

SUPREME COURT OF NOVA SCOTIA
(Family Division)

Citation: Morphy v. Powell, 2018 NSSC 257

Date: 20181115
Docket: SFHISOS 088561
Registry: Halifax

Between:

Elizabeth P. Morphy

Applicant

and

Thomas William Powell

Respondent

LIBRARY HEADING

Judge: The Honourable Associate Chief Justice Lawrence I. O’Neil

Hearing: September 18, 2018, in Halifax, Nova Scotia

Issues: 1. Is the adult child dependent under Ontario legislation?
2. Is retroactive or ongoing child support payable?

Summary: The parties separated in January 2000. The child was born ***, 1999. The subject child was made a ward of the Ontario child protection authorities in Kingston, Ontario in 2009 because of his extreme behavioural issues which the family could not manage. Mr. Powell lost contact with the child.

In 2014 through the Court process, Mr. Powell learned the child had been transitioned to his mother and now lived in Ottawa. Mr. Powell was then living in Nova Scotia and was serving as a member of the Canadian Forces.

This matter began as an Interjurisdictional Support Orders ‘ISO’ Application filed in Ottawa. However, Ms. Morphy attorned to the jurisdiction of the Nova Scotia Court to have Mr. Powell’s past and ongoing child support obligation determined. Ms. Morphy and her counsel participated by videoconference from Ottawa.

The mother sought retroactive child support to 2011 and ongoing child support claiming the child remains dependent as defined by the *Ontario Family Law Act*, R.S.O. 1990, c. F.3.

The Court ordered ongoing child support based on the Nova Scotia tables because the child was pursuing full-time education.

The Court did not order any child support for the period before January 1, 2017, finding Mr. Powell was not guilty of blameworthy conduct prior to 2014 and thereafter that Mr. Powell had probably overpaid for periods since January 1, 2017 and any obligation that existed for the period

January 1, 2015 to January 1, 2017 was probably met by Mr. Powell's overpayment after January 1, 2017.

Keywords:

Retroactive child support; dependent child; disabled child; ISO; Interjurisdictional Support Order

Legislation:

Nova Scotia Child Support Guidelines
Ontario Family Law Act, R.S.O. 1990, c. F.3

Cases Considered:

D.B.S. v. S.R.G., [2006] 2 SCR 231, 2006 SCC 37
Senos v. Karcz, 2014 ONCA 459
Howell v. Howell, 2017 NSSC 128

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Counsel: Joshua Vickery, Counsel for Elizabeth Morphy
Thomas Powell, Self-Represented

By the Court:

Introduction

[1] The Applicant has agreed to have this matter concluded in Nova Scotia. She has attorned to the jurisdiction of the Nova Scotia Courts for the purpose of concluding the child support issues that arise herein. She and her counsel participated by videoconference from Ottawa.

[2] This Court received an Interjurisdictional Support Orders Act ‘ISO’ application from the mother on July 23, 2013. She sought child support for her son, born **, 1999 in Ottawa, Province of Ontario. That application was filed in Ottawa on February 21, 2013.

[3] Ms. Morphy, the mother, was residing in Ottawa at the time of her application for child support and was in receipt of social assistance of some type. Ms. Carole Fortier, an Ottawa city family support worker assisted her with this application and continues to do so. More recently, Ottawa legal counsel has participated on behalf of the Applicant.

[4] In her 2013 application, the Applicant noted the father/Mr. Powell's social insurance number; referenced his posting to the Halifax navy base and his marriage to Brenda Powell, his current partner. In addition, the phone and fax number for his place of work were provided in the ISO forms. In the same 2013 application, Ms. Morphy identified Mr. Powell's mother, Patricia Powell, a resident of Kingston, Ontario as someone who would know where to contact Mr. Powell. Ms. Patricia Powell's telephone number was also provided.

[5] In her 2013 filings, Ms. Morphy declared further that she and Mr. Powell began living together in 1996 and separated in January 2000. This initial filing sought a determination that Mr. Powell is the parent of the child. The Applicant also filed 'ISO' form F and requested child support based on an imputed income of \$50,000. In response to a 'form' question about Mr. Powell's sources of income, she stated Mr. Powell was with the Canadian Armed Forces; had been posted to Halifax for the past year and further that Mr. Powell was expecting monies from a family member's estate.

[6] Later, on the same form she stated that as recently as May 2009 Mr. Powell had worked at a McDonald's restaurant in Kingston, Ontario.

[7] Attached to her 'ISO' application is a separation agreement dated July 2002 between the parties which required Mr. Powell to pay Ms. Morphy \$218 per month as child support, based on his income of \$24,600. Subsequently, the child lived with Mr. Powell in Kingston, Ontario. The payments were to continue until *inter alia* the child reached eighteen (18) years of age unless thereafter, the child enrolled in a full-time program of studies; the child turned sixteen (16) years of age or older and withdrew from paternal control or the child ceased to live with the mother.

[8] Paragraph 4 of the agreement also required the father to provide annual financial disclosure to the mother, at the written request of the mother. Paragraph 6 provided that while in receipt of social assistance, the amount of child support may not be an amount less than that which would be determined by the *Child Support Guidelines*.

[9] Accompanying the Court application herein is a copy of an e-mail exchange dated June 25, 2013 between Ms. Fortier and an official with the Ontario Ministry of Community and Social Services. That official recommended that the 2002

agreement should be registered with the Court and made an order of the Ontario Court and she recommended that a variation application be filed. In response to this suggestion, Ms. Fortier asked that the agreement nevertheless be forwarded the way it is and explained it was not registered because “he had no ability to pay prior to joining the forces”. It appears no order to pay child support currently exists other than the one out of this Court effective January 1, 2017.

[10] Following receipt of the ‘ISO’ application in Nova Scotia and beginning in November 2013, Court officials in Halifax made efforts to learn Mr. Powell’s address for service and did so.

[11] By Notice of Hearing issued March 10, 2014, Mr. Powell was required to appear at a Halifax Court on May 6, 2014. A local address for Mr. Powell was provided to the Sheriff’s department to effect service as was his employer’s Halifax address.

[12] Mr. Powell attended at the downtown Law Courts in Halifax on March 13, 2013 and accepted the application herein.

[13] In response, Mr. Powell filed a Financial Statement being ‘ISO’ form K, dated April 1, 2014. He estimated his 2014 income as \$52,807.71; reported that he lived with Brenda Powell; with two (2) of her children then seventeen (17) and nine (9) years of age and that he and Brenda Powell also had a daughter then six (6) years of age. He attached his Notices of Assessment and Tax Returns for 2012 and 2013, which show line 150 income of \$36,174 and \$56,170 respectively.

[14] On April 1, 2014 Mr. Powell advised the Court he was scheduled for sea duty. As a result, the matter was rescheduled to May 2, 2014.

[15] In May 2014, the Court heard from Mr. Powell. He stated his belief that the subject child had been taken into care in 2009 and remained in care. He questioned the veracity of Ms. Morphy generally and described ongoing harassment of him by her. The matter returned to Court July 7, 2017 for a status report.

[16] The Court was sufficiently concerned about Mr. Powell’s allegations about Ms. Morphy that a referral was subsequently made by the Court to the Community Services offices in Nova Scotia and Ottawa on August 21, 2015. A transcript of

proceedings on both May 1, 2014 and July 7, 2015 was forwarded with the referral to those authorities.

[17] In addition, on May 1, 2014 the Court requested further information from Ms. Morphy:

Request for Further Information

TAKE NOTICE that on May 1, 2014 this Court heard the application for an ISO Support Application made by Elizabeth Morphy El Karaoui on the 21st day of February, 2013. On that date, the Court adjourned the hearing without day for the filing of information.

YOU ARE DIRECTED to contact the Applicant or appropriate authority in the reciprocating jurisdiction to request the following information or documents:

- All relevant orders including:
 - Orders from the Family Court of Ontario (Ottawa municipality), if such orders exist;
 - Any orders from the child protection agencies in Kingston, Ontario or Ottawa, Ontario that exist and that Ms. El Karaoui has access to;
 - Any order which confers upon Ms. El Karaoui the authority to care for M.W.P., born **, 1999.

AT THE HEARING ON MAY 1, 2014 an interim order was not made.

[18] A response was received from Ms. Fortier on September 24, 2014. She provided copies of orders of the Ontario Court and relevant to the subject child's legal status and history. The orders received revealed the following concerning the history of the subject child:

Orders:

- (a) June 11th, 2009 - The Honourable Justice Robertson at Kingston (transfer order)

The transfer of the proceeding from the Superior Court of Justice at Kingston to Ottawa was approved. The order continued the interim care and custody of the Children's Aid Society.

- (b) September 2nd, 2009 - Justice V.J. MacKinnon at Ottawa (a temporary order)

The Children's Aid Society of Ottawa applied for and was granted interim care and custody with access at the discretion of the Society. Return date

set as September 24th, 2009.

- (c) December 15th, 2009 - Justice J.A. Blishen at Ottawa (a final order)

The Children's Aid Society of Ottawa assumed care of the child who became a Society ward for a period of four months with access by the mother, Elizabeth Morphy at the discretion of the Society. Access by the father, Thomas Powell to also be at the discretion of the Society. Return date set as April 13th, 2010.

- (d) July 2nd, 2010 - Justice J.A. Blishen at Ottawa (a final order)

The Children's Aid Society of Ottawa continued as to care for the child until July 21st, 2010, at which time the child was to be returned to the mother under a six (6) month supervision order. Return date set as January 19th, 2011.

- (e) February 22nd, 2011 - Justice P. Kane at Ottawa (a final order)

The Children's Aid Society of Ottawa is again the Applicant. The father is noted in default and the step-mother is noted in default. The Court ordered termination of the Supervision Order. (The order was signed May 26th, 2011).

- (f) October 30th, 2013 - Justice P.F. Lalonde at Ottawa (a temporary order)

The Children's Aid Society of Ottawa was the Applicant. The child was placed in the temporary care and custody of the Children's Aid Society at Ottawa. Matter adjourned to December 12th, 2013. (The order was signed December 30th, 2013).

- (g) April 8th, 2014 - Justice V.J. MacKinnon at Ottawa (a final order)

The Children's Aid Society of Ottawa was the Applicant. The Court ordered that the child be made a ward for a period of six months commencing December 25th, 2013. Matter adjourned to June 19th, 2014. (Order signed June 2nd, 2014).

- (h) June 19th, 2014 - Justice A.D. Sheffield at Ottawa (a temporary order)

The Applicant was the Children's aid Society of Ottawa. The Court ordered the child to be placed with the mother, Elizabeth Morphy under a supervision order. The matter was adjourned to August 5th, 2014. (Order from June appearance signed August 22nd, 2014).

Note: this order continues to show Mr. Powell as a resident of Kingston, Ontario notwithstanding Ms. Morphy's February 21, 2013 filing revealed she believed Mr. Powell was living in Nova Scotia.

[19] What is now known is that for periods of time since 2013 when this support application was being processed, the child was not in fact in the care of Ms. Morphy.

[20] On May 14, 2015, more than seven (7) months after receiving the first package of information from Ms. Fortier, this Court received further information from Ms. Fortier.

- The Child's Status

[21] In Ontario, the age of majority is eighteen (18). For the subject child, now twenty (20) years of age, to trigger an ongoing child support obligation requiring Mr. Powell to pay Ms. Morphy child support, the child must be found to be dependent and in the care of Ms. Morphy.

[22] Section 31 of the *Ontario Family Law Act*, R.S.O. 1990, c.F.3 is the governing statute:

Obligation of parent to support child

31 (1) Every parent has an obligation to provide support, to the extent that the parent is capable of doing so, for his or her unmarried child who,

- (a) is a minor;
- (b) is enrolled in a full-time program of education; or
- (c) is unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents. 2017, c. 34, Sched. 15, s. 1.

Same

(2) The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control.

[23] This statute further provides that an application for the support of a dependent need not always be made by a parent:

33 (3) An application for an order for the support of a dependent who is the respondent's spouse or child may also be made by one of the following agencies,

[24] There is a significant volume of evidence supporting the conclusion that this child was troubled and a behavioural challenge since a young age. Both parents have conceded this. The records of the social workers managing his care in the 2010-2014 period when this child was in and out of care offer additional support for this conclusion.

[25] More recently, the child's pediatrician authored two reports and commented on the child's functionality. These reports were filed on behalf of Ms. Morphy as exhibits 'G' and 'H' to her affidavit filed June 21, 2018.

[26] In her May 2, 2015 letter, Dr. Gillies, being exhibit 'G' to Ms. Morphy's affidavit filed June 21, 2018, summarized the child's history to that date.

[27] In her more recent report dated May 23, 2014, attached to the same affidavit, Dr. Gillies summarized the child's health as follows:

I am writing as the pediatrician who has followed M.P. for his mental health and developmental concerns for the past 12 years.

M. is now 18 years old and will now be graduating from pediatric care. Over the time that I have followed him, he has dealt with many challenges in his life and several significant mental health diagnoses: severe Attention Deficit Hyperactivity Disorder, significant Anxiety Disorder (Separation, Generalized, Social and School Avoidance), Oppositional Defiant Disorder, Learning Disability and Attachment Problems. He has had repeated assessments by mental health professionals, one hospitalization lasting a month, over two years in foster care during his middle childhood and numerous gaps in his school attendance, which have all been challenges to his resilience. Fortunately, he has great strengths, including a wicked sense of humour and a warm and loving relationship with his mother, both of which have helped him to cope through difficult times. He is also a physically healthy young man, although until very recently, he has appeared about 3 years younger than his age, due to a combination of very delayed constitutional growth, slight build and his very young facial appearance. Being such a late bloomer would be a challenge for an adolescent. He has handled this with his own unique blend of coping.

Because of the unusual challenges he has faced, his development has progressed slowly relative to his same age peers, both mentally and physically. At 18, M. is still psychosocially younger than his age. M. has made great progress over the time that I have followed him. However, he will need the continued support of the adults in his life, especially his parents, to help him to reach his potential as he continues to gain in skills, knowledge and while he completes his secondary education in a supportive school setting.

I wish M. and his family well as they move forward. Please do not hesitate to contact me if further information is required. I can be reached at the phone number and address noted above.

[28] Also in her affidavit sworn June 21, 2018, Ms. Morphy says the child has not been in school since February 1, 2018 because of health issues. More particularly, because of some undesirable side effects of his medication, doctor(s) decided to reduce the medication that is meant to stabilize his aggressive behavior and ADHD. The result is that the child's behavior became more of an obstacle to his continuing his education.

[29] The leading Supreme Court case setting out the principles that should govern when retroactive child support should be ordered is referred to as *D.B.S. v. S.R.G.*, [2006] 2 SCR 231, 2006 SCC 37.

[30] I am satisfied that Mr. Powell believed his son was in the permanent care of child protection authorities and only through this process has he learned the child's legal status since child protection authorities in Kingston, Ontario assumed the child's care in 2009.

[31] In his submissions before the Court in 2014, he stated what he believed and why he believed it.

[32] Subsequently, this Court received copies of Court orders issued by Ontario Courts that confirm the child was in and out of state care a number of times after 2009. These orders also reveal that even after the subject application was filed by Ms. Morphy, in February 2013 the child was placed in the care of the state.

[33] These orders further confirm that as recently as June of 2014, almost eighteen (18) months after this application was filed, the relevant child protection Court orders identified a Kingston address for Mr. Powell. As stated earlier, Ms. Morphy's 2013 application stated Mr. Powell lived in Nova Scotia.

[34] Therefore, I am satisfied that Mr. Powell only received effective notice of Ms. Morphy's claim in early 2014 with service upon him. Even then, he had good reason to treat the claim for child support with some suspicion.

[35] The order of an Ottawa court dated April 8, 2014 (issued June 2, 2014) shows Mr. Powell's address as being Kingston and says service on Mr. Powell is dispensed with.

[36] Mr. Powell was required to be away with the Canadian Navy for periods of time after March 2014 and the Court itself was required to request further information from Ms. Morphy following the May 1, 2014 appearance. Additional material relevant to the status of the child and his relationship with Ms. Morphy in recent years was received until May 2015.

[37] Mr. Powell was justifiably skeptical of Ms. Morphy's claim that she was caring for the child. As stated, we now know that for months in 2014, well after her claim for child support was filed, the child had been in the care of child protection authorities. Notwithstanding this reality, Ms. Morphy persisted with her claim for child support from Mr. Powell on the basis that the child was in her care throughout.

[38] The foregoing is relevant when determining the significance of the parties' 2002 agreement wherein Mr. Powell agreed to *inter alia* pay child support. In my view, he reasonably believed the obligations under the 2002 agreement had become of no effect after his son became a ward of social services in 2009. Even before 2009, the child's care had been entrusted to him.

[39] He is therefore not guilty of blameworthy conduct for not paying child support prior to the effective notice of the claim for child support. I find notice became effective in March 2014 with his appearance before me.

[40] For the same reasons, this is not an appropriate case to order a retroactive calculation of child support for any period before March 2014.

[41] The question then becomes what is Mr. Powell's obligation to pay child support for the period after March 2014.

[42] By order of this Court granted January 6, 2017, he is required to pay ongoing child support in the amount of \$603 each month based on an income of \$66,000. This quantum was later reduced by order granted September 21, 2017 to \$558 each month to reflect the Nova Scotia child support tables and not the Ontario child support tables, by order granted September 21, 2017.

[43] That obligation continues until altered by this or another Court of competent jurisdiction.

[44] I see no basis for interfering with the quantum provided for in the January 6, 2017 order as amended.

- **Ongoing Child Support**

[45] Ongoing child support will reflect Mr. Powell's current income and the Nova Scotia child support tables. The obligation to pay child support will terminate by the end of June 2019 or earlier if the child's current academic year ends earlier. A review will occur when the current academic year ends.

[46] Any arrears of child support which have accrued after January 1, 2017 are payable at the rate of \$50 per month commencing January 15, 2019. I have considered the considerable financial pressures to which Mr. Powell is subject in coming to this conclusion.

- **Retroactive Child Support**

[47] This is not an appropriate case to order a retroactive payment of child support for the period March 2014 – January 1, 2017.

[48] The information before the Court does not support a conclusion that this child is incapable of supporting himself. It does, however, support a conclusion that this child is not yet doing so because of his ongoing need to complete his education and training. He is also addressing the need to re-structure his medical care including a determination of the most effective medication for him.

[49] He therefore continues to be a dependent child in the care of Ms. Morphy.

[50] The subject child reached eighteen (18) years of age on May 22, 2017. The focus of this decision is narrowed to an assessment of Mr. Powell's obligation for the period March 2014 – January 1, 2017, a period of two- and one-half years.

[51] The evidence of the child's circumstances beginning in 2013 is incomplete.

[52] Mr. Powell has been paying support for a period of time after the child reached eighteen (18) years of age. It is not clear that the child was in attendance at an educational institution and unable to support himself since reaching eighteen (18) years of age. In my view, it is more likely than not that Mr. Powell has been assessed a child support obligation for some months after January 1, 2017 for which he was not under an obligation.

[53] In my view, any overpayment that has arisen since January 1, 2017 is a fair offset to any underpayment of child support that may exist for the period prior to January 1, 2017. It is difficult to do a precise accounting given gaps in the evidence.

[54] Although I have not found the subject child dependent because of a disability, that issue has been raised, I wish to make reference in *obiter* to some case law wherein other Courts reference a parent's obligation to support an adult disabled child who is also supported by the state.

[55] The obligation of a parent to support a child whose special needs may render the child permanently dependent on a parent or the state was discussed in *Senos v. Karcz*, 2014 ONCA 459. In that case, balancing the state's obligation to support an adult child with those of a parent was commented upon. Justice Strathy, as he then was, found an obligation to pay an amount less than the table amount for a twenty-five (25) year old who suffered from schizophrenia, lived with his mother and received social assistance.

[56] Justice Robert M. Gregan of this Court in *Howell v. Howell*, 2017 NSSC 128 at para 35-42 also discussed a similar circumstance:

[35] Having determined Kyle is still a child of the marriage the court must consider the issue of the obligation of Cynthia Howell to pay child support. Cynthia Howell through her counsel, argues that Kyle receives social assistance and that should be considered.

.

[41] I repeat there is nothing before me in evidence to suggest that Kyle's needs are not being met at the present time by his present income.

[42] I will recognize the obligation of Cynthia Howell to pay child support for Kyle, but set child support at \$0 for Kyle from October 2013 onwards. This is in keeping with the approach set out in various authorities. I will refer first to the Child Support Guidelines in Canada 2015. Julian Payne and Marilyn Payne and there the authors say as follows:

Where an adult child is returned to the care of the parent because of illness or disability states subsidies received for that child under provincial statutes have been regarded as a relevant consideration in determining what amount if any the other parent should be required to contribute to that child's support. In the absence of general parental obligation to support adult children, the obligation of the state to support the adult child may be placed ahead of that of the parents having regard to their financial circumstances. But the fact that the state has agreed to subsidize a special needs child necessities of life does not automatically relieve parents of their support obligation under the Divorce Act. If they can reasonably supplement the bare necessities provided for by the state. While an order for table amount of child support under s. 3.1(a) and 3.2(a) of the Federal Child Support Guidelines may be an appropriate by reason of the disabled child's receipt of government assistance, an order for child support may be appropriate under section 3.2(b) of the Guidelines having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to the support of the child [Payne, Julien D, and Payne, Marilyn A: Child Support Guidelines in Canada, 2015. Irwin Law Inc, August 2015. P. 222].

Conclusion

[57] Mr. Powell is to receive a progress report on his son's education on or before January 1, 2019, including (1) confirmation the child is in fact in full-time attendance at an educational institution; (2) confirmation of the day and month the program of education will end; and (3) evidence of his son's attendance/participation in the program as required by the program.

[58] He is to pay ongoing child support pursuant to the terms of the current order.

[59] Mr. Vickery is ordered to prepare the order within two (2) weeks of receipt of this decision.