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IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

Cite as: H.P v. D.P. , 2006 NSFC 48

BETWEEN:

**H. P.
-APPLICANT**

AND

**D. P.
-RESPONDENT**

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATE HEARD: DECEMBER 13, 2006

DECISION DATE: DECEMBER 18, 2006

**APPEARANCES: SHARON COCHRANE FOR THE APPLICANT
MELANIE PERRY FOR THE RESPONDENT**

DECISION

Issues: Access, 'section7 expenses', undue hardship, spousal support, low income parties

Result: 'Standard' Access order, spousal support awarded despite not being warranted per the Spousal Support Advisory Guidelines, section 7 expenses not awarded, undue hardship claim not made out

By the Court

1. The Applicant H. P. and the Respondent D. P. are married and, as of May of this year, separated. They have two daughters soon to be 15 and 11 years old. By agreement the children reside with their mother subject to access to the father. On the basis on his 2005 Income Tax return showing an annual income of \$24,459 interim child support was set by consent interim order dated September 25, 2006 at \$362 per month. That has been paid.

ISSUES

-The terms of Mr. P.'s ongoing access to/parenting times with the two girls needs to be resolved.

-Ms. P. claims that the amount of child support is inadequate and seeks a finding of 'undue hardship' and a higher child maintenance award.

-Ms. P. seeks a contribution to 'section 7' expenses.

-In addition, or in the alternative, Ms. P. seeks spousal maintenance.

ACCESS

2. The parties had obviously reached an agreement as to where the children would live. I don't recall being told whether they agreed on a joint or a sole custody order. For the purposes of this decision I will call Mr. P.'s time with the children by the generic name access but that is not to imply a sole custody preference. In fact, from what I have heard, a joint custody order would be appropriate.

3. Shortly after the parties separated in May Mr. P. took up residence with and,

he says, subsequently, a relationship with, another woman. There is an issue between the parties about the comfort level of the girls with Mr. P.'s new relationship. As a result, the children have yet to spend an overnight with Mr. P. since the separation. Ms. P. says they do not want to spend the night, and both parties agree that they have not asked to do so. Mr. P. maintains that the children are picking up signals (my phrase) from their mother and are responding to her wishes rather than expressing their own views. He says that the girls appeared to be comfortable with his new woman friend and her child.

4. Neither party spoke ill of the other as a parent and from what I can tell both are loving and committed parents who have been, and wish to be, very involved in their lives and upbringing.

5. Recently Mr. P.'s living arrangements have changed. Since December 4 he has resided with his parents although he says that he still sees the other woman. He said that he wasn't sure whether the relationship would survive. He described it at present as "wishy-washy".

6. Apparently the request on behalf of Ms. P. for full financial disclosure not only from Mr. P. but from this other woman caused a lot of friction in his household. She absolutely declined to provide the disclosure, and to quote from Mr. P.'s affidavit, "...we realized that we can no longer live together...(so) I proceeded to move out...". There is some ambiguity in that statement as to whether they live separately because the friction eroded their relationship or whether they are living separately so as to avoid having the other woman provide this information.

7. Mr. P.'s recent move in with his parents is or might be a factor as far as the maintenance is concerned but it also impacts on the access question as, since Mr. P. now lives with his parents, this perhaps removes or lessens any problem or alleged problem the girls might have had with this new girlfriend of their father. The evidence is that the girls have a good relationship with their grandparents and that they would be welcome at the grandparents' home for visits, including overnights.

8. Mr. P. believes that Ms. P. is behind the reluctance on the part of the girls thus far to express any wish to spend overnights with him. He cited several incidents with respect to the younger daughter which he maintains are strongly suggestive of the child feeling uneasy, in the presence of her mother, to express affection towards her father or pleasure in his company. He urges the court to set forth a specific access regime, including every second weekend, because this would remove from the shoulders of the girls the feeling that they have to choose between their parents. Mr. P. also argues that this would also get around a practice which he said Ms. P. has engaged in of scheduling activities for the girls at times that wind up thwarting his access.

9. Ms. P. disagrees that she has influenced or has attempted to influence the girls. She says, simply, that they are unsettled by the separation and the sudden appearance of the new girlfriend for whom they were and are not yet ready. She insists that they do not want to spend the nights with Mr. P. although I couldn't tell from her testimony whether the fact that the father is now living with his parents made a difference in their views.

10. Obviously the test as to access or custody is that of the children's best interests. Obviously too we are dealing with somewhat older children, in or on the

threshold of their teens. Frankly, I am unable to determine which parent is correct in his or her assessment of the situation. I believe both parents were speaking the truth as they see it and most likely they are both correct to a degree.

11. I believe it is important for the girls to ‘normalize’ things as soon as possible to enable them to come to terms with their parents’ separation and that their lives will be different. I don’t believe it is in their best interests that their father, for whatever reason, is marginalized or that they feel under pressure, from either parent, to walk the plank, that is to say to perceive that the happiness of their mother or father rests on their shoulders. These are not really young children and would be entitled to a say, but it seems the decision is not coming easily to them, either because of perceived pressure or, just as likely, because the newness and strangeness of the situation has them confused and unsure what to do.

12. I will order that the children spend every second weekend with their father from Friday at supper time to Sunday at 6:30, beginning Friday, January 5. I will also order that the children will be in the care of their father from December 26 at 10:00 a.m. to noon on Friday, December 29. There will also be a provision for telephone access, that access extend until Monday evening at 6:30 if the Monday following Mr. P.’s weekend is a holiday. The order will also provide for shared times at March break, two weeks in the summer, access, but not overnight, one weekday from after school, and such other access as the parties may agree upon.

13. I got the impression that Mr. P. recognized and was sensitive to what the girls were going through. I am presuming that he will be respectful of their wishes and of the need, perhaps, to proceed slowly. In particular he should go slowly in introducing or attempting to integrate the children with any new partner. I think the

children are quite likely to be somewhat uneasy about that. It may well have nothing to do with whether this other woman is a nice person or not; it is more likely the enormity of having another person in the mix of what they had always known for a family. It may be prudent for the parties to refer the girls to counselling if they sense that the adjustment problems continue.

FINANCES

14. Mr. P. works at a local building supply store. In 2005, according to his Income Tax return he earned \$24,459, being a combination of salary plus overtime and bonuses. This year he reports an income of \$1,966 monthly which would work out to \$23,358 for the year and this does seem to be in line with what could be extrapolated from his pay stub for the year-to-date totals as of the pay period ending November 4, 2006. No issue was raised about lowering the 'table' amount payment to reflect the lower income so I'll leave it where it is at \$362 per month.

15. He says he pays his parents \$60 per week (he quotes \$240 per month) to live in their home and that he buys his own food at a cost of \$200 monthly. He reports several other monthly expenditures most or all of which are modest. One can question the odd one here and there, particularly given the ultra-modest budget put forward by Ms. P., but, in truth he has been reduced to living with his parents and his budget is not much beyond bare bones.

16. Ms. P. has it no better. Maybe not as good. She works at a local retail concern grossing approximately \$1,225.80 monthly. Some weeks she could get a few more hours here and there but on the other hand if she or one of the girls are ill and she misses work as a result, she doesn't get paid. I accept the \$1,225.80 figure.

On top of that she receives the child support in the amount of \$362 monthly and the Child Tax Credit in the amount of \$605.40 monthly for a total monthly income of \$2,193.20.

17. One needn't belabour the point: at her income she struggles to make ends meet and to provide extras for her girls. Ms. P. and the girls continue to reside in the matrimonial home. Housing costs, (mortgage, tax, insurance and electricity), consume forty per cent of her gross income. Those costs are not exorbitant, but still, it is hard to see where the money will come from to maintain the present arrangement. Counsel for Mr. P. picked over her budget meticulously and scavenged a few dollars here and there which theoretically could be saved, maybe shaving the monthly deficit to under a hundred dollars. The fact is however is that she's poor and that she and the girls are already going without many things which others would take for granted. She is finding it particularly hard to provide "extras" for the girls such as swimming, expenses associated with the school band and band trip for the older child, and basketball for the younger child, who will, next school year, also have band expenses.

18. Ms. P.'s request for assistance comes under three headings: 'section 7' expenses, 'undue hardship' or in the alternative spousal support. I propose to award spousal support to Ms. P. in the amount of \$175 per month payable the first of every month commencing January 1, 2007 and until the earlier of eighteen months, the sale or some resolution of the matrimonial home issue or an order from the Supreme Court in the context of Divorce proceedings. (I have no information as to the equity or possible equity that the parties might have in that property.) That figure, I believe is the absolute maximum that can be squeezed out of him and it will be onerous for him. That said, it will still amount to only a small change for

the better in the lives of Ms. P. and the girls.

19. In doing so I am acutely aware of how little money Mr. P. has, how he has already been reduced to living with his parents, and that he would need to have some money to be able to meaningfully exercise access with his children. I am further well aware that applying the Spousal Support Advisory Guidelines he would not be ordered to pay spousal support. I have referred myself to section 4 of the Maintenance and Custody Act and in my view subsections (d) and (e), having to do with the responsibility of Ms. P. for the children, come to the fore. I have the strong sense that the girls' world has been rocked by their parent's separation and that they have lost so much, that they are doing without many things, and that they may well, if things keep on, lose their home too.

20. It is possible, albeit barely, and absolutely necessary, given the precariousness of the situation of the mother and daughters, to pare Mr. P. back to the absolute minimum in the short run. He can put a hold on his RRSP contributions for a time and trim some already modest monthly expenses somewhat. The spousal support will be tax deductible, affording him some relief, and he can have the tax deduction changed at source.

21. Frankly, it is the attractiveness of the availability of the tax deductibility that has inclined me towards the spousal support route rather than a further award, for whatever reason, of child maintenance. I am mindful of the admonition in the legislation to deal with child support before spousal support, and that has been done, at least so far as the 'table amount' is concerned. Since the section 7 expenses being claimed are for 'extras' and in any event are tiny in comparison with the real needs, it simply makes sense to deal with the real issue and that is that

Ms. P. needs more money to run the household.

22. I did not find that the Applicant's circumstances amounted to an 'undue hardship' although I appreciate the argument that the high mortgage costs which Ms. P. is carrying may be said to be an 'unusually high level of debt' per section 10 (2) (a) of the Child Maintenance Guidelines. Similarly, I do not accept the argument that the income of the other woman be imputed to Mr. P. for the purposes of a comparative standard of living test. That argument is premised on a theory as to what lies behind his recent split, but the evidence leaves it just that, a theory.

23. I would ask Ms. Cochrane to please draft the order.

Bob Levy, J.F.C.