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IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
[Cite as: D.M.C.T. v L.K.S., 2007 NSFC 22]

BETWEEN:

D. M. C. T.
-APPLICANT

AND

L. K. S.
-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATES HEARD: JUNE 12, 13, 14, 2007

REVISED DECISION DATE: JULY 5, 2007

ORIGINAL DECISION DATE: JUNE 27, 2007

APPEARANCES: BLAINE SCHUMACHER FOR THE APPLICANT
WILLIAM RYAN, Q.C. FOR THE RESPONDENT

REVISED DECISION

**The text of the original decision has been corrected July 5, 2007 and replaces the previously issued decision dated June 27, 2007

OUTLINE OF REVISED DECISION

Maintenance and Custody Act of Nova Scotia
Child Maintenance Guidelines
Application for variation of child maintenance - 1 child

Issues:

-Whether there has been a 'change of circumstances'
    -answered in the affirmative

-Determination of the payor's income per sections 16-19 of the Guidelines
    -Recourse had to section 19 (1) (e) whether father's assets of $27.5 million reasonably utilized to generate income
    -Income for Guidelines purposes determined to be $1,111,160 per year

-Determination of Table amount - $8,125.35 per month

-Determination that Table amount was not proven to be "inappropriate'

-Determination as to section 7 expenses, private school, that the parties share the tuition costs equally and that the mother pick up the balance in the future

-Variation made retroactive to August, 2005, the date that the mother gave the father "effective notice" that she wanted the maintenance quantum reviewed
    -'arrears' of $71,883.05 awarded and payable forthwith

Decision was revised due to a mathematical error in the original.

* This is an unofficial summary of the decision. Any quotes must be from the body of the decision proper.

By the Court:

1 This is the decision following the hearing of an application by D.M.C.T. (the mother) for a variation in the amount of child support she receives from L.K.S. (the father) for their 12, soon to be 13, year old son. The parties had an on-again-off-again relationship for eleven years ending in October, 2004. They are not and never were married to one another nor have they ever cohabited. The proceeding, therefore, is pursuant to the Maintenance and Custody Act of Nova Scotia.

ISSUES

2 Of necessity the court will have to determine whether there has been a 'change of circumstances' justifying a variation. There needs to be a determination of the father's income pursuant to Guidelines sections 16 to 19, the 'table amount' that follows from that, whether that Guidelines amount is "inappropriate", and, if so, what an 'appropriate' amount would be. The court is also being asked to resolve some issues with respect to section 7 of the Guidelines as well as to adjudicate a claim for a retroactive increase in the amount of child support if indeed the quantum of child maintenance is varied. Counsel have agreed that the issue of costs will be addressed later.

OVERVIEW OF THE FACTS

3 The dominant fact of this case is the father's wealth. He reports a net worth, in a Statement of Property filed January, 2007, of about $27,500,000.00.

4 The parties had originally litigated the issue of child maintenance before myself in the pre-Guidelines days of 1995. My decision of July 15, 1995, granting the $3,600 per month (then taxable) as requested is reported in (1995), 144 N.S.R. (2d) 138 and it was upheld on appeal by Saunders J., then of the Supreme Court, reported in (1996), 154 N.S.R. (2d) 309. Subsequent to these decisions, after the advent of the Guidelines, in 1998, and without any financial disclosure the parties re-negotiated child maintenance to the amount of $5,000 monthly, now free of tax to the mother. As with the $3,600, this sum has been paid faithfully. On being requested I declined then and since to register the said agreement pursuant to section 52 of the Maintenance and Custody Act as I had no basis to determine whether this amount was in accord with the Child Maintenance Guidelines.

5 The mother approached the father in or around August of 2005 seeking a revisiting of the amount of the monthly maintenance, (her verbal testimony and paragraph #6 of her affidavit of March 3, 2006, previously filed). The father wasn't sure of the exact date but agreed that it was around then. I determine the date to be August. The father sought legal advice and advised the mother that her request was declined as he felt he was already paying, if not indeed overpaying, the appropriate amount. In the fall of 2005, perhaps November, the mother retained the services of legal counsel, (Mr. Schumacher), who made formal requests for financial disclosure which were refused. This application was commenced in March of 2006 and has dragged on since.

6 The mother is 53 years old and has a grade 11 education. She has worked for twelve years as a legal secretary and then for five years as an executive secretary

for a business which shut down in the mid-nineties. She had a severance package, drew Employment Insurance for a time and utilized some equity she had in a property together with a small insurance settlement. This was during the time she was pregnant with this child and for a time after he was born. She resided in the same town as and near to the Respondent who enjoyed frequent access, often multiple times daily, with the child while he was an infant. She has not worked outside the home since the child's birth, nor has she sought employment, nor has her health represented an impediment to employment. There was some mention of her having a subscription to QuickLaw for the purpose of doing some piecework research for a lawyer but one gathers that this in fact generates little, if any, income. Having been out of the employment market for over twelve years now I accept that her employment skills have significantly atrophied and that it might well be difficult for her to obtain employment. I conclude that she has regarded and does regard the parenting of this child as being a full-time occupation and that the child has been the major focus of her life since he was born.

7 In the later 1990's she moved outside of the town and was in a brief relationship with another man. During this time the father claims that he was experiencing difficulties getting to see his son. He says that he agreed to her request for an increase in the maintenance to the $5,000 per month as a means to assure his continued contact with the child. She did not respond to this allegation, but I find, whatever was happening then, that she has made every effort to be accommodating ever since.

8 The relationship with this other gentleman failed and the mother moved back

into town. She and the Respondent were perhaps at that point contemplating resuming their relationship which had suffered considerably as a result of the earlier court proceeding. She says that she moved to a certain area of town to be near the French immersion school which the Respondent wanted the child to attend and also to be near the Respondent's residence to make his contact with the child easier. She testified further that she asked him to assist with a $5,000 down payment for the house she wanted to purchase and it is common ground that he declined.

9 The Applicant adopted a strategy of paying down the mortgage as rapidly as she could and then obtaining more funds against the mortgage for renovations to the home. She did this for several years, wanting to 'build an asset' (or words to that effect) for herself and her son. Soon she was adding to the mortgage not only for renovations but to pay down credit card debt. She has liberally used three credit cards, a CIBC Visa and two MBNA credit cards, all with the typically high interest rates, to finance not only a lifestyle for her son and herself and some renovations and mortgage payments, but, even more lethally, to make payments on the other credit cards balances. (Robbing Peter to pay Paul.) All of this can only end in tears and that is exactly what has happened. The mortgage has not been paid for all or much of this year, the outstanding balance stands at $190,000, (against a value she puts on the home at about $260,000), and the Bank is currently in foreclosure proceedings on the house, with it being scheduled to sell on July 12th. Additionally she has no credit left on her three credit cards and owes a total of about $64,000 on them. She has also, as security for legal fees for this proceeding, granted a second mortgage to her counsel in the amount of $80,000. She is resistant to the idea of

bankruptcy although she has at least contemplated taking that step.

10 Of no small consequence to her present predicament is her decision, her unilateral decision, to move the several hundred kilometers from her home town to live in the Wolfville area so that the child can attend Kings-Edgehill school (Kings) in Windsor. She moved last August and enrolled the child there for September. I emphasized that this was a unilateral decision for a reason. There has never been a custody order with respect to this child and the parties have been content to regard themselves as having joint custody. In their first appearance before me in March of 2006 the father stated his objection to the removal of the child to attend Kings and I cautioned the mother that with joint custody I thought the father's consent was essential.

11 The mother explains that for almost the entire time that the child has been a student in the home town school he was bullied by several other children and by one child in particular. She says that she had tried and failed for years to bring an end to this with little or no success, at least no lasting success. She maintains that this was very hard on and detrimental to the child over the years and she spoke of his dread on occasion at having to go back to school. The father, on the other hand, says she over-reacted, that the boy wasn't all that worried about it and that in any event all of that is good training for life.

12 In addition she observed that through the 2005-6 school year the child's grades deteriorated from being very good to, as of June of 2006, being almost straight C's. She perceived that this being a pivotal year, the year before he

entered Junior High, that he was missing important foundation work and she was concerned about his academic future.

13 She testified that in 2004 she attended a recruiting session with a Kings staff person and she gave a brochure to the father, who, she says, evidenced no response. She testified that she knows that the child spoke to his father repeatedly about Kings and of trips that he and his mother had taken up there to inquire further into the idea. In all of the circumstances, she testified, she took the father's silence to be consent, at least until March of 2006.

14 In any event she continued on with her decision, enrolled the child, putting the tuition, like almost everything else, on a credit card, and moved to the valley. In September of 2006, after the child had already started at Kings, there was a hearing scheduled as to whether the child would have to be returned to his home town. By this time however the father acknowledged that the child wished to be at Kings and seemed to be happy there and so therefore he no longer objected.

15 The father has since become impressed, "ecstatic", at how the boy is doing there, not only with improved grades, but that he is "blossoming" as a young man. As of January of 2007 he has reimbursed the mother for the tuition she had paid and school-related expenses, (there is an argument about some incidental expenses which will be addressed later), and throughout the year has paid all the monthly bills coming from Kings, and he indicates that he is prepared to continue to do so. (He does say though that he'd like the boy assessed to see if maybe he should be a full-time boarding student next year, and one hopes that this will not turn into

another protracted dispute.)

16 In any event this move to Wolfville, (the mother says she tried and failed to find appropriate accommodations in the Windsor area), has had it's financial ramifications. To begin with she had hoped to keep the house in the home town as a place for her and the child to return to on visits, but she wound up renting it to persons she knows for $500 monthly plus utilities and an obligation on the tenants to be responsible for upkeep. The problem is that her mortgage payment alone is over $1,000 monthly and other expenses that she is responsible for would bring her costs for that house to about $1,500 monthly. She has the place listed for sale, as she did for a time last year, but so far has had no offers on her asking price of $269,000.

17 The mother also has to pay the $750 monthly rental plus utilities and related expenses for the house in Wolfville and deal with the shortfall for the house back home. In addition she had to pay about $3,600 for moving costs. Thus, to an extent, her lamentable financial situation has been made worse by her having elected to place her son in Kings and having as a consequence to suffer the losses on her house and the moving expenses. While she acted unilaterally and in the face of a clear caution from the court that she needed the father's consent, it turns out that she was right all along about what her child needed. The father is now totally on board with that decision to the point of agreeing that obviously it was necessary for the mother to move up here to this area, although he makes it clear that she should be living in Windsor, not Wolfville.

18 The mother did not present a budget in the course of these proceedings. However, counsel for the father cross-examined the mother extensively on her pattern of expenditures over the past few years and I am satisfied that in the course of her answers to these and other questions that I have gleaned a reasonable, if general, appreciation of how she does or would spend the child maintenance. Counsel utilized exhibits # 18 through #22, which she more or less agreed seemed to be accurate, to show, or to attempt to show, irresponsibility and extravagance. Collectively they do indeed show that she was spending well beyond her means and they bear dramatic evidence of just how deadly it can be to finance your lifestyle in significant measure on credit cards at nineteen percent interest. I believe counsel's point was that given all of that she would outspend whatever it was that was ordered by way of child maintenance, and that it would be imprudent in any event to give her any great amount of money as she just couldn't manage it.

19 The overwhelming conclusion that one can draw from counsel's exhaustive questioning about her spending pattern as evidenced in particular by the 'pie chart' counsel or his staff prepared, exhibit #22, which breaks down her Visa expenditures over a three year period, is that relatively little of what she spent was for herself. Rather, the expenditures, including those which were most imprudent given her finances, were overwhelmingly for the benefit of the child. She states, for example that she buys the child's clothes at two U.S. catalogue firms, Lands End and L. L. Bean's, (where the father buys much of his clothing), and, she says, convincingly, that she buys most of her clothing at Frenchies.

20 There was a fair amount spent on entertainment but I accept that she has

made it a point to expose the child to quality entertainment experiences. Much was made of the various trips she has made with the child, a trip to Moncton, several stays of a few days at White Point Lodge and a stay at Digby Pines and at Mountain Gap Inn. In so doing I find that she is following the pattern of short trips that the parties and child used to go on when they were still a 'couple', (see the father's affidavit dated August 23, 2006 that was presented at the hearing in September, especially paragraph 18, where he lists 44 trips of several days duration, 38 of which included the child). Since the 2004 'separation' the father has not taken the child on any trips, nor indeed, until the boy started at Kings, had he ever had him overnight.

21 The father, aged 65, is a life long, and he says, a committed bachelor. He was born into a wealthy family. He attended both Acadia University and Mount Allison University graduating with a business degree. He also attended a non-degree course at Harvard Business School. On graduation he went into the prosperous family business with his father, at some point becoming president of the company. On the passing of his father he took over the family business and he, along with his two sisters, inherited the family wealth. The family business was sold in 1994 for $27,000,000 and this sum was split equally among the father and the sisters. In 1995 when the matter was previously before me the evidence was that he had a net worth of about $17,000,000.

22 The money has remained invested since that time with he and his two sisters having identical portfolios, operating under the general direction of the father in the day to day control of professional money managers. The father said that his

main investment goal is to “preserve capital” and I recall that he fairly blanched at the prospect that he might ever be responsible for losing any of his sisters’ money. More particularly he testified that it is his strategy to seek, by way of interest and dividends, an annual return of between one and two percent which he would live on and still have an asset that has appreciated in value through an increase in the value of the stock. Thus, his investment portfolio would be, as his accountant described it, conservative in nature although he agreed with me that it is certainly earning more than the 4.46 percent, (I mis-spoke myself when asking the accountant, and used the figure 4.6 percent), that the mother’s expert Mr. Duffett reported could have recently been earned on the ultra conservative Government of Canada Bonds held for a five to ten year term.

23 The father prides himself on living modestly. He holds it to be important to live like everyone else in his home community. He says that his house in which he has lived for years is only valued at $150,000 and that he has only ever bought one new car, his current vehicle, albeit a 2005 Cadillac. On the other hand he testified that he has never ever had to borrow any money for any purchase. He agreed that he can afford to live anywhere in the world that he wanted to live. His Statement of Property lists nine properties other than his home property of which he seems to make little use and of which none generates any income. On the other hand as well he accepted, (“It wouldn’t astonish me”), the mother’s counsel’s calculations that he had spent some $40,000 on travel in the past two years. He usually makes two trips a year to Europe, being mostly Ireland and Rome with a brief stop or two in Paris. (He has never taken the child with him on these trips.) He has given a somewhat comparable sum to various charities, (he thought the sums might be

more like $12,000 and $14,000 in each of the past two years but that it might somewhat more because some gifts were without receipts).

24 His personal Income Tax returns for the years 2002 through 2004 show ‘Line 150' incomes of $224,883.38, $236,191.30, $285,767.86. In none of these years was there any capital gain reported and in none of these years did he take any money out of his wholly-owned holding company. In 2005-2006 he changed money managers and the new money manager, (for good cause), rolled all or most of his personal investments into his holding company and sold off some investments yielding some capital gains. In 2005 his personal ‘line 150' income was reported as $698,218, (to be grossed up to $969,707 to account for only fifty percent of the capital gains being taxable), and in 2006 it was $1,100,801.63, (to be grossed up to $1,634,026 for the same reason). The evidence is that in the future his plan is that he will be receiving by way of a dividend from his holding company an amount meant to replace his usual pre-2005 income, of, as he told his counsel, $250,000 to $300,000 per year.

25 It is agreed and I so find that as sole owner of his holding company he has complete and unfettered discretion as to how the investments are managed, whether and under what circumstances a capital gain may be realized and whether, when and in what amount a dividend may be declared.

26 Mr. Duffett, C.A. and C.B.V., (Chartered Business Valuator, a recognized sub-specialty of the Canadian Institute of Chartered Accountants), prepared a report and testified on behalf of the mother based on available documentation

provided by the father through his counsel as of that point. Counsel had sought more documentation and access to business associates of the father but, having listened to fights over disclosure for over a year by then, and wearied of the exercise and worried that a long-delayed hearing would be delayed even more, I had him do his best with what was available. He did however have late access to a recently filed Statement of Property and a copy of the father's 2006 Income Tax return, the latter being filed the Friday before the hearing, and he included an analysis of these materials in his viva voce evidence and in Exhibit #4.

27 (Counsel for the father objected to the witness being able to comment on this information as he did not have the requisite notice of his intent to do so. However as the information was highly relevant, and because the reason for the absence of notice was the late filing on behalf of the father, I permitted the introduction of this evidence. The father's counsel had also sought to introduce a report from his own expert and to have him testify. Because it was only faxed to the other side and to the court late the afternoon before the hearing, and as I had made it abundantly clear that the Family Court Rules, which call for a minimum of five days notice of any expert's report, would be strictly enforced, the report was not admitted nor was the author permitted to testify. In any event the father's counsel said he thought that the report was not dissimilar to the contents of Mr. Duffett's report.)

ANALYSIS

-Change of Circumstances

28 The court may not change the amount of support unless it first finds a ‘change of circumstances’. This point was not argued, but it remains the case, (section 37 (1) of the Act).

29 In 1995 when the first order was made the father claimed assets worth $17,000,000. Today he claims assets worth over $27,000,000. That is a change of circumstances from the 1995 order. There was no financial disclosure, I’m told, associated with the 1998 agreement that saw the child maintenance increase to $5,000 per month, hence it might be difficult to determine if indeed there has been a change. However, working backwards from the amount of $5,000 monthly, I have determined that that is what would have been payable per the then-existing table for an income of $687,361.11 per year. Based on the analysis to follow I believe there has been the requisite change of circumstances from the date of the 1998 agreement as well.

-The father’s ‘Guideline’ Income

30 There is no immediately obvious answer to the question of what the father’s ‘Guideline’ income should be considered to be. Sections 15 through 19 of the Guidelines read as follows:

> Determination of annual income
> **15 (1)** Subject to subsection (2), a parent's annual income is determined by the court in accordance with Sections 16 to 20.
> **Agreement**
> **(2)** Where the parents agree in writing on the annual income of a parent, the court may consider that amount to be the parent's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under

Section 21.

Calculation of annual income

16 Subject to Sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total Income)" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.

Section 16 replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

Pattern of income

17 (1) If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

Subsection 17(1) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

Non-recurring losses

(2) Where a parent has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the parent's annual income under Section 16 would not provide the fairest determination of the annual income, choose not to apply Sections 6 and 7 of Schedule III, Adjustments to Income, as adopted herein**,** and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

18 (1) Where a parent is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's annual income as determined under Section 16 does not fairly reflect all the money available to the parent for the payment of child maintenance, the court may consider the situations described in Section 17 and determine the parent's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent

taxation year; or

(b) an amount commensurate with the services that the parent provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the parent establishes that the payments were reasonable in the circumstances.

Imputing income

19 (1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:

(a) the parent is intentionally under-employed or unemployed, other than where the under- employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;

(b) the parent is exempt from paying federal or provincial income tax;

(c) the parent lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(d) it appears that income has been diverted which would affect the level of child maintenance to be determined under these Guidelines;

(e) the parent's property is not reasonably utilized to generate income;

(f) the parent has failed to provide income information when under a legal obligation to do so;

(g) the parent unreasonably deducts expenses from income;

(h) the parent derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

Clause 19(1)(h) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

(i) the parent is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Reasonableness of expenses

> **(2)** For the purpose of clause (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act* (Canada).

31 For reasons that I will elaborate upon I conclude that reference to section 16 of the Guidelines alone will not result in the "fairest determination" of the father's income. I intend to rely in particular on Guidelines section 19 (1) (e) in determining that income. I will try to observe in substance if not in exact form the approach taken by Justice Mesbur of the Ontario Superior Court of Justice in **Tauber v. Tauber** (2001), 18 R.F.L. (5th) 384.

32 Whether the court should "pierce the corporate veil" was never an issue in this case, at least it was never argued. The parties seemed to accept that for the purposes of this action the corporate and private holdings of the father were one and the same, that the corporation is, as Justice Weiler of the Ontario Court of Appeal put it in **Debora v. Debora**, (2006), 33 R.F.L. (6th) 252, the "alter ego" of the father. His Lordship stated, para. 24, that the court, "...will not enforce the 'separate entities' principle when it would yield a result too flagrantly opposed to justice, convenience or would defeat the desired effect of the legislation...". His Lordship also noted a salient consideration, para. 25, not present here or in that case, of whether the interests of third parties would be affected. (For further cases see the decision of MacPherson, J.A. in **Wildman v. Wildman** [2006] O.J. No 3966, 2006 CarswellOnt 6042 and in particular paragraphs 35-41, and **Kowalewich v. Kowalewich** [2001] B.C.J. No 1406, (C.A.), especially para. 43.) It is clear that the prime, the father says "only" reason, why so much of his holdings is in the name of the corporation is purely because of U.S. estate tax laws.

There is otherwise no business or historical reason why his corporate holdings should not be regarded as one and the same as his own.

33 Counsel for the father was insistent that there is no Canadian case where capital gains were taken into account in determining the payor's income. I would observe that section 16 of the guidelines directs a court to the 'total income' figure in the income tax returns, (line 150) and that that figure includes realized capital gains, or, more accurately one-half of such gains. It is abundantly clear through section 18 (1) (a) and 19 (1) (h) of the Guidelines, and even more so given the amendment to section 17 (1) of the Guidelines of the year 2000, that to an extent determined by the court in its discretion to be appropriate, realized capital gains can be taken into account. (See in this respect **Mascarenhas v. Mascarenhas** (2000), 18 R.F.L. (5th) 148, (Ont. Div. Crt.), (U.S. capital gains were included), and **Arnold v. Washburn** (2000), 20 R.F.L. (5th) 236 (Ont. C.A.), which upheld a lower court's exclusion of stock option 'income' while saying that it is clear that in a court's discretion it can very well be included).

34 The father has historically left the capital gains alone and lived off of interest or dividends, and it would appear that continues to be his plan. In my view allowing capital gains to go unrealized year after year, and thus discounting them entirely, in this particular situation generates an unfair and an unreasonable picture of the father's true position and capacity to pay child maintenance. The rate of return which he would have the court regard as his income, that which he actually draws from the company, in my view invokes section 19 (1) (e) of the Guidelines and amounts to the same thing as not reasonably utilizing his property to generate

income, at least for the purposes of the legislation and Guidelines. The issue is analogous, it seems to me, to the not-infrequently raised issue of how to treat retained earnings.

35 The argument is put that while on the face of it there appears to be “x” amount of money available, that really the health of or strategy for the company requires that all or most of the ostensible surplus be plowed back into the company. That proposition did not explicitly make it to the surface of this proceeding otherwise than obliquely by the father indicating his investment strategy that capital gains go unrealized until some unidentified future date or event so that his investments will provide both income and growth.

36 Mr. Schumacher has referred the court to the case of **Vance v. Kovacs** [2005] N.B.J. No 540 (Q.B.- Family Division). There Justice Robichaud referred to **Brophy v. Brophy** [2002] O.J. No 3658 (Ont. S.C.J.) which in turn, at paragraph 36, referred to a number of other cases in which various courts exercised their discretion by attributing different amounts of retained earnings (or none) to personal income depending on the facts of the case. Factors considered included whether the corporation is operating or non-operating, whether there are other shareholders, what the business reasons were for retaining earnings, and historical practice.

37 In this instance the corporation exists entirely as a vessel in which to carry the father’s investments. It requires no capital equipment and has only minimal expenses such as management fees and auditing fees. It is managed conservatively

such that it can be counted upon for a sustained yield and growth. There is no evidence that the growth being sought is for any reason other than its own sake or that there is anything that the father wants or needs that he cannot now readily afford. While his practice has been to invest in lockstep with his sisters there is no legal imperative to do so. I am aware of no adverse consequence to withdrawing more money from the investments other than tax consequences and the fact that the already considerable capital will not appreciate as fast.

38 Mr. Duffett approached his analysis in several ways. He noted from the information supplied to him that the father's assets, reported at $27,501,996, had grown by $10,026,575 from the amount declared in assets at the 1995 hearing. He says this represents an annual compound rate of interest of 4.02% which, on his current reported wealth, would yield an annual income of $1.1 million. He compares that to the father's reported taxable income for the years 2002 to 2005, (before Schedule III adjustments), of 0.8%, 0.9%, 1.0% and, for 2005 when he realized some capital gains, 2.5%.

39 Mr. Duffett reports that the current available rate on Government of Canada bonds is 4.13% for 5-10 year term and that it had been 4.46% between 2002 and 2005. At today's rate assuming he had but $26 million to invest he could earn $1.07 million a year and could have earned $1.16 million a year in recent years, all risk-free, (and presumably without the need to pay some $85,000 a year in management fees).

40 In Exhibit #4 Mr. Duffett calculated three year pre-tax incomes, including

Schedule III adjustments, for the years 2004 to 2006, (with a minor error on carrying charges), of the father personally and of his holding company, of $270,457, $1,350,059 and $2,145,784 for an average of $1,255,433 per year. Adding imputed capital gains of $3,289,919, per the father's 2006 tax return, he reported, would give a three year average income of $2,352,073.

41 Mr. Duffett's calculation of the average compound rate of return on the father's assets at 4.02% does not, as I understand it, take into account that he was, by his evidence, also drawing out an average in the vicinity of $250,000 per year. Multiply that sum by the eleven years and add it back into his current assets and you would have an additional $2.75 million dollars. I don't know how to calculate a new compound rate of return but it would obviously be higher than the 4.02%.

42 I will resist the position of counsel for the mother to determine that the father's annual income is between $2 and $3 million, based upon his having, in 2005 and 2006, realized capital gains. I accept that this was a specific one time event following the change in money managers, not consistent with the historical practice, and not likely, on the father's evidence, to be repeated any time soon, at least on this scale.

43 I conclude, per section 19 (1) (e) of the Guidelines, that for the purposes of this legislation and the maintenance of this child, that the father's property, "...is not reasonably utilized to generate income". Absent Schedule III adjustments, as Mr. Duffett points out, the father has been receiving, on average, less than one percent a year on investments while his net worth has appreciated considerably

more than that. Obviously he is not employing these many professionals to earn less than a quarter of what he could earn on Government of Canada bonds. The $250,000 to $300,000 a year that he said he plans on drawing by way of an income is an obvious and gross understatement of his actual capacity to pay child maintenance.

44 I hold that the increase in the value of his investments, be that by way of interest, dividends or capital gains, realized or unrealized, simply has to be taken into account to obtain a realistic understanding of his capacity, his “financial ability to pay” child maintenance. His considerable assets are constituent elements in his “means” and “circumstances” addressed in section 2 (k) of the Act. Recognizing that his portfolio is or is meant to be low risk, I accept that there nonetheless is some risk and I recognize as well that the father reasonably expects to realize some increase in his wealth.

45 I determine that the father’s income should be taken to be $275,000 per year, (half way between the $250,000 and $300,000 figure that he stated on the stand he expects to draw), and 80% of 4.02% of the property that he has available for investment, which I put, (as did Mr. Duffett), at $26,000,000. Thus, to the $275,000 per year I would add or impute an additional $836,160 for a total annual income for Guideline purposes of **$1,111,160 per year**. This equates to a return of4.27% on the $26,000,000.

-The ‘table’ amount

46 The ‘table’ amount for one child at that income for a Nova Scotia resident payor is $1,205 plus .72% of $961,160, (which is $1,111,160 less $150,000). The amount payable is, by that calculation, is **$8,125.35 per month.** This represents 7.3% of the father’s income as I have determined it to be.

-Is the ‘table’ amount “inappropriate”?

47 Section 4 of the Guidelines provides:

> Incomes over $150 000
> **4** Where the income of the parent against whom a child maintenance order is sought is over $150 000, the amount of a child maintenance order is
> **(a)** the amount determined under Section 3; or
> **(b)** if the court considers that amount to be inappropriate,
> (i) in respect of the first $150 000 of the parent's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates,
> (ii) in respect of the balance of the parent's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to maintenance and the financial ability of each parent to contribute to the maintenance of the children, and
> (iii) the amount, if any, determined under Section 7.

48 The leading case is that of **Francis v. Baker** (1999), 50 R.F.L. (4th) 228, (S.C.C.). I have also referred myself to, and have advised counsel that I had referred myself to the following cases all of which deal with wealthy payors:

Greenwood v. Greenwood (1999), 2 R.F.L. (5th) 190, (B.C.S.C.)

Simon v. Simon (1999), 1 R.F.L. (5th) 119, (Ont. C.A.)

R. v. R. (2000), 10 R.F.L. (5th) 88, (Ont. S.C.J.)

M. (O.) v. K. (A.) (2000), 9 R.F.L. (5th) 111, (Quebec. Sup. Crt.)

Metzner v. Metzner (2000), 9 R.F.L. (5th) 162, (B.C.C.A.)

Hollenbach v. Hollenbach (2000), 10 R.F.L. (5th) 280, (B.C.C.A.)

Tauber v. Tauber (2001), 18 R.F.L. (5th) 384, (Ont. S.C.J.)

Debora v. Debora (2006), 33 R.F.L. (6th) 252, (Ont. C.A.)

49 In **Metzner,** Justice Finch for the majority drew the following principles from the decision of the Supreme Court of Canada in **Francis v. Baker**:

> "As I understand the reasons for judgement of the court (in **Francis v. Baker**) in reaching (the) conclusion, these principles were applied:
> 1) It was Parliament's intention that there be a presumption in favour of the Table amounts in all cases (para.42);
> 2)The *Guidelines* figures can only be increased or reduced under s.4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate (para.42);
> 3)There must be clear and compelling evidence for departing from the *Guidelines* figures (para. 43);
> 4)Parliament expressly listed in s. 4 (b) (ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom (para. 44);
> 5)Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly set out in s. 4 (b) (ii) (para.44);
> 6)Section 4 (b) (ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section (para. 39) A proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of

> the actual “condition, means, needs and other circumstances of the children” on the other, (para. 40)
> 7)While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The *Guidelines* have not displaced the *Divorce Act* which has as its objective the maintenance of children rather than household equalization or spousal support (para. 41).
> 8)The court must have all necessary information before it in order to determine inappropriateness under s. 4. If the evidence provided is a child expense budget, then “the unique economic circumstances of high income earners” must be considered.
> 9)The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high “as to exceed the generous ambit within which reasonable disagreement is possible”: *Bellenden v. Satterthwaite*, [1948] 1 All E.R. 343 (Eng. C.A.), at 345

50 An application for leave to appeal to the Supreme Court of Canada was dismissed (2000 CarswellBC 2504).

51 In **Francis v. Baker** the legislation in question was the *Divorce Act*. There is no substantive difference between the child support principles and objectives of that legislation and the *Maintenance and Custody Act* when it comes to quantum of support, and indeed the *Guidelines* and Tables are identical in all material respects.

52 Bastarache, J. in **Francis** said that child expense budgets “<u>may</u> be required under s. 4" and that it would be “<u>preferable</u> to proceed with fully current child expense figures”, (emphasis added in both places), but he also pointed out that, “...Parliament did not choose to create a blanket rule requiring custodial parents to produce child expense budgets in all cases where s. 4 of the Guidelines is invoked.

I would therefore leave it to the discretion and experience of the trial judges to determine on a case by case basis whether such budgets will be required." (Quotes from paras. 45 and 46 of the judgment.) (See too **Hollenbach v. Hollenbach** (2000), 10 R.F.L. (5th) 280 (B.C.C.A.), para. 42.) In the present case none was presented but, as I said, I am satisfied from the extensive evidence in direct and cross that I have a sufficient appreciation of her expenditures and priorities to understand, in a general way, how child support was and would be spent. Justice Bastarache went on to note the notorious limitations inherent in budgets observing, with perhaps some understatement, that budgets were not an "exact science".

53 Justice Bastarache dealt with what he called the "sheer size" argument that was before the court in that case. He regarded this argument as shifting the onus to the recipient parent to justify the Table amount, an approach which he found was "unacceptable". He also stated that he felt that in effect the "sheer size" argument or its variants would in effect be imposing a "cap" on child support payments and pointed out that, "...Parliament did not choose to impose such a cap...", (para. 52).

54 Justice Bastarache also recognized that, "...child support undeniably involves some form of wealth transfer to the children and will also produce an indirect benefit to the custodial parent." He continued:

> While standard of living may be a consideration in assessing need, at a certain point, support payments will meet even a wealthy child's reasonable needs. In some cases, courts may conclude that the applicable Guideline figure is so in excess of the children's reasonable needs that it must be considered to be a functional wealth transfer to a parent or *de facto* spousal support. I wholly agree with Abella, J.A. that courts should not be too quick to find that the Guideline figures enter the realm of wealth transfers or spousal support. But courts

> cannot ignore the reasonable needs of the children in the particular context of the case as this is a factor Parliament chose to expressly include in s. 4 (b) (ii) of the Guidelines. Need therefore is but one of the factors courts must consider whether Table amounts are inappropriate under s. 4. In order to recognize that the objective of child support is the maintenance of children, as well as to implement the fairness and flexibility components of the Guidelines objectives, courts must have the discretion to remedy situations where Table amounts are so in excess of the children's reasonable needs so as no longer to qualify as child support. This is only possible if the word "inappropriate" is interpreted to mean "unsuitable" rather than merely "inadequate", (para. 41).

55 Interestingly, the word "suitable" or, more accurately, the words "reasonably suitable" are in the Maintenance and Custody Act. Section 8 of the Act sets forth that parents are under a legal duty to provide "reasonable needs" for the child, absent a lawful excuse. "Reasonable needs" is defined in 2 (k) to mean, "...whatever is reasonably suitable for the maintenance of the person in question, having regard to the ability, means, needs and circumstances of that person and of any person obliged to contribute to such reasonable needs". The statute would have a court have regard to the ability, means, needs and circumstances of the child and parents whereas s. 4 (b) (ii) of the Guidelines, when it comes to the parents, would only have the court consider the financial ability to contribute. I'm not sure that the difference is material for our purposes. The short answer is that "reasonable needs" equates to "reasonably suitable" and the latter phrase incorporates reference not only to the circumstances of the child but of his parents, and, it might be observed, the words "ability to pay", and for that matter, 'means' and 'circumstances', encapsulate more than just income.

56 In paragraph 49 of the **Francis** decision, Justice Bastarache wrote:

> Furthermore, as the trial judge recognized and counsel for the appellant conceded in oral argument, the unique economic situation of high income earners must be acknowledged. Child expenses which may well be reasonable for the wealthy may too quickly be deemed unreasonable by the courts.

His Lordship noted that of course at some point estimated expenses can become unreasonable and that a "proper balance is struck" by requiring the payor parent to prove that the expenses are so high, that they, "...exceed the generous ambit within which reasonable disagreement is possible...".

57 Professor MacLeod, in his annotation to **Francis** concluded that, "On the basis of Justice Bastarache's reasons, it seems impossible to convince a court that the Table amount of support under s. 4 of the Guidelines is too high." However, a review of the cases that I set out in paragraph 48 will show that in some instances that was indeed found, just as in some the Table amount was upheld.

58 Justice Donald in **Hollenbach**, paras. 37, 41 and 42 picked up on Justice Bastarache's words, saying:

> I interpret this passage as laying down a test that "the unique economic situation of high income earners must be acknowledged" at the threshold stage and that the level of expenses must be unarguably excessive.
> ...I think that the fact that the children have never lived in the style usually associated with the kind of wealth possessed by this father is not a reason for doubting the appropriateness of the Guidelines.
> ...the "needs" for children of very wealthy families are different from those of ordinary middle class families. The Guidelines provide amounts for children of wealthy parents which most people would consider extravagant in their own lives.

59 Implicit, or perhaps explicit, in the father's case is that he lives a modest lifestyle and that so too should a support award be modest in recognition of the standard set by the father in his lifestyle. This begs the question of whether owning nine non-income producing properties can be considered modest, or whether two trips a year to Europe or a $40,000 expenditure on travel over two years can be considered modest. But even if it is modest, courts have taken the position that the payor cannot impose his standards on the receiving "custodial" parent. In **Hollenbach** the B.C. Court of Appeal said, para. 41:

> The children should not receive treatment different than other children of wealthy parents just because the father has always been close to his money. One of the objectives of the Guidelines is: (d) to ensure consistent treatment of spouse and children who are in similar circumstances.

60 The 'modesty' of his living standards, coupled with the fact that there is no evidence that he has any other dependents speaks to the father's "needs" per section 2 (k) of the Act being relatively easily met given his wealth. There is no reason to believe that a child maintenance order in the table amount would in any way impair the father's ability to meet those needs.

61 I put 'custodial' in quotes because I am well aware that the parties have joint custody of the child. That might be said to give the father a veto in the lifestyle or at least standard of living of his child. I see problems with that approach however in that joint custody would then give a payor a veto to increased and appropriate maintenance. Maintenance is, after all, the right of the child. These parents never cohabited so there is no established joint standard. Rather, since the child's birth he

has been in the sole care of his mother who has carried almost the entire responsibility for all aspects of his upbringing with the assistance of the maintenance the father pays. Not only would she have a better sense of her child's needs, she has demonstrated a consistent desire and intent to raise the child as best she could, even when short of money, even to the point of financing it on credit, in a manner commensurate with the wealth of his father and the future he might reasonably expect from his father's estate.

62 The child is on the threshold of adolescence. His health is good, apparently. He has no special needs other than he seems to have benefitted immensely from his attendance at the private school. His 'needs' from this point on will only increase. His father, apart from expenses billed by Kings, has, since the separation, left all or almost all of the expenditure on the child to the mother. I'm sure that is not entirely the case and I don't mean to suggest or imply anything negative as it is clear that the father dotes on his son. What it does mean though is that the mother will have to provide all of the basics and all of the extras that might properly be identified as within the legitimate range of experience of the child of such a wealthy man, the travel, perhaps to Europe or wherever, the exposure to culture and to intellectual stimulation.

63 At this point, be it through lack of financial acumen, seeking a life and a lifestyle for her son beyond her means, or poor financial judgement and management, the mother's circumstances, and hence the child's circumstances, are constrained. They live in modest rental accommodations, drive in a modest car, (with very nice winter tires), and things have reached the point where it looks like

the mother will not be able to afford to take the child on his annual week at Fortress Louisbourg which has been a summertime staple for the child for years. Certainly, the way things stand the child will not be able to travel with his mother the way he has since his birth. I repeat that it certainly appears to me that the bulk of the expenditures that rose above the level of the basic were for the child and his benefit of the child. The evidence does not suggest that the mother's expenditures on the child, or the child's lifestyle, have increased markedly if at all since the 'separation' of the parties, and there is no evidence of any occasion when the parties were 'together' that the father complained of the mother's excesses with respect to the child.

64 There is one aspect of the mother's expenditure in the past that needs to be addressed. That is the money she spent, if not in purchasing the house in the town where the child was born and raised, then at least in expenditures to renovate it so as to 'build an asset' for herself and the child. To the extent that she was intent on building an asset for herself, (and I think it is reasonable to assume that this was a large part of it as she had no other assets, prospects or pension, and the boy would hardly need that, given the prospect of an inheritance from his father), that was outside the scope of child maintenance. Maybe it shouldn't be, in a way, because it sounds harsh, but the support was exclusively for the benefit of the child and any benefit to the 'custodial' parent of necessity would have to be incidental. I simply don't know what a higher court might do with this issue if faced with it but I suspect that the mother would have a tough time justifying the utilization of even a part of child support to 'build an asset' for herself.

65 The father's biggest objection is simply that the mother is not and has not been employed outside the home. That bothered him immensely in 1995 and still does today. His counsel argues that it is inconsistent with any principle of fairness, (citing various passages in **Francis v. Baker**), that she contributes nothing financially to the child's support. He does not accept that with the boy in school all day that she should not have a job. He argues that child support is the obligation of both parents.

66 The mother states that she has to take the child to school every morning and pick him up every afternoon at 4:30. She doubts that she can get any job that will accommodate those obligations or that will enable her to devote the attention to her son that she has in the past. She claims that she is treating the raising of this child as a full time job, and as I indicated, I accept that she is doing exactly that. She would say that doing this, and forgoing job experience and pension and the like is an immense contribution. In addition she noted that her job skills, which were at best earning her a modest income, have since atrophied and that she is simply not capable at the present time of earning any significant money even if she did work outside the home.

67 But more than that it is no particular answer to the amount that the father might be ordered to pay per the guidelines, including the provisions of section 4, that the mother could also contribute if she would but work outside the home. The difference it might make to the money available to support of the child would be at best a marginal amount and would come at the cost, the admittedly unmeasurable cost, of the child losing the benefit of his mother's exclusive attention.

68 With the exception of the failed experiment with her house I cannot see that the mother has sought to benefit personally to any great extent from the child support. I am impressed that she is devoted to the child and is intent on doing the best she can in raising him, preparing him for a life that he has very reason to expect will be available to him as his father's heir. If the child were not exposed to the benefits of wealth at this stage one might fear that when he does inherit from his father, (and his father says that he has taken good care of the son in his will), he may otherwise be totally unprepared. Similarly I trust that, chastened by her bitter financial experiences the mother will in all likelihood steer clear of a repetition of her previous imprudence. Additionally I believe that an annual income of $97,504.20 ($8,125.35 x 12), even, albeit, free of tax, would give the child access to a lifestyle commensurate with, to use an inexact phrase, the relatively high middle class, nowhere near the lifestyle of the very, very wealthy available to his father.

69 I do not see a problem with the father's "ability to pay" the table amount. I do not see that quantum of maintenance amounting to a wealth transfer to the child or 'spousal support' to the mother. I do not see that the father has presented "clear and compelling" evidence to rebut the presumption in favour of the table amount. The amount, under all the circumstances of the child and the parents is not so high "as to exceed the generous ambit within which reasonable disagreement is possible", and, is "reasonably suitable" given "the condition, means, needs and other circumstances" of the child, (and the parents).

-Section 7 Expenses

70 The parties have agreed to their son attending Kings. Tuition is over $12,000 per year and there are related, additional expenses that arise from time to time. The father paid, or reimbursed the mother, for the 2006-07 tuition and picked up the expenses as billed thereafter from Kings. The mother also made some payments related to Kings for the past school year for which she has not been reimbursed. The father stated, before the increase in maintenance awarded in this decision, that he was prepared to continue paying expenses attributable to his son's attendance at Kings, or at least those billed by Kings. I don't know what his position would be at this new amount.

71 I find per Guidelines s. 7 (1), and 7 (1) (d) in particular, that the Kings expenses are a 'necessary expense in relation to the child's best interests' and 'reasonable in relation to the means of the parents'. I further find that Kings is 'an educational program that meets the child's particular needs'.

72 In my initial decision I made a significant mathematical error which resulted in an overstatement of the father's income which resulted in a table amount being set that was appreciably in excess of the amount now being ordered. At that higher income I felt that it was 'appropriate' that the mother pay the entirety of the costs associated with the child attending Kings. At the lower, corrected, amount I am no longer comfortable that the child would be provided for 'appropriately' or 'reasonably suitably' if the mother were obliged to shoulder the entire cost. I do, however, believe that she should contribute significantly and that the maintenance amount has some room in it for her to do so.

73 I appreciate that s. 7(2) of the guidelines sets forth the “guiding principle” that the parties should share this expense in proportion to their respective incomes (after accounting for any contribution from the child). I don’t think that this principle is of much help in this situation where the mother’s ‘income’ is the child maintenance.

74 I will order that the parties will equally share the tuition costs for Kings and that the mother be responsible for any additional, related costs. I do not, however, make any order as to boarding costs if and when that issue arises, as at present the issue is moot and in any event I have not been asked to do so.

-Retroactive maintenance

75 The leading case on retroactivity of child maintenance is indexed as **S. (D.B.) v. G. (S.R.)** (2006), 31 R.F.L. (6^{th}) 1 (S.C.C.). While there are various considerations and principles identified in that case for the court to consider I do not feel the need to repeat them or to explicitly deal with them in this decision although I have considered them. Following the **S. (D.B.)** decision and the evidence in this case I can see no reason to depart from the “general rule” to order payments retroactive to the date of “effective notice”, (**S. (D.B.)** para. 118), which I find to be August of 2005, the month in which the mother let the father know she wanted the maintenance reviewed.

76 Given the nature of the father’s income as I have determined it, I will regard it has having been constant since August of 2005. Accordingly I will order that the

sum of $8,125.35 be paid on the first of every month retroactive to August 1, 2005. Thus as of June, 2007, the date of the original decision, there were ‘arrears’ of **$71,883.05**, ($8,125.35 x 23 months = $186,883.05) less (23 months x $5,000=$115,000). This sum is payable forthwith.

77 The extreme circumstances of the mother and child in recent times were made all the more acute by her eventually-vindicated decision to place the child in Kings. These circumstances were protracted and exacerbated by the recalcitrance of the father to part with his financial information and then by the need to interpret it. The mother’s financial situation, with the foreclosure and punishing interest charges in this past year or so, even if in part the result of her imprudence, has created a hardship not only for her but, I’m sure, on the child as well. Accordingly, I will exercise my discretion not to credit the father’s payments for Kings expenses against the arrears even though this obligation will be shared (unequally) henceforth.

78 I would respectfully ask Mr. Schumacher to prepare the order.

79 The parties will want to be heard as to costs. Barring any difficulties this may pose for counsel I would direct that this be dealt with by way of written submissions...Mr. Schumacher by July 10, Mr. Ryan by July 20, with a reply, if any, by Mr. Schumacher by July 25.

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Bob Levy, J.F.C.