

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

Citation: *L.L.F. v. J.D.*, 2004 NSFC 19

Date: 20041201

Docket: 02Y018903

Registry: Yarmouth

Between:

L.L.F

Applicant

v.

J.D.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: Before The Honourable Chief Judge John D. Comeau Chief Judge of the Family Court of Nova Scotia

Heard: Heard at Yarmouth, Nova Scotia, July 21, 2004
final brief received from counsel November 15, 2004

Written Decision: December 1, 2004

Counsel: Hugh E. Robichaud, for the Applicant Gregory S. Barro, for the Respondent

THE APPLICATION:

[1] The applicant is requesting the following relief:

“ custody and maintenance for the child Z. born November [...], 2003 with reasonable

access to the Respondent. Special medical expenses being medical for a total of \$180.00.”

ISSUES:

[2] 1. Quantum of child support.

FACTS:

[3] The application was made in January 2004 and was delayed by paternity testing with the results being the probability of J.D. being the biological father greater than 99.99999 %.

[4] The issue is quantum of child support and the Respondent has raised the issue of undue hardship. He is under a duty to support another person (his wife) in the amount of \$1000.00 per month as well as \$201.00 maintenance for the child of the marriage. It is clear the Respondent meets the first step (criteria) in a claim of undue hardship. There has been a comparison of the household standard of living test (schedule II of the guidelines) prepared and submitted by counsel for the Respondent. This calculation requires the annual income of each person in each household. Household is defined in schedule II as follows:

“ household means a spouse and any of the following persons residing with the spouse.

(a) any person who has a legal duty to support the spouse or whom the spouse has a legal duty to support;

(b) any person who shares living expenses with the spouse or from whom the spouse otherwise receives an economic benefit as a result of living with that person, if the court considers it reasonable for that person to be considered part of the household; and

(c) any child whom the spouse or the person described in paragraph (a) or (b) has a legal duty to support.”

[5] Counsel for the Applicant objects to the standard of living calculation prepared by the Respondent’s counsel. The argument is made in a post-trial brief supported by a copy of separation agreement dated May 29, 1997. This separation agreement is between the Applicant’s common law spouse and his wife. A transcript of evidence given in this court on May 19, 2004 containing the testimony of the Applicant’s common law spouse has also been provided to the Court and counsel. This transcript deals with the financial situation of the common law spouse who comes under the definition of “household” in schedule II.

[6] The financial information to calculate standard of living is as follows:

Applicant Payee

[7] Applicant

Guideline income - federal and provincial taxes = annual income \$3,805.70 - 0 = \$3,805.70

[8] Applicant common law spouse

Guideline income - federal and provincial taxes = annual income \$49,848.43 - \$10,816.89 = \$43,837.24

RESPONDENT PAYOR:

[9] Guideline Income - federal and provincial taxes = annual income \$38 909.88 - \$3 721.53 = \$35 188.35

Total household Income = \$35 188.35

[10] It is clear that a common law spouse's income should be used to determine household income see **ZORN v. ZORN** [1998] B.C.J. No. 3014(S.C.)

[11] Counsel on behalf of the Applicant argues that her common law spouse's income to be included in the household income for calculation of standard of living should be reduced by \$15 492.00 for the following reasons:

1. Required to pay child support in the amount of \$866.00, 6 month (separation agreement) annual cost - \$10 392.00.
2. By separation he is required to keep life insurance with his ex-wife as beneficiary (\$250 000.00) with a monthly premium of \$425.00, annual cost - \$5100.00.

[12] There is also some question as to whether part of his income is a non-recurring amount. (income from RRSP's)

[13] Counsel also argues that \$212.00 child support should not be used in the calculation of household income because it is an amount paid for the benefit of the children. This is included in the Applicant's line 150 income which would be required to be included in schedule II calculation in any event.

[14] Argument is made that the household income of \$38 910.00 used by the Respondent to calculate household income is not his real income. His is the sole shareholder of a corporation and he draws a salary and other benefits that he controls. That the company provides him with a vehicle and pays his rent to his mother which he admits is calculated below market value for similar accommodations.

THE LAW:

[15] The Nova Scotia Child Maintenance Guidelines are applicable.

“ Undue hardship

10 (1) On the application of a parent, a court may award an amount of child maintenance that is different from the amount determined under any of Sections 3 to 5, 8 or 9 if the court finds that the parent making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

Circumstances that may cause undue hardship

(2) Circumstances that may cause a parent or child to suffer undue hardship include the following:

(a) the parent has responsibility for an unusually high level of debts reasonably incurred to maintain the parents and their children prior to the separation, where the parents cohabited, or to earn a living;

(b) the parent has unusually high expenses in relation to exercising access to a child;

(c) the parent has a legal duty under a judgment, order or written separation agreement to maintain any person;

(d) the parent has a legal duty to maintain a child, other than a child to whom the order relates, who is

(i) under the age of majority, or

(ii) the age of majority or over but is a dependent child within the meaning of clause 2 (c) of the Act; and

(e) the parent has a legal duty to maintain any person who is unable to obtain the necessaries of life due to an illness or disability, including a dependent parent within the meaning of clause 2 (d) of the Act.

Standard of living must be considered

(3) Despite a determination of undue hardship under subsection (1), an application under the 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 Section 3 to 5, 8 or 9, have a higher standard of living than the household of the other parent.

Standard of living test

(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.

Reasonable time

(5) Where the court awards a different amount of child maintenance under subsection (1), it may specify, in the child maintenance order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

Reasons

(6) Where the court makes a child maintenance order in a different amount under this Section, it must record its reasons for doing so.”

[16] Schedule II of the Nova Scotia Child Maintenance Guidelines makes allowance for unmarried parents and refers to schedule II of the Federal Child Support Guidelines.

“Schedule II
(Subsection 10 (4))

COMPARISON OF HOUSEHOLD STANDARDS OF LIVING TEST

Definitions

1. The definitions in this section apply in this Schedule.

“child” {enfant}

“child” means a child of the marriage or a child who

- (a) is under the age of majority; or
- (b) is the age of majority or over but is unable, by reason of illness, disability or other cause to obtain the necessities of life.

“household” {menage}

“household” means a spouse and any of the following persons residing with the spouse

- (a) any person who has a legal duty to support the spouse or whom the spouse has a legal duty to support;
- (b) any person who shares living expenses with the spouse or from whom the spouse otherwise receives an economic benefit as a result of living with that person, if the court considers it reasonable for that person to be considered part of the household; and
- (c) any child whom the spouse or the person described in paragraph (a) or (b) has a legal duty to support.

“taxable income” {revenu imposable}

“taxable income” means the annual taxable income determined using the calculations required to determine “Taxable Income” in the T1 General form issued by the Canada Customs and Revenue Agency.

Test

2. The comparison of household standards of living test is as follows:

STEP 1

Establish the annual income of each person in each household by applying the formula (A - B)

where

A is the person’s income determined under sections 15 to 20 of these Guidelines, and

B is the federal and provincial taxes payable on the person’s taxable income.

Where the information on which to base the income determination is not provided, the court may impute income in the amount it considers appropriate.

Step 2

Adjust the annual income of each person in each household by

- (a) deducting the following amounts, calculated on an annual basis:

- (i) any amount relied on by the court as a factor that resulted in a determination of undue hardship, except any amount attributable to the support of a member of the household that is not incurred due to a disability or serious illness of that member,
- (ii) the amount that would otherwise be payable by the person in respect of a child to whom the order relates, if the pleading of undue hardship was not made,
 - (A) under the applicable table, or
 - (B) as is considered by the court to be appropriate, where the court considers the table amount to be inappropriate.
- (iii) any amount of support that is paid by the person under a judgement, order or written separation agreement, except
 - (A) an amount already deducted under subparagraph (i), and
 - (B) an amount paid by the person in respect of a child to whom the order referred to in subparagraph (ii) relates; and
- (b) adding the following amounts, calculated on an annual basis:
 - (i) any amount that would otherwise be receivable by the person in respect of a child to whom the order relates, if the pleading of undue hardship was not made.
 - (A) under the applicable table, or
 - (B) as is considered by the court to be appropriate, where the court considers that table amount to be inappropriate.
 - (ii) any amount of child support that the person has received for any child under a judgment, order or written separation agreement.

STEP 3

Add the amounts of adjusted annual income for all the persons in each household to determine the total household income of each household.

STEP 4

Determine the applicable low-income measures amount for each household based on the following:

Low-income Measure

Household Size Low-income Measures Amount

One person

1 adult \$10,382.00

Two persons

2 adults \$14,535.00

1 adult and 1 child \$14, 535.00

Three persons

3 adults \$18,688

2 adults and 1 child \$17,649

1 adult and 2 children \$17,649

Four persons

4 adults \$22,840

3 adults and 1 child \$21,802

2 adults and 2 children \$20,764

1 adult and 3 children \$20,764

Five persons

5 adults \$26,993

4 adults and 1 child \$25,955

3 adults and 2 children \$24,917

2 adults and 3 children \$23,879

1 adult and 4 children \$23,879

Six persons

6 adults \$31,145

5 adults and 1 child \$30,108

4 adults and 2 children \$29,070

3 adults and 3 children \$28,031

2 adults and 4 children \$26,993

1 adult and 5 children \$26,993

Seven persons

7 adults \$34,261

6 adults and 1 child \$33,222

5 adults and 2 children \$32,184

4 adults and 3 children \$31,146

3 adults and 4 children \$30,108

2 adults and 5 children	\$29,070
1 adult and 6 children	\$29,070
Eight persons	
8 adults	\$38,413
7 adults and 1 child	\$37,375
6 adults and 2 children	\$36,337
5 adults and 3 children	\$35,299
4 adults and 4 children	\$34,261
3 adults and 5 children	\$33,222
2 adults and 6 children	\$32,184
1 adult and 7 children	\$32,184

STEP 5

Divide the household income amount (Step 3) by the low-income measures amount (Step 4) to get a household income ratio for each household.

STEP 6

Compare the household income ratios. The household that has the higher ratio has the higher standard of living.”

CONCLUSION/DECISION:

[17] Both parties agree the Respondent has met the first step (requirement) in a claim of undue hardship, in that he is under a legal duty to support another person and a child. The issue is what is the income of both households, for the purpose of calculation with respect to the standard of living test.

[18] It is conceded that as per step 2(a)(iii), the child support paid by the applicant's common law spouse should be deducted from the household income of the applicant. Her common law spouse is required under a separation agreement, to pay an insurance premium of(\$425.00). This amount has not been disputed as follows:

“The husband shall maintain the wife as beneficiary in trust for the children, of his life insurance, in the amount of(\$250,00.00). He shall maintain this designation for as long as he is required to pay child support”

[19] Although counsel for the respondent objects to this being deducted in the calculation of household income, it is a valid deduction under step 2(a)(iii) of schedule II. It is in fact, for the benefit of the children and is not an exception referred to in the schedule.

[20] As suggested by the Applicant's counsel, the income of the Applicant's common law spouse should be reduced by (\$15,492.00). For the purpose of the household income of the Applicant, the Court sets the amount at a total of (\$31,157.24) which is the Applicant's common law spouse's income after taxes of \$39,031.54 (less \$15,492.00) and the Applicant's income of (\$3,805.70) plus possible child support if undue hardship were not claimed of (\$3,912.00) (see

schedule II, step 2(b)(i)). The Applicant's line 150 income contains child support received required to be added in the calculation (see schedule II, step 2(b)(ii)).

[21] Determination of the Respondent father's income who is self-employed is not as simple as considering line 150 of his income tax return.

[22] In SNOW v. WILCOX(SNOW), 1999 NSCA 163 Flinn, J. A. discussed how self-employed income should be dealt with.

“In the case of a self-employed businessman, like the respondent, there is very good reason why the Court must look beyond the bare tax return to determine the self-employed businessman's income for the purposes of **Guidelines**. The net business income, for income tax purposes, of a self-employed businessman, is not necessarily a true reflection of his income, for the purpose of determining his ability to pay child support. The tax department may permit the self employed businessman to make certain deductions from the gross income of the business in the calculation of his net business income for income tax purposes. However, in the determination of the income of that same self employed businessman, for the purpose of assessing his ability to pay child support, those same deductions may not be reasonable.

In the recent case of VERMEULEN v. VERMEULEN, [1999] N.S.J. No. 19 (Q.L.), this Court upheld the decision of a trial judge who went beyond the self-employed spouse's income, as declared in his tax return. Chief Justice Glube, writing for the Court, said the following:

In my opinion, the decision of Justice Hall to impute the sum of \$30 000.00 as income is quite reasonable. It is one thing to deal with your income tax to provide most favourable conclusion, but it is another matter if that affects the person's ability to make support payments.

A similar conclusion was reached by Associate Chief Judge Comeau of the Family Court in the case of C.A.L. v. R.V.W., [1998] N.S.J. No. 542 (Q.L.).

[23] Reference is made to the Respondent father's corporate benefits (he is the sole shareholder of the Company). He is provided with a vehicle and the financial statement of the company at fiscal years end, December 31, 2003 shows retained earnings of \$44, 571.00 under shareholder's equity. Expenses show 2003 income of \$16, 628.00 with salaries paid of \$36, 452.00. Vehicle expense was \$14,259.00. Depreciation of \$4, 803.00 which is merely a book entry.

[24] It also shows dividends of \$9,000.00. The Respondent says he needs the retained earnings to operate the Company (line of credit). His 2003 personal income tax return shows employment income of \$27,649.88 and dividends from taxable Canadian corporation of \$11, 250.00. T-5 shows actual amount of dividends at \$9,000.00, the former being the taxable amount.

[25] Both ZORN and SNOW supra are authorities for the fact that the Court can impute income to any of those persons that come under the definition of household in schedule II but in this particular case it is not necessary to arrive at household income this way.

[26] The Court makes the following finding with respect to income of the parties respective households for the purpose of calculation of standard of living.

Applicant's Household Income: Total income: \$31, 257.24

Respondent's Household Income:

[27] At this point in time, although the Respondent has a number of corporate benefits the court believes the fairest determination of his income is that on line 150 of his income tax return total household income of \$38,909.88 less \$3,912.00

guideline support as if a claim of undue hardship was not made (see schedule II step 2(a) (ii). Total household income for the Respondent \$34, 997.88 - \$3,721.53 Income Tax. He is also paying spousal support of \$1000.00 for another person and child support of \$201.00 for another child. Deducting these amounts makes a total household income of \$16,864.35.

[28] The discussion of his self-employed income and the benefits therefrom is relevant to the issue of whether paying the guideline amount would cause undue hardship to the Respondent.

Standard of Living calculation:

APPLICANT: Household Income \$31, 251.24

Low Income Measure for household (2 adults, 3 children - \$23, 879.00)

Step 5 - Adjusted annual income/low income measure =household ratio income

$$\$31, 257.24/\$23, 879.00 = 1.30$$

RESPONDENT: Household Income \$16, 864.35 Low Income Measure for household (1 adult) - \$10, 382.00)

Step 5 - Adjusted annual income/low income measure =household ratio income

$$\$16,864.35/\$10 382.00 = 1.624$$

[29] The Respondent has the higher standard of living and is not entitled to a departure from the guidelines and his claim for undue hardship is denied. There is

not a large discrepancy between the two ratios but based on his income and assets (business) the guidelines amount would not cause undue hardship even if he had the lower standard of living.

RETROACTIVITY OF CHILD SUPPORT:

[30] This matter started in January 2004 and was delayed by a number of things including a request by the Respondent for paternity testing. Further delays occurred with respect to filing of briefs and time for the court to review all the evidence and arguments and make its decision.

[31] The most equitable way to deal with this is by an order retroactive to July 1, 2004.

[32] The Respondent shall pay child support for Z., born November [...], 2003, in the amount of \$326.00 a month retroactive to July 1, 2004 through the Director of Maintenance Enforcement. This is based on an annual income of \$38, 909.88. Counsel for the Applicant shall prepare the order.

JOHN D. COMEAU

CHIEF JUDGE OF THE FAMILY COURT OF NOVA SCOTIA