

78 Nfld. & P.E.I.R. 170

Ploughman v. Ploughman

Newfoundland Supreme Court, Trial Division

Steele J.

Judgment: October 30, 1989

Ploughman v. Ploughman

William Robert McLeod Ploughman (petitioner) v. Georgina Mabel Ploughman  
(respondent)

Georgina Mabel Ploughman (petitioner by counter-petition) v. William Robert  
McLeod Ploughman (respondent by counter-petition)

Newfoundland Supreme Court, Trial Division

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Judgment: October 30, 1989

Docket: Doc. 1001, 00850

Counsel: **David C. Day**, Q.C. , for Georgina Mabel Ploughman.

Graham Watton , for William Robert McLeod Ploughman.

Steele, J. :

1 The petitioner (Dr. Ploughman) asks for a determination of his arrears of periodic support and maintenance payments owing the respondent (sometimes called the mother or Mrs. Jones) pursuant to two orders of Furlong, C.J.; secondly, a ruling respecting children of the marriage; and, thirdly, an application to vary the maintenance order to the extent that it be terminated and the arrears cancelled and forgiven or, in the alternative, the debt reduced.

2 Dr. Ploughman and the mother were married August 27, 1959, and had five children, one by adoption:

William - born November 22, 1960

Robert - born April 14, 1963

Gina Kristan - born November 13, 1965

Kenneth - born November 21, 1965

Lisa - born April 12, 1967.

Kenneth is of unknown parents and was adopted in August 1969.

3 The parties were divorced by decree nisi October 16, 1972, and made final by decree absolute

February 8, 1974. Custody of the five children was originally granted to Dr. Ploughman (see *Ploughman v. Ploughman* (1972), 3 Nfld. & P.E.I.R. 489 (Nfld. T.D.) . He was ordered to pay spousal maintenance of \$1,200. per year.

4 The mother married her present husband, William Jones, February 14, 1974, and they reside in Ottawa. Mrs. Jones is employed with the Canadian Red Cross and her husband is manager of a branch of the Bank of Nova Scotia.

5 By order of Furlong, C.J., filed February 26, 1974, the decree nisi was varied and custody of Kenneth, Gina Kristan and Lisa was granted to the mother (see *Ploughman v. Ploughman* (1974), 5 Nfld. & P.E.I.R. 431 (Nfld. T.D.) . Dr. Ploughman continued to have custody of William and Robert. At that time no children's maintenance was ordered.

6 On May 9, 1975, Furlong, C.J., ordered custody of William and Robert also be given to the mother. In that same order it was provided that Dr. Ploughman pay to the mother maintenance for the five children of \$400. per month. That sum was not prorated amongst the five children. In her affidavit of October 27, 1988, Mrs. Jones says that Dr. Ploughman has never made any spousal maintenance payments and there is owing \$1,600. for the period from the date of the granting of the decree nisi to the date of remarriage. She also states that Dr. Ploughman has made only one payment of \$500. on account of children's maintenance and that was pursuant to a verbal arrangement in September/October of 1987.

7 William is now 28 years of age, married and living in British Columbia. Robert is 26 years, has a learning disability, and lives with Mrs. Jones' mother in St. John's. Gina Kristan is 23 years of age and left school in February of 1984 while in grade XIII. She worked from March of 1984 to March of 1988. She was involved in a very serious motor vehicle accident in March of 1988, sustaining head injuries. Her husband-to-be, a passenger in the front seat, was killed. She was unable to work as of the date of the hearing in November of 1988. Gina Kristan is expected to make a good recovery; she is taking two courses at Carlton University in Ottawa. Son, Kenneth, is now 23 years of age. He moved to Vancouver and is employed. Lisa is the youngest, age 22, and she completed high school in June of 1987. She is a single mother, employed, residing with her mother in Ottawa.

8 The chronology of Dr. Ploughman since 1972 is confounding. He is 51 years of age. As stated above, Dr. Ploughman and the mother were divorced in October of 1972. On March 9, 1974, he married Marva Smallwood, and in September, 1975, they moved to British Columbia living there for approximately three years. In the spring of 1978, he petitioned for bankruptcy. While Dr. Ploughman and his wife Marva were in British Columbia, the mother instituted maintenance enforcement proceedings without any success. At one point, a warrant for civil arrest was issued but not executed. The marriage of Dr. Ploughman and Marva Smallwood produced one son, Jonathan, born December 17, 1974, while they were still living in St. John's. During 1978, Dr. Ploughman and Marva moved to Houston, Texas. They were divorced in Texas on June 24, 1981. At the time of that divorce, Jonathan was six years old. Marva obtained custody and Dr. Ploughman was ordered to pay her maintenance for their son in the amount of \$400. monthly commencing July of 1981.

9 Dr. Ploughman was in Houston, Texas, approximately four years, returning to Newfoundland in August of 1982. He began the practice of medicine at Jeffreys on the West Coast and shortly thereafter

at Bay Roberts, on the East Coast.

10 In June of 1984, Dr. Ploughman married Elizabeth Dawe. She died some six weeks after the marriage - July 15, 1984.

11 On July 2, 1985, Dr. Ploughman again declared personal bankruptcy, the second time in seven years. He was discharged June 8, 1987.

12 In December of 1987, Dr. Ploughman married Yvonne Gould. She had two children from a previous marriage, ages 9 and 11. The couple separated in August of 1988. They had no children from the marriage.

13 Subsequent to Dr. Ploughman's return to Newfoundland from Texas in 1982, he had a drinking problem requiring hospitalization for a period in 1986/87. He also had difficulties with the Provincial Medical Board, and at one point was under suspension for 18 months. At the end of February 1987, he was permitted to return to the practice of medicine and did so at Hawkes Bay, on the Northern Peninsula, Newfoundland. In September of 1987, he commenced medical practice at Port Saunders, also on the Northern Peninsula. He still resides and practices medicine at that place.

14 The following figures adduced at the hearing, while admittedly incomplete, do give a general indication of Dr. Ploughman's income from 1975 to 1988:

Private Worker's Period	Practice	Compensation	Locums	Other
1975:				
May (Bay Roberts)	\$ 7,500.00	\$ 500.00		
June (Bay Roberts)	\$ 7,500.00	\$ 500.00		
July				
August				
September				
October				
November				
December				
1976				
(Victoria, B.C.)	\$ 95,000.00			
1977				
(Victoria, B.C.)	\$ 95,000.00			
1978				
(Victoria, B.C.)	\$ 95,000.00			
1979				
(Texas) (U.S.)	\$ 78,000.00			
1980				
(Texas) (U.S.)	\$ 78,000.00			
1981 U.S.				
(Texas)	\$110,000.00			
1982				
(Texas, Alta., Man.)	\$15,750.00	U.S.		
	\$ 70,000.00			
1982				

(Jeffries, Nf.)	\$ 3,750.00			
1982-83				
(Nf.)	\$ 23,206.90			
1983-84				
(Nf.)	\$146,510.50	\$ 600.00		
1984-85				
(Nf.)	\$101,785.13	\$ 600.00		
1985-86				
(Nf.)	\$ 18,243.27			
1986-87				
(Nf.)	\$ 9,276.39			
1987-88				
(Nf.)	\$111,050.86	\$ 600.00		
1988				
(6 months)	(Nf.)	\$ 66,905.13	\$ 300.00	
<hr/>				
(Totals)	\$932,978.18	\$3,100.00	\$19,500.00	\$180,000.00
Summary				
Totals, 1975 - 1988 \$1,135,578.18				

15 This application by Dr. Ploughman makes three requests: firstly, that the Court fix the amount of the arrears of periodic support and maintenance payments owing by Dr. Ploughman to the mother pursuant to orders of Furlong, C.J., filed October 16, 1972, and May 9, 1975; secondly, and I quote, "the definition of 'child of the marriage' as it relates to the *Divorce Act, 1985* , and our particular factual situation"; and thirdly, an application pursuant to section 17 of the *Divorce Act, 1985* , to vary the order of Furlong, C.J., filed May 9, 1975, to the extent that all Dr. Ploughman's obligations to pay maintenance and support to the mother be terminated and all arrears of maintenance be cancelled and forgiven or, in the alternative, reduced. The second request respecting "child of the marriage" is ill-defined, but I take it to mean a determination as to any of the children who may still be considered a child of the marriage or, if not, an indication when they ceased to be a child of the marriage.

16 I shall consider the second question first, that is, the matter of determining the children of the marriage, as that issue may possibly affect the calculation of the arrears of maintenance.

17 A "child of the marriage" is defined by section 2 of the *Divorce Act, 1985* , as follows:

'child of the marriage' means a child of two spouses or former spouses who, at the material time,

(a) is under the age of sixteen years, or

(b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

Based upon the definition of a child of the marriage, I am satisfied that none of the children are deemed to be children of the marriage:

### **William**

18 William ceased school attendance in June of 1978, while in grade XII, and in November of 1978,

he joined the Canadian Armed Forces. Accordingly, I find that William ceased to be a child of the marriage in November of 1978.

### **Robert**

19 Robert, who has a learning disability, moved to St. John's in April of 1982 and continues to live in St. John's with Mrs. Jones' mother. I am satisfied that Robert ceased to be a child of the marriage in April of 1982.

### **Gina Kristan**

20 This child left school in February of 1984, while in grade XIII and was employed for the period from March of 1984 to March of 1988. As previously mentioned, Gina was seriously injured in a motor vehicle accident in March of 1988. Her vehicle was struck by a drunken driver. Gina had been employed for four years and had entirely withdrawn from her parents' charge. I do not consider her a child of the marriage within the definition in section 2 of the *Divorce Act*. The accident causing the serious injury and short-term disability was extraneous to the marriage and the collapsed parental relationship. In my opinion, Gina Kristan ceased to be a child of the marriage when she left school and went to work for an extended period in March of 1984. At that point, her independence was intended to be final and she had in actuality withdrawn from her parents charge. Her emancipation was not legally rescinded by mere fortuitous tragic chance.

### **Kenneth**

21 Son, Kenneth, ceased attending school while in grade XII, during March of 1986. At that time he left home and the custody of his mother. I find that Kenneth ceased to be a child of the marriage in March of 1986.

### **Lisa Diane**

22 According to paragraph 27 of the Affidavit of Mrs. Jones, Lisa completed high school (grade XII) in June of 1987. She is a single mother with one child and at the date of the hearing was employed. Lisa is now 22 years of age and I consider her no longer a child of the marriage. Her financial straits - and no doubt they are very real - arise not by reason of illness, disability or any cause naturally contemplated and emanating from her tender years, but from an untimely pregnancy that imposes no legal burden on a long detached father. I find that Lisa Diane withdrew from her father's charge upon graduation from high school in June of 1987.

### **Arrears Of Maintenance**

23 In February and March of 1985, the parties executed in agreement establishing a repayment schedule for the arrears of maintenance payments imposed by the order of Furlong, C.J., May 9, 1975. No payments were ever made pursuant to that agreement. Without intending to determine the legal validity or enforceability of that agreement, I do consider it helpful and revealing. It is the best evidence that in the winter of 1985 the parties agreed upon the arrears of maintenance for the children. Putting

aside the question of the validity of the agreement, I consider it an acknowledgement by Dr. Ploughman of his total indebtedness. It was voluntarily executed by the parties with independent legal advice. The acknowledgement is not so startling as the calculation is not much more than simple multiplication.

24 In the calculation of the arrears of maintenance, the other significant date is the date that Lisa, the youngest child, ceased to be a child of the marriage. As I have indicated, that was June of 1987. I take the position that the order of Furlong, C.J., filed in May of 1975, is valid and in full force and effect until varied, rescinded or suspended. None of those events occurred here. The argument that the payment of maintenance of \$400. should be prorated between the children admittedly is logical, but that was not the order made. The order as filed makes no reference to prorating and it stands until altered. There is another facet admittedly of dubious legal weight.

25 It is difficult to ignore the fact that Dr. Ploughman has made only one payment since the date of the order in 1975 and, secondly, although William and Robert ceased to be children of the marriage in 1978 and 1982 respectively, the cost of living has increased drastically since 1975. That unremitting rise in living expenses was absorbed solely by the mother. I know of no legal reason or even moral justification in the circumstances existing to prorate the maintenance payment of \$400.

26 I calculate the arrears of maintenance and support payments to be \$49,185.59, made up as follows:  
[See Table on page 177]

27 Since 1975, Mrs. Jones has expended a very large sum of money on behalf of the children by way of legal fees and costs attempting to collect maintenance arrears. In determining Dr. Ploughman's debt - arrears of maintenance payments - I lack authority to add on legal expenses incurred in the past. I am not fixing or establishing an award - just assessing a debt due under the order of Furlong, C.J. For this reason, I am unable to include legal costs of collection to date. However, as we shall see, Mrs. Jones' legal costs are taken into consideration under the third question posed on this application.

### **Cancellation Or Reduction Of Arrears**

28 The third issue raised by Dr. Ploughman is actually an application for the cancellation and forgiveness of the full maintenance debt or, in the alternative, a reduction in the arrears of maintenance payments. Section 17(1) (a), (3),(4), (6), (7), (8) of the 1985

May 9/75 to March/84	\$42,400.00
April/84 to March/85 (12 mo.)	\$ 4,800.00
April/85 to March/86 (12 mo.)	4,800.00
April/86 to March/87 (12 mo.)	4,800.00
April/87 to June/87 (3 mo.)	1,200.00
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	\$15,600.00
Arrears of spousal payments (October 16/72 to February 14/74)	\$ 1,600.00
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	\$59,600.00
Less: received by execution order	\$ 9,914.41
one payment Sept.-Oct./85	500.00
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\$10,414.41 10,414.41

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Total Arrears \$49,185.59

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*Divorce Act* reads as follows:

17(1) Order for variation, rescission or suspension. A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses;  
or

.....

(2) ...

(3) Terms and conditions. The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

(4) Factors for support order. Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change.

.....

(6) Conduct. In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

(7) Objectives of variation order varying order for support of former spouse. A variation order varying a support order that provides for the support of a former spouse should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the former spouses pursuant to subsection (8);

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

(8) Objectives of variation order varying order for support of child. A variation order varying a support order that provides for the support of a child of the marriage should

(a) recognize that the former spouses have a joint financial obligation to maintain the child; and

(b) apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation.

29 The Court has the jurisdiction to cancel and forgive arrears of maintenance payment. *Payne's Commentaries on the Divorce Act, 1985* at page 65 expresses that proposition this way:

Subsection 17(1) of the *Divorce Act, 1985* expressly empowers the court to vary, rescind or suspend a spousal or child support order prospectively or retroactively. Accordingly, the court may order a retroactive variation of a subsisting order, with a consequential remission of all or part of any arrears that have previously fallen due: see *Payne's Divorce and Family Law Digest* (formerly entitled *Payne's Digest on Divorce in Canada*), 34.16 'Suspension and remission of arrears' and 35.28 'Prospective and retrospective variation; suspension and remission of arrears'; and see *infra*, subheading 'Consent Orders'.

30 I have outlined briefly Dr. Ploughman's activities from 1972 to date and unquestionably it is a narration that includes financial adversity. Nevertheless, upon reading Mrs. Jones' affidavit, and in particular paragraphs 28 to 35, and upon hearing her viva voce evidence, I am convinced that her financial hardship in providing for the children has been no less harsh. She did have the support of her husband, though his contribution was minimal. His business failed and he also had to support children from another marriage. When one reviews the professional income of Dr. Ploughman since the mid-70's, and giving full recognition to his financial turmoil, it is still difficult to understand his position that he was unable to make any financial contribution whatsoever to his children's support and welfare. One is apt to surmise that his sense of priorities were awry.

31 From the very beginning, Dr. Ploughman failed to cooperate and Mrs. Jones, of necessity, incurred inordinate legal fees and costs in her efforts to enforce maintenance payments. Dr. Ploughman's travels and sojourn out of the Province, firstly to British Columbia and then inexplicably to Houston, Texas, have no clearly-demonstrated motive. The purpose of that seven-year circuit and absence from the province was never elucidated or unravelled and inevitably, rightly or wrongly, gives rise to conjecture and suspicion. On that point I give no verdict but, whatever his destination and aspirations may have been, seemingly his children lacked rank.

32 On the evidence before me, I am of opinion that cancellation or forgiveness of any part of the maintenance debt is not warranted - nor is it a solution. It would appease Dr. Ploughman, but from Mrs.

Jones' perspective, it would only add to her embitterment - and her ordeal. There is no assurance that any abatement in the arrears of maintenance payments will mean any offering from Dr. Ploughman. None has been promised, and his record of payment is nonexistent.

33 It seems to me the court would be far more sympathetic to an application by Dr. Ploughman to reduce his maintenance arrears if he evinced an honest and sincere intention to honour the maintenance order of Furlong, C.J., of May 9, 1975. Surely, the best evidence of an intention of that nature would be consistent sizable payments for a period necessary to reveal good faith.

34 It must be obvious that a matter of this nature and complexity can best be settled out of court, with the aid of solicitors, rather than in the adversarial form of a courtroom. It seems apparent that at some stage the parties will have to reach an accommodation on the payment of the arrears of maintenance. This matter has been a crushing millstone for 17 years. The mother has endured years of pecuniary deprivation and the father has abided continual financial and family upheaval. For both, the intractable problem of maintenance arrears is disheartening. Unmistakably, the mother has sensed the inequity of a Court order awarded 17 years ago but never honored. If the parties cannot reach an accord, they are at liberty - have the right - to again apply to the court for relief.

35 For these reasons, the application by Dr. Ploughman to have his arrears of maintenance payments cancelled and forgiven, or in the alternative, reduced, is dismissed.

36 The respondent, Georgina Mabel Jones, shall have her costs of this application, to be taxed.

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