

The respondent is the mother of the child, Jordan R. Dorton, born [...], 1990 from a previous relationship. The applicant, Mr. Winford, was involved in a common-law relationship with Ms. Dorton. They have another child together.

The question before me is whether or not Mr. Winford stands in loco parentis to the child and, more particularly, whether there is jurisdiction under the *Maintenance and Custody Act*, R.S.N.S. 160 (formerly the *Family Maintenance Act*) to order child support payable by a step-parent.

By consent, the parties caused an order to be issued by the Family Court on October 31, 1995 pursuant to which the respondent consented to paying \$200.00 per month child support for that child. The court order contained the following recital:

"And whereas the parties have reached agreement with respect to the payment of child support despite the parties' recognition that the current state of Nova Scotia laws, and in particular the Family Maintenance Act, R.S.N.S. 1989, c.160, does not recognize that the applicant has stood in loco parentis to the child, Jordan R. Dorton, hence creating no legal obligation to pay child support.

And whereas regardless of the current state of provincial child support laws, the parties do not wish to differentiate between the children and are agreed that child support shall be payable with respect to both children."

Child support became payable pursuant to that arrangement. A further interim consent order was issued by consent dated the 28th of October, 1998 calling for child support of \$431.00 for two children including the subject child. No similar recital occurred in that document.

These orders also provided for access to the applicant. By order dated February 2, 2000, by consent and at the applicant's request, his access rights to both children were terminated. The payment of child support became interrupted when the applicant lost his job. He subsequently has applied to terminate his support obligation arguing that there is no jurisdiction to award support in a step-parent, common-law situation. That question is answered by deciding whether or not such a person fits the definition of "parent" in section 2(i) or the definition of "guardian" in section 2(e) which state:

"In this Act,

(e) "guardian" includes a head of a family and any other person who has in law or in fact the custody or care of a child;...

(i) "parent" includes, in the case of a child of unmarried parents, a person who has been ordered by a court of any law district to pay maintenance for the child;"

In the case of *Reed v. Smith* (1998) 86 N.S.R. (2d) 72, the Nova Scotia Court of Appeal upheld the trial judge's decision that a step-parent does not fit within either of those definitions. In *Fitzgerald v. Siepierski* [2000] N.S. J. No. 451, Justice Hood reaffirmed that position notwithstanding that the Family Division of the Supreme Court had by then been created with broader jurisdictional powers than the Family Court had enjoyed. See also *Baker v. Peterson* [2001] N.S.J. No. 52.

Counsel for the mother argues that the applicant fits the definition of parent because he is a person who has been "ordered by a court" to pay maintenance. I reject that contention because the section expressly applies only to the case of a child

of unmarried parents. It is not enough that the parents be not married to each other. Those words require that the child is the child of both of them. The section only applies to a man and a woman who are both biological parents of the subject child.

It follows that Mr. Winford is not a "parent". He cannot be a guardian because he does not have care or custody.

If the case were not decided by reference to words "a child of unmarried parents" I would nonetheless conclude that there is no jurisdiction because of the invalidity of the child maintenance order. At the time that the maintenance order was granted, it was understood and indeed recited in the order, that the *Reed* case, supra clarifies that there is no jurisdiction to order child maintenance against a step-parent under that statute. It is not possible for the parties to confer jurisdiction on the court. The court order was nothing more than a consent arrangement by which the applicant volunteered support. The definition of parent must be construed to mean that the person has been legally and enforceably ordered by a court to pay support. For that alternative reason, I would find that Mr. Winford does not meet the definition of parent.

Accordingly, I would vary the existing order to terminate the applicant's obligation for child support in respect of the child, Jordan. I would ask the solicitor for the applicant to draft the order.

Douglas. C. Campbell, J.

DCC/wak