be \$16,216.00. During this 48 month period, Mr. Parfitt has actually paid \$9,600.00. The shortfall is \$6,610.00.

Year	Income	Monthly child support	Annual amount due
2012	37,280.00	314.00 (seven months)	2,198.00
2013	35,805.00	300.00	3,600.00
2014	40,719.00	343.00	4,116.00
2015	44,317.00	371.00	4,452.00
2016	44,129.00	370.00 (five months)	1,850.00
Total amount due			16,216.00
Less amounts paid			(9,600.00)
Unpaid shortfall			6,616.00

56. According to his Statement of Property, Mr. Parfitt owns no property. He has no debts according to his Statement of Expenses and Statement of Property.
57. I have calculated that the annual surplus in Mr. Parfitt's home is \$4,922.64.
58. I find it is appropriate to order Mr. Parfitt to pay retroactive child maintenance. I fix the amount at \$6,616.00. I order that Mr. Parfitt pay this amount by paying \$1,654.00 to Ms. Conway in 2016 and each of the next three years. His payment must be made on or before December 31 of each year.

Costs:

59. Ms. Conway has asked that I make the previously granted costs order enforceable through the Maintenance Enforcement Program. The payment of expenses for legal fees – which I interpret to include an order for costs - qualifies as an order for the payment of maintenance or support: *Maintenance Enforcement Act*, S.N.S.1994-95, c. 6, clause 2(e)(viii). I order that Mr. Parfitt's requirement to pay Ms. Conway \$100.00 pursuant to the order of Justice MacDonald be enforced through the Maintenance Enforcement Program.
60. Finally, I order that Mr. Parfitt annually provide Ms. Conway with a copy of his personal income tax return and all schedules and attachments each year by June 1. This will begin in 2017.
61. This order shall be subject to automatic recalculation.
62. This order shall be registered for enforcement through the Maintenance Enforcement Program.

Elizabeth Jollimore, J.S.C.(F.D.)