

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Deagle v. MacFarlane, 2013 NSSC 354

Date: October 31, 2013

Docket: SPFAOTH - 009440

Registry: Port Hawkesbury

Between:

Marie Florence Deagle

Applicant

v.

John Eric MacFarlane

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

July 3, 2013, in Port Hawkesbury, Nova Scotia

Counsel:

Tracey Sturmy, for the respondent

By the Court:

[1] This is an addendum and correction to the Decision dated February 19th, 2013 in Port Hawkesbury, Nova Scotia.

[2] This was a Confirmation Hearing relating to an application dated February 2012, to vary a maintenance order retroactively and prospectively pursuant to the *Interjurisdictional Support Orders Act*, 2002, Statutes of Ontario, c. 13.

[3] In attempting to calculate arrears to draft the Order, Ms. Sturmy, counsel for Mr. MacFarlane, noted that some of the arrears included in the calculation of arrears for 2008 and 2009 related to the third child who was not dependant at the time of the application.

[4] The Court had already concluded that no retroactive assessment and adjustment of child support was available for children who were not dependant at the time of the application.

[5] The Confirmation Hearing to which this addendum relates is not subject to a further hearing in Ontario. In addition, the Order in this matter has not been drafted. I am entitled under the Rules and case law to address any errors of this nature.

[6] There are four children who are the subject matter of the Ontario Divorce Order on September 24th, 2002.

[7] The youngest child, Erica, born August 10th, 1994, was the only child dependant at the date of this Application. It is for this child only that the Court is permitted to make a retroactive variation (paragraph 12).

[8] This Decision effects enforcement of arrears that exist under the previous Order concerning the remaining children only in so far as I adjust the arrears as a result of a retroactive variation from January 2008 forward for the fourth child.

[9] The evidence confirmed, and I found, that the applicant was responsible to pay child support for two children up to and including August, 2009 (paragraph 28).

[10] Thereafter, the applicant was responsible to pay support for one child from September 1, 2009 to June, 2012.

[11] The chart, seen on page 6, reflects what ought to have been paid for the two dependant children according to the actual salary.

[12] Ms. Sturmy correctly identified that the figure found owing in 2008 on page 7, in the amount of \$10,720.03 represents the arrears accumulated for two children. Implicit in this fact is that the chart reflects a retroactive evaluation made for two children including the child who was not dependant at the time of the application.

[13] The calculation of arrears must be adjusted to retroactively evaluate only those arrears that arise as a result of the payor's actual income for the child dependant at the time of the application.

[14] The arrears as stated in paragraph 117 and 134, therefore, ought to be corrected.

[15] An adjustment must be made to reflect only the child remaining dependant in accordance with my Decision at paragraphs eight to 14.

[16] The difficulty that arises is how does one apportion the actual payments made in 2008 (\$6,883.97) and (\$8,775.42) in 2009 between the two children.

[17] I asked Ms. Sturmy for her submissions on this point .

[18] The submission dated July 26th, 2013 correctly identifies the obvious difficulty arriving at an apportionment of the amount paid between the two children dependant in 2008 and in part 2009.

[19] There are many variables and frailties associated with these variables when adopting a particular formula or allocation.

[20] In the applicant's submissions no credit is given in either 2008 or 2009 for the actual payments made for child support to the older child.

[21] That would give an unfair advantage to the payor, as the payee had in her household two children who were the recipients for whom child support award was made.

[22] In 2008, according to the evidence, the Court accepted that their third oldest child was dependant up to and including August 2009. So, in 2008 there were two dependent children.

[23] In 2009 there were two dependant children for eight months and one for the remaining four months.

[24] In 2008, Maintenance Enforcement actually collected \$6,883.97. In 2009 they collected \$8,775.42.

[25] Ms. Sturmy suggested that I credit the payor for the total amount paid as if it was paid for the one child with no adjustment for the second child. In other words, to credit the applicant with the entire amount. However, that would create a fiction that the payments were made for that one child.

[26] Alternatively, I could divide it arbitrarily into four, recognizing that the order on which the Maintenance Enforcement Program was operating is an order that was created in September of 2002, when all four children were dependant. However, that would produce another fiction, that there four children were dependant in 2008 and 2009.

[27] An additional problem arises if one recognizes that a review of the Record of Payments reflects that payments were made by garnishee, the amounts do not reflect the child support award and there were previous arrears up to and including 2008 and 2009.

[28] Having heard evidence in other cases as to the manner of crediting garnished payments, I recognize that the Court does not have in this case evidence or a method of determining whether the payments made in each month were first put towards the arrears and thereafter current monthly payments or the reverse, or some other payment's formula was applied.

[29] Short of delaying this matter further and ordering an officer from Maintenance Enforcement to appear to put their methodology on the record, I have no evidence in this case as to how they would have adjusted the arrears with garnished payments in various amounts.

[30] Thus, the Court can not fairly apportion the actual payments collected in each month as if they were payments for that year on then current child support.

[31] Without that information I would be arbitrarily adjusting the arrears for 2008 and 2009 child support under the assumption that all payments in that years should be credited towards the current maintenance without knowing how that reflects on the previously accumulated arrears.

[32] The Maintenance Enforcement Program is in the best position to recalculate and apply a formula to adjust for the findings of fact as they are in a better position to determine how much of the payments each year went to current support and how much went to arrears and how that would effect their final arrears statement.

[33] Due to these frailties, I have concluded that the fairest way to apportion the actual payments made is to have Maintenance Enforcement decide according to their ordinary formula which money collected was collected and applied to current child support and which was paid against previously accumulated arrears.

[34] Once that determination is made, that which was paid for the then current year shall be divided equally between the children then dependant . Then the amount owing for the dependant child shall not be reduced by that which was paid for the third child (*the child **not** dependant at the date of the application*).

[35] To assist them in determining how to apportion the actual payments made, I have restated my conclusions in the decision that for the one child, who was dependant at the time of the application (the youngest), we will make the adjustments to reflect actual income back to January of 2008.

[36] They may then recalculated the arrears based on my findings of fact as outlined in my decision..

[37] Thus, for the 2008 year, there were two children that were dependant and half of the actual amount paid towards then current child support shall be apportioned to each child.

[38] The portion paid for the third oldest child shall not be credited as a payment reducing the arrears relating to the youngest child.

[39] In my retroactive evaluation for the one child for 2008, on his then current income of \$110,396, aside for what he should have paid for the third oldest child, the payor should have paid \$918 for one child for a total payment of \$11,016 for that child.

[40] I understand in so doing that there is a principle of the economies of scale in the creation of the guidelines. I must however exclude the third child and the result may be somewhat arbitrary.

[41] However, the problems of recalculation are in part the result of the delay in bringing this application forward in a timely manner . This delay rests with the applicant.

[42] I refer this to Maintenance Enforcement to adjust the arrears for that child.

[43] Likewise in 2009, the retroactive assessment for the dependant child based on actual income results in a monthly payment of \$184 for an annual total of \$2,208.

[44] To determine how much of the actual payments made were applied to then current child support as opposed to arrears, I again refer to Maintenance Enforcement to follow their usual formula.

[45] All other arrears are as previously calculated.

[46] Thus, subject to the retroactive adjustment from January 2008 forward all else remains the same.

[47] The Order shall be drafted and sent to Maintenance Enforcement for recalculations based on these findings of fact.

[48] The matter may return to the court for further evidence as to effecting the Decision as amended by this addendum.

[49] Ms. Sturmy shall draft the order.

Moira C. Legere Sers, J.