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IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
[Cite as: S.D. v. J.G., 2006 NSFC 47]

BETWEEN: **S. D.**
-APPLICANT

AND

J. G.
-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATE HEARD: NOVEMBER 28, 2006

DECISION DATE: DECEMBER 14, 2006

APPEARANCES: LINDA RANKIN FOR THE RESPONDENT

DECISION

ISSUES: Interjurisdictional Support Orders Act, Child Maintenance Guidelines
Relevance of the Schedule II standard of living test for very low income parties.
Can high drug costs be considered a ground for undue hardship pursuant to section 10 of the Guidelines?
Can high drug costs of one party otherwise be considered in doing the standard of living test under section 10?

RESULT: The combination of the Respondent's low income, low household income, high costs for transportation and drugs, result in an order that there be no child support payable at present

By the Court:

1. The Applicant S. D. is a resident of New Brunswick and the Respondent J. G. is a resident of Nova Scotia. S. D. has applied, via the Interjurisdictional Support Orders Act, for a maintenance order from J. G. for the support of two children, aged 12 and 9 who reside with her and her common-law husband.

2. The Respondent acknowledges that he is the father of one of the children and indicates that he “may” be the father of the other. For reasons that will become evident I have not found it necessary to address the issue of parentage of the second child for the purposes of this decision. Mr. G. also lives common-law, his partner works part-time, and they have two children of their own aged 3 and 1.

3. The most salient fact in this case is that the Respondent and his new family, and, for that matter the Applicant and her family, live in grinding poverty, far below the “poverty line” or what the Child Maintenance Guidelines would call, Schedule II, the “low income measures amount”.

4. Pursuant to section 13 (a) of the Interjurisdictional Support Orders Act the substantive law to be applied is the law of New Brunswick, which would specifically be the Family Services Act, 1983, c. 16, s. 1 as amended. The section dealing with child support is section 115 which for the purposes of this decision is similar to the child support provisions of the Family Maintenance Act of Nova Scotia.

THE APPLICANT

5. The Applicant's evidence is in the documentation forwarded through the regular channels. As indicated, she lives common-law with her partner and the two children for whom support is being sought. She receives social assistance in the amount of $901 per month, ($10,812 per year). Her partner works part time and earns, according to the documentation, $184.79 per month, ($2,217.48 per year). The household annual income therefore, absent the Child Tax Credit and any GST rebate, is $13,029.48. The documentation submitted reveals only negligible assets. The Applicant has done some part time work in the retail sector before, but apparently, for reasons unknown, she is not now employed outside the home.

THE RESPONDENT

6. The Respondent gave his evidence by way of affidavit and various financial documents (Exhibits #1 and 2), and from the stand. His common-law partner also testified; her financial documentation is Exhibit #4. I accept their evidence, as, from what I can tell, they were both being entirely straightforward and sincere.

7. Since April of this year Mr. G. has worked as a cook in a local chain restaurant. He works "...between 25 and 30 hours a week", (I use the figure 27.5 hours), earning $8.00 per hour. Calculated annually that would give him an income of $11,440. His partner currently works "...between 15 and 20 hours every two weeks" (I put the figure at 17.5 hours bi-weekly), and earns $11.38 an hour. Calculated annually that would give her an income of $5,396.30. (Her documentation projected an annual income of $8,855 but I can't see how she would get that income working the number of hours that she reports). Thus, the

family income, once again absent the Child Tax Credit and any GST rebate cheque, would be $16, 836.30. This couple too have negligible assets.

8. The Respondent suffers from diabetes. He gave evidence as to the expenses caused by that disease and I accept that they run about $300 per month for the insulin, syringes and related paraphernalia, ($3,600 per year). He has no drug plan nor access to any. I don't have medical evidence on this particular point beyond a scribbled note from a doctor (Exhibit #3) confirming that Mr. G. is a diabetic and insulin-dependent. I will take judicial notice of the seriousness of this disease and that a failure on the part of Mr. G. to take the medicine as prescribed could lead to severe health problems, even premature death.

UNDUE HARDSHIP

9. According to the applicable 'table', Nova Scotia's, the Respondent would pay, for the two children with the Applicant, the sum of $121.64 per month at his income of $11,440. He pleads "undue hardship".

10. The Respondent and his current partner have dependent children. That brings him clearly within the parameters of section 10 of the Child Maintenance Guidelines, (s. 10 (2) (d)). Nova Scotia has enacted it's own Guidelines in full with a few changes to suit provincial legislation and terminology. For our purposes the distinction is without consequence but New Brunswick has simply adopted the Federal Child Support Guidelines *per se* with the regulations making a few changes of wording, including to s. 10 (2) (d), which would read:

> (2) Circumstances that may cause a parent or child to suffer undue hardship include the following:...
> (d) the parent has, under the *Family Services Act* or the *Divorce Act* (Canada), a legal duty to support any other child as defined in those Acts;

11. The second aspect of section 10 of course is that in order for the Respondent to be afforded any relief from the obligation to pay the 'table amount', he will have to meet the criteria of section 10 (3) of the Guidelines, which in both provinces reads:

> (3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child maintenance under any of Sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other parent.

In both provinces subsection (4) of 10 (2) reads:

> (4) In comparing standards of living for the purpose of subsection (3) the court **may** use the Comparison of Household Standards of Living Test referred to in Schedule II. (Emphasis added)

12. Both households in this instance consist of two adults and two children. The Applicant has a household income of $13, 029.48 using the criteria of sections 15 to 20 of the Guidelines. That of the Respondent is $16, 836.30. I acknowledge that one can, in a section 10 analysis, include both the Child Tax Credit and the GST rebates, (Pelletier v. Kakaway (2002), 31 R.F.L. (5th) 132 (Sask. C.A.). I have not done so as, given the respective incomes and the family compositions, I assume the amounts would be comparable, and would not change the essential rationale I intend to articulate.

13. There is an air of unreality, of the Mad Hatter, in the attempt to discern, as between these two families mired in desperate poverty, which one of the two has the higher standard of living. The Respondent's household has the higher income of the two, but their transportation expenses, (in Exhibit #2), made necessary in largest part by the necessity of both adults getting back and forth to work and their rural location, total $671 per month, ($8,052 per year), almost half their household income. Compare that to the $65 monthly ($780 per year) reported as transportation expenses by the Applicant and her partner between them and any advantage that the Respondent might be said to have had, illusory though it may have been, has disappeared.

14. The court is obliged not to afford relief to the Respondent if convinced that his household has the higher living standard. In doing so the court appears to be free to employ whatever reasonable yardstick that yields a realistic assessment of the circumstances. In dealing with the micro budgets of the very poor the employment of Schedule II is irrelevant to the point of being fatuous. The truth is that both households are having trouble keeping body and soul together and neither party has any spare money whatsoever. The court cannot in conscience ask the Respondent's family to tighten their belts any further than they already are. The effect would be devastating for them and have only a marginal impact, if any, on the lives of the children of the Applicant.

15. I find that the Respondent would suffer an undue hardship if obliged to pay the 'table amount'. Further, I do not find that his household's living standard would be higher if relief from the table amount were afforded him. Lastly, given

his finances I will not order him to pay any child maintenance at present.

THE RESPONDENT'S DRUG COSTS

16. It is surprising that an item such as extraordinary or even, to use a word in current usage, "catastrophic" drug costs for a would-be payor or even a dependent of the payor, is not specifically included in the grounds for undue hardship in section 10. In the alternative at least one would think, given the wording of section 10 (2), (i.e. "**include** the following"), that a ground of a similarly compelling nature as those set forth in subsections (a) through (e), could be considered. I read the decision of the N.S. Court of Appeal, (which technically would be binding here as I am to apply New Brunswick law), to hold that the (a) to (e) list in 10 (2) is exhaustive. (See Gaetz v. Gaetz (2001), 191 N.S.R. (2d) 143, espy. para 15). (I concede that Justice Hall of the Supreme Court did not read the Gaetz decision to hold that (a) to (e) are exhaustive; see Wainman v. Clairmont (2004), 221 N.S.R. (2d) 152.)

17. If , as should be permitted, this court could consider the Respondent's substantial, at his income crippling, drug costs as a possible undue hardship ground then, again insofar as it is relevant at these income levels, the impact on the living standards calculations, certainly in conjunction with the other factors, would be determinative. The Respondent would even more unambiguously 'pass' the standard of living test and the result would be an order that there be no maintenance payable at present.

OBITER

18. In circumstances such as these, the whole matter of the extraordinary drug costs is so urgent, so non-negotiable, that the Guidelines should enable a court to simply deduct them directly off the parent's income without having to go through the undue hardship analysis. In this instance, deducting the Respondent's $3,600 per year drug costs from his $11,440 income would result in a net income figure of $7,840, below the amount where the 'table' would require any payment.

19. The drug cost is unusually high, in absolute terms and particularly in terms relative to his income. In no sense of the word is it a discretionary figure; there is no room for it to be adjusted. It will not admit of being weighed against another cost to see which one is the more important; it is completely non-negotiable. He can't get rid of the expense by going bankrupt or cutting back on his access. The amount is not adjustable depending on his income as with maintenance obligation for a dependent.

20. It is more analogous to a business person's cost of doing business, in a way, than it is to the grounds under section 10 (2). If he does not spend this money on drugs he will earn no income. He will earn no income because he will be too ill or dead. Under circumstances such as these where there is so little income in the first place and exhorbitant drug costs, a comparison of the standards of living seems a little beside the point.

DECISION

21. The Respondent will not be ordered to pay child support. I will order however that on or before June 1 every year, commencing June 1, 2007, he shall send to the Applicant a copy of his Income Tax return and Notice of Assessment to enable her to keep track of his financial situation.

22. The court will prepare the order.

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Bob Levy, J.F.C.