

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** B.M. v. A.L.G., 2014 NSSC 443

**Date:** 20141216  
**Docket:** SFSNMCA84478  
**Registry:** Sydney, NS

**Between:**

**B M**

**Applicant**

v.

**A "L" G**

**Respondent**

**Judge:** The Honourable Justice Theresa M. Forgeron  
**Heard:** December 2 and 3, 2014 in Sydney, Nova Scotia  
**Oral Decision** December 16, 2014  
**Written Decision:** December 22, 2014  
**Counsel:** BM on his own behalf  
LG on his own behalf

**By the Court:**

[1] **Introduction**

[2] Mr. M is the uncle and guardian of T and S G. Mr. M assumed guardianship after the death of the mother. L G is the father.

[3] Parenting and child support issues were not resolved following the mother's passing. In due course, Mr. M commenced a court proceeding. Although an interim consent order was reached in the summer of 2013, the parties remained locked in an ongoing dispute. A trial was held to resolve the outstanding issues. By the conclusion of the hearing, only financial issues were contested.

[4] **Issues**

[5] The following issues will be decided in this decision:

- What is the income of Mr. G?
- Should s. 7 post-secondary educational expenses be awarded?
- What is the appropriate prospective child support award?
- Should an adjustment be granted to the retroactive child support owing pursuant to the interim consent order?

[6] **Background**

[7] Following their parent's separation and divorce, T and S lived with their mother, and had access with their father.

[8] After their mother died in 2010, Mr. M moved into Ms. M's home to care for T and S. Ms. O, a close family friend, also provided care and support to T and S. Eventually, the time Ms. O physically spent with T and S reduced, although the children continued to have regular contact with Ms. O by telephone, texts and email.

[9] In the aftermath of Ms. M's death, Mr. G's relationship with S and T became somewhat strained. The children and Mr. G did not spend much time together.

[10] On December 20, 2012, Mr. M commenced an application pursuant to the provisions of the *Maintenance and Custody Act*. This application was contested by Mr. G. The application resulted in the issuance of an interim consent order dated July 23, 2013. The interim order confirmed that Mr. M was granted leave to apply for custody, and primary residence of the children. Mr. G was granted access. Child support was backdated to November 1, 2010, and at a rate of \$498 per month. Child support was calculated based upon an annual income of \$34,481.60. Significant arrears accrued because of the backdating of the order.

[11] On December 10, 2013, a date assignment conference was held; trial dates were assigned for December 2014. A settlement conference was likewise scheduled. The settlement conference was cancelled by the settlement conference judge because a specific form had not been completed. The settlement conference was not rescheduled.

[12] In the fall of 2014, T sustained serious injuries while riding a mountain bike. T was hospitalized as a result. T asked for the father, who remained at T's side for the duration of the hospital stay. This unfortunate accident acted as a catalyst to repair the strained parent child relationship.

[13] The trial proceeded on December 2 and 3, 2014. The court heard the evidence of Ms. O, Mr. M and Mr. G. Before hearing the submissions of the parties, it became apparent to the court, that the parenting issues had essentially resolved. All parties understood that Mr. G must play an important role in the lives of S and T if they are going to develop into happy, well-adjusted adults.

[14] The parties confirmed the following parenting agreement, prior to giving their submissions on the maintenance issues:

- Mr. M and Mr. G will share joint custody of T G, born \* and S G, born \*.
- The primary residence of the children will be with Mr. M.
- Mr. M must keep Mr. G notified as to all important matters impacting the health, education, and general well-being of S and T. The communication will be by email except if there is an emergency.
- Mr. M must supply Mr. G with a copy of printed materials provided by S's psychologist so that Mr. G will gain a better appreciation of S's special needs, and learn strategies on how to best meet these needs.

S's special needs include anxiety, panic attacks, and rigidity symptoms.

- Mr. M must supply Mr. G with timely notice of all medical appointments for T and S. The communication will be by email except if there is an emergency. Mr. G may attend medical appointments, including meeting with S's psychologist, either individually or in joint sessions with S, as the psychologist deems appropriate.
- Both parties must keep the other advised of a current email address and telephone number, and any changes made.
- Mr. G will have access to T and S at reasonable times and in conjunction with the wishes and availability of the children.
- Access will be introduced on a graduated basis. Mr. M will attend initially until both children are comfortable. The first access visit will be at \* and will take place on Thursday, December 3, 2014. Another visit will occur on December 14, 2014, when the children will attend their paternal grandmother's home for Sunday dinner at noon. Another visit will occur on December 24, 2014 when the children will attend their paternal aunt's family gathering between 6:30 p.m. and 10:30 p.m. In addition, the children will attend a Christmas shopping trip with Mr. G.
- Mr. G must be consistent with access, and must maintain a calendar for this purpose.
- Mr. M will encourage access. Overnight access visits are contemplated by the summer of 2015.
- A settlement conference is scheduled for May 25, 2015 at 2:00 pm to assist in the resolution of any outstanding parenting issues. All materials to be discussed during the settlement conference must be filed with the court, and the other party, by May 18, 2015.

[15] **Analysis**

[16] **What is the income of Mr. G?**

[17] *Position of the Parties*

[18] Mr. G is a meat cutter employed at a local grocery store. His income would ordinarily be easily calculated. Such a calculation is not appropriate in this case because Mr. G is also paid cash by his employer in exchange for mowing grass and, on one occasion, for setting up decorations. This income is not included in Mr. G's T4 earnings.

[19] Mr. G did not keep a record of how much he earned mowing grass, although he did at one point in the past. Mr. G also notes that he is hopeful that one or both of his children will eventually assume this work. Mr. G stated that he currently allows his former girlfriend to mow the grass for the New Waterford store.

[20] Mr. M wants the unreported income to be included for child support purposes, together with an imputed amount to take into account the tax free nature of the exchange.

[21] *Decision*

[22] The cash payments which Mr. G earns must be included as income for the calculation of child support. I am satisfied that Mr. G earned \$3,375 from mowing lawns in 2014 and, I infer, earned approximately the same amount in each prior year. Therefore, Mr. G's income is as follows:

2010	$\$33,101.82 + \$3,375 = \mathbf{36,476.82}$
2011	$\$34,481.60 + \$3,375 = \mathbf{37,856.60}$
2012	$\$38,631.88 + \$3,375 = \mathbf{42,006.88}$
2013	$\$35,652.38 + \$3,375 = \mathbf{39,027.38}$
2014 (pro-rated, based upon paystub dated November 27, 2014)	$\$36,077.78 + \$3,375 = \mathbf{39,452.78}$

[23] This court will not, however, impute income because Mr. G did not pay income tax on the cash transactions. Section 19(1)(b) of the *Guidelines* is not applicable because the cash payments are not exempt income. To the contrary, Mr. G is required by law to report all income which he earns from mowing lawns to Revenue Canada. The fact that Mr. G, thus far, failed to report the income does

not trigger s. 19(1)(b). The Court admonished Mr. G for his failure. Mr. G must abide by the law and report the income. Serious consequences can arise from the failure to report taxable income.

**[24] Should s.7 post-secondary educational expenses be awarded?**

[25] *Position of the Parties*

[26] Mr. M seeks s.7 post-secondary educational expenses for T's attendance at Acadia University in 2012-2013; and at NSCC from 2013 to present.

[27] Mr. G resists this payment. He states he was not notified in advance and he is not in a financial position to contribute. Further, he suggests that the educational expenses were paid through other sources.

[28] *Guidelines*

[29] Section 7(1)(e) of the *Guidelines* provides the court with the jurisdiction to order additional support for the payment of university and post-secondary educational expenses. This section states as follows:

Special or extraordinary expenses

7 (1) In a child maintenance order the court may, on a parent's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation:

...

(e) expenses for post-secondary education

[30] Section 7(2) requires the court to consider the child's contribution before prorating the remaining expense between parents. Section 7(2) states as follows:

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[31] Finally, the court must also take into account subsidies, benefits, tax deductions and credits available in relation to the expense in its calculation as stated in s. 7(3) of the *Guidelines* which provides as follows:

Subsidies, tax deductions, etc.

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

[32] *Decision*

[33] That the post secondary educational expenses are necessary and reasonable in the context of T's best interests, was not contested. I must now examine the various documents to determine Mr. G's contribution, if any, towards these special expenses.

[34] *Acadia: September 2012 to April 2013*

[35] T's first year was spent at Acadia. T was 18 years old when T attended Acadia. T did not live with Mr. M while attending Acadia; T lived in residence.

[36] In calculating T's reasonable expenses while attending Acadia, I must apply the law as stated in **Lu v. Sun** 2005 NSCA 112, leave to appeal to the Supreme Court of Canada refused at 2005 CarswellNS 580. In **Lu v. Sun**, the Court of Appeal held that a non-custodial parent must pay the *Table* amount of support for a child who is under the age of majority, and who resides in a city other than where the custodial parent resides, while attending university. Given, however, that shelter and meal expenses are assumed in the *Table* amount, and to avoid double counting for costs associated with housing and meals, university shelter expenses must be reduced accordingly.

[37] Because Mr. G was required to pay the *Table* amount for T while T attended Acadia, the residence and meal hall expenses must be adjusted by 50%. I therefore find that T's reasonable expenses while attending Acadia are as follows:

Tuition	\$ 6,828
Books	\$ 1,500
Residence and Meal Plan	\$ 4,433
<b>Total Expenses</b>	<b>\$12,761</b>

[38] The value of the tax saving achieved by utilizing the education tax credit must be considered. University expenses attract an education tax credit, to a maximum of \$5,000 per annum. The combined federal and provincial rate for Nova Scotia is 23.79%, which results in a tax savings of **\$1,189.50** per academic year. This amount will be deducted in keeping with s.7 (3) of the *Guidelines*.

[39] I must also deduct T's contribution which includes the value of scholarships, RESP funds, and personal contribution from income earned. RESPs expended equalled **\$11,459.97**, while the scholarship was valued at **\$1,266.50**. Further, T earned \$13,807 in 2012. T should contribute one-half of his earnings to the cost of his university education, or **\$6,903.50**.

[40] The deductions to be subtracted from the 2012 to 2013 university expenses are follows:

Tax Benefit	\$ 1,189.50
RESP	\$11,459.97
Scholarship	\$ 1,266.50
Earnings	\$ 6,903.50
<b>Total Deductions</b>	<b>\$20,819.47</b>

[41] Based upon the above calculations, it is apparent that T's reasonable university expenses, which total **\$12,761**, were covered by the RESPs, scholarship, tax benefit, and T's own earnings, which total **\$20,819.47**. There are no outstanding amounts to be prorated between the estate and Mr. G. T's university expenses at Acadia were covered without having recourse to Mr. G.



[42] NSCC: *September 2013 to June 2014; September 2014 to June 2015*

[43] T's educational path changed in 2013. He returned to live with Mr. M and attends NSCC. He is doing well in this program. Although he is 19 years old, his circumstances mirror those of a child under the age of majority and so the *Table* amount continues to apply in conformity with s. 3(2)(a) of the *Guidelines*.

[44] Section 7 post-secondary expenses which T incurs while attending NSCC must be examined. These expenses are both necessary and reasonable. The NSCC expenses for each of the past two academic years are composed of the following:

Tuition	\$ 4,890
Books and supplies	\$ 1,500
Transportation for nine months	\$ 1,560
<b>Total Expenses</b>	<b>\$ 7,950</b>

[45] T earned \$16,294 in 2013. T will earn a comparable amount in 2014. T must contribute one-half of this amount to his education, or **\$8,147**.

[46] The deductions to be subtracted for each of the two NSCC academic years are composed of the tax saving arising from the use of the education credit and one-half of T's earnings:

Tax Savings	\$1,189.50
Earnings	\$8,147
<b>Total Deductions</b>	<b>\$9,336.50</b>

[47] Once again, there is no outstanding amount to be prorated between the estate and Mr. G because expenses total **\$7,950**, while available resources equal **\$9,336.50**. T's post-secondary expenses at NSCC are covered without having recourse to Mr. G.

[48] I further find that Mr. G is currently not in a financial position to pay s.7 expenses given the outstanding maintenance arrears and the retroactive maintenance adjustment which I have awarded, and which is detailed later in this decision.

[49] In the future, if university expenses increase for T, or include S, then an application to vary can be made, in the event the parties are unable to reach agreement.

[50] **What is the appropriate prospective child support?**

[51] Based upon Mr. G's income of **\$39,452.78**, he must make monthly child support payments of **\$563** to Mr. M, who has primary care and residence of the children. This amount is due and payable monthly, effective January 1, 2015, and continuing monthly thereafter. Further, other provisions stated in the consent interim order will continue, namely as follows:

- Mr. G must continue to maintain medical, dental and drug plan coverage for the children, available through his present or subsequent employer. Mr. G must see that Mr. M, or the children, are reimbursed without delay after receipt is delivered by the other party, or the children, for submission to the insurer.
- No later than June 1 of each year, Mr. G must provide Mr. M with a copy of his income tax return, completed and with all attachments, even if the return is not filed with the Canada Revenue Agency, and also provide Mr. M with all Notices of Assessment from the Canada Revenue Agency immediately after each assessment is received.
- All child maintenance payments must be made payable to Mr. M. The payments must be sent by Mr. G to the Office of the Director of Maintenance Enforcement, P.O. Box 803, Halifax, Nova Scotia B3J 2V2, while the order is filed for enforcement with the Director.
- A court officer must send the current designated addresses of the parties, and a copy of this order, to the Office of the Director of Maintenance Enforcement in accordance with s. 9 of *the Maintenance Enforcement Act*.
- Both parties must advise the office of the Director of Maintenance Enforcement of any change to their address, within ten (10) days of the date of the change, under s. 42(1) of the *Maintenance Enforcement Act*.
- Mr. G must advise the Office of the Director of Maintenance Enforcement of a change in location, address and place of employment, including the commencement or cessation of employment, within ten (10)

days of the date of the change, under s 42(2) of the *Maintenance Enforcement Act*.

- A requirement to pay money under this order, that is not enforced under the *Maintenance Enforcement Act*, may be enforced by execution order, or periodic execution order.

**[52] Should an adjustment be granted to the retroactive child support owing pursuant to the interim consent order?**

[53] *Position of the Parties*

[54] The interim order specified that maintenance was payable at a rate of \$498 per month, and was based on Mr. G earning \$34,481.60 per annum. Mr. M seeks an adjustment because Mr. G's income was greater than that which was previously stated. In contrast, Mr. G indicates that he felt pressured to sign the order. He says he can't afford to pay the retroactive order.

[55] *Decision*

[56] The evidence does not support a finding that Mr. G was coerced into agreeing to the provisions of the interim consent order. The order was not appealed. Retroactive support was, and is, appropriate.

[57] The court has also determined that the retroactive maintenance, which was ordered, will be adjusted to reflect the actual income earned by Mr. G, commencing January 2011. I make this decision for the following reasons:

- Mr. G acted in a blameworthy fashion in that he did not accurately disclose his income until December 2014. Further, income tax returns have yet to be produced. Mr. G must not benefit from his failure to disclose accurate information to Mr. M and to the court.
- The children require the retroactive support. Mr. M, the children's uncle, had to cash in savings to support the children because there were insufficient funds available as a result of the underpayment of child support. Mr. M's financial circumstances are strained. Mr. M is in receipt of disability income as a result of his arm being severed during a work place accident. Mr. M suffers from post-traumatic stress disorder and a number of other ailments. Mr. M loves both T and S, and has assumed the position of a

parent. He must be supported to the full extent afforded by the *Child Support Guidelines*. The children deserve no less.

- Any hardship experienced by Mr. G was self-induced. He should have paid child support voluntarily. Despite this finding, the court will provide a repayment schedule which will mitigate any hardship experienced by Mr. G.

[58] An adjustment of the child support based upon the actual income which Mr. G earned is awarded, which translates as follows:

<b>Year</b>	<b>Income Earned</b>	<b>Table Amount Due</b>	<b>Table Amount Pd</b>	<b>Adjustment Due</b>
2011	\$37,856.60	\$542	\$498	44 x 12 = \$528
2012	\$42,006.88	\$596	\$498	98 x 12 = \$1,176
2013	\$39,027.38	\$557	\$498	59 x 12 = \$708
2014	\$39,452.78	\$563	\$498	65 x 12 = \$780
			<b>Total Adjustment</b>	<b>\$3,192</b>

[59] Mr. G must pay an additional **\$3,192** as retroactive child support. This adjusted figure must be added to the arrears outstanding as calculated by MEP, and as based on the last court order, less credit for all payments made.

[60] I must now determine the monthly payment which must be made by Mr. G towards the retroactive payment. I have reviewed Mr. G's circumstances, including the fact that he currently resides with his parents. Mr. G must pay an additional \$200 per month until the retroactive award and arrears are paid in full. This payment will hopefully provide Mr. M with sufficient child support so that he will not have to collapse any more savings.

[61] **Conclusion**

[62] The following relief is granted:

- The adoption of the parenting provisions proposed by the parties at the conclusion of the hearing;
- The denial of the claim for s. 7 university expenses;

- The granting of a child support payment of \$563 per month;
- The granting of an additional \$3,192 in retroactive support; and
- The granting of a repayment order of \$200 per month until all retroactive maintenance and arrears are paid in full by Mr. G, together with credit for all payments received by MEP.

[63] Any cost submissions must be placed in writing. The court, however, notes that success appears to have been divided in that Mr. G was successful on the s.7 claim and Mr. M was successful on the retroactive claim. If costs are sought, submissions must be received no later than January 5, 2015, with responses no later than January 8<sup>th</sup>.

[64] The court will draft the order.

Forgeron, J.