NOVA SCOTIA COURT OF APPEAL
Citation: ***Dillon v. Dillon***, 2005 NSCA 166

Date: 20051222
Docket: CA 247105
Registry: Halifax

Between:

David Edmond Dillon

Appellant

v.

Kelly Anne Elizabeth Dillon

Respondent

Judges:	Bateman, Cromwell and Oland, JJ.A.
Appeal Heard:	November 22, 2005, in Halifax, Nova Scotia
Held:	Appeal allowed in part per reasons for judgment of Bateman, J.A.; Cromwell and Oland, JJ.A. concurring
Counsel:	Patrick Eagan, for the appellant Heather McNeill and Erin Hoult, for the respondent

Reasons for judgment:

[1] This is an appeal by David Dillon from the June 16, 2005 support and matrimonial property aspects of the judgment of Justice Mona M. Lynch of the Nova Scotia Supreme Court (Family Division). The decision on appeal (2004 NSSC 273) is unpublished.

BACKGROUND:

[2] David Edmond Dillon and Kelly Anne Elizabeth Dillon, having lived together since 1984, married on May 6, 1989. They separated in May, 2000 and divorce proceedings were commenced in August, 2000. Their son was 17 years old at the time the divorce came on for hearing commencing in June of 2004. By that time he was living alternate months with each parent, but had been in the primary care of his mother until March, 2003.

[3] During the marriage, Mr. Dillon, a mariner, was the primary bread-winner and at sea for lengthy periods. Ms. Dillon worked part-time as a waitress and was the principal care-giver for their son.

[4] In 1993 Ms. Dillon admitted to her husband that she had a gambling problem. From that point forward, as was found by the judge, Mr. Dillon controlled the finances. Ms. Dillon had no direct access to bank accounts or credit. In 2001, after the parties' separation, Mr. Dillon declared bankruptcy and was discharged in 2002. All family debt was in his name at the time of separation and was extinguished with the bankruptcy.

[5] The son is an accomplished dancer. In the summer of 2000 he attended a program at the National Ballet School in Toronto where he continued as a full time student in September of 2000 until returning to live with his mother in June of 2001.

[6] By interim consent order dated 17 October, 2000 it was agreed that Mr. Dillon would pay, directly, all expenses associated with the son's care including school tuition, clothing, personal expenses and an allowance. Spousal support was to be by way of monthly third party payments including the mortgage on the matrimonial home, car payment, power, house and car insurance and a furniture payment. Mr. Dillon was to receive tax relief for all third party spousal support

payments and indemnify Ms. Dillon for any tax consequences. Ms. Dillon was to occupy the family home.

[7] The third party payments for Ms. Dillon ceased in December of 2000 when, by agreement of the parties, Mr. Dillon moved into the matrimonial home, just prior to its sale. The vehicle was turned over to him at that time, as well. Since moving from the matrimonial home Ms. Dillon has shared accommodation with a common law partner.

[8] A further interim consent order, dated September 17, 2001, contained essentially the same terms as the earlier order. The purpose of this later order was unexplained. The matrimonial home had been sold in early January 2001 and in June 2001, the parties' son left the National Ballet School, returning to live in Dartmouth, primarily with his mother. The terms of the order were therefore stale at the time it was issued. I will assume its purpose was to ensure appropriate tax relief to Mr. Dillon for the third party spousal support payments which had been made up to the time he took possession of the home.

[9] The parties agreed in January 2001 that Mr. Dillon would pay Ms. Dillon $3400 for her share of the household contents. This he paid at the rate of $200 per month which funds Ms. Dillon used for living expenses for herself and their son. At that point Mr. Dillon was not paying any spousal support and was making only direct payments to the son for his needs.

[10] In July of 2001 Ms. Dillon made application to the court for child support, the parties' son having returned from the National Ballet School to live with her. Mr. Dillon was continuing to pay the son's direct costs as required in the Order. However, those expenses had dropped dramatically with the son's return to Nova Scotia. Mr. Dillon was not providing any funds directly to Ms. Dillon which would assist with basic expenses for shelter, laundry, transportation and food, nor was he paying spousal support.

[11] Ms. Dillon's application for support in July of 2001 was followed by a further application for both child and spousal support initiated in October 2001. A hearing was commenced in September of 2002 but adjourned for completion at a later date. The parties were unable to secure a mutually acceptable date for the resumption of the hearing until mid-August of 2003. On that date, the presiding

judge decided the matter of interim support should await the divorce hearing which was then scheduled to commence in October of 2003.

[12] The trial did not go ahead on that date due to Hurricane Juan. Mr. Dillon's work schedule required him to be at sea for lengthy periods. Accordingly, the trial did not commence until June of 2004. It was adjourned for completion to December of that year. No further interim support orders issued. No payments were made for Ms. Dillon's support. Mr. Dillon continued to contribute directly to their son's needs.

[13] Mr. Dillon had been earning in excess of $100,000 annually during the latter part of the marriage. He lost his job in 2001 and, although he found new employment, his annual income dropped dramatically.

[14] Mr. Dillon's financial disclosure throughout these proceedings was sporadic and tardy. His bankruptcy, unemployment and re-employment complicated the financial picture. In September, 2002 Justice Deborah Gass issued a comprehensive Disclosure Order in response to an October 2001 application by Ms. Dillon. Notwithstanding that Order, an inordinate amount of trial time was consumed in attempting to establish Mr. Dillon's income. He was apparently a poor record-keeper. The judge determined that his income for the year 2001 was $44,562; for 2002 was $61,231; and for 2003 was $75,310. She assumed his 2004 income would continue at the 2003 rate.

[15] Using those incomes the judge fixed retroactive child support from July 2001 to December 2004 at a total of $19,964 and ordered ongoing child support payable by Mr. Dillon to Ms. Dillon of $477 monthly. This figure reflected a shared custody arrangement and resulted from a set-off of the Table amounts payable for their respective incomes (Federal Child Support Guidelines, SOR/97-175). The judge declined to order retroactive spousal support, fixing an ongoing amount of $500 monthly. The awards of child and spousal support commenced December 15, 2004.

[16] As stated above, the parties had agreed to the division of the house and contents before trial. The judge did not accept Ms. Dillon's submission that she was disadvantaged on that division. Left to be addressed by the judge was division of RRSPs. In Mr. Dillon's name was a locked-in employment RRSP valued at $116,255.62 gross. In 2000 he had cashed another RRSP of

$19,906.39 (gross) using the money for living expenses and bill payments, post-separation.

[17] Mr. Dillon had received a $10,000 payment upon being discharged from his employment. There was dispute between the parties as to the nature of that payment. The judge concluded that both RRSPs and the above discharge amount were matrimonial assets. She ordered an equal division. This required that the only remaining asset, the locked-in RRSP, be divided in Ms. Dillon's favour by an extra $14,407.66 to reimburse her half share of the RRSP which had been cashed by Mr. Dillon and of the $10,000 discharge amount. No costs were ordered.

GROUNDS OF APPEAL:

[18] Mr. Dillon says the judge made a number of errors:

(i) in fixing Mr. Dillon's 2003 income ;

(ii) in fixing Ms. Dillon's income;

(iii) in dividing the matrimonial property equally;

(iv) in awarding retroactive child support;

(v) in the manner of applying s. 9 of the Guidelines to calculate ongoing child support;

(vi) in failing to put a time limit on ongoing spousal support.

THE STANDARD OF REVIEW:

[19] The standard of review on matrimonial appeals was summarized by Cromwell, J.A. for this Court in **McLennan v. McLennan** (2003), 212 N.S.R. (2d) 116; N.S.J. No. 15 (Q.L.):

> **[9]** In both support and division of property cases, a deferential standard of appellate review has been adopted: **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 (N.S.C.A.); **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321; 436 A.P.R. 321 (C.A.); **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47; 461 A.P.R. 47

> (C.A.). The determination of support and division of property requires the exercise of judicial discretion. Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice: **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136; 231 A.P.R. 136 (C.A.) at 162; **Leblanc v. Leblanc**, [1988] 1 S.C.R. 217; 81 N.R. 299 at 223 - 24; **Elsom v. Elsom**, [1989] 1 S.C.R. 1367; 96 N.R. 165, at 1374 - 77; **Hickey v. Hickey**, [1999] 2 S.C.R. 518; 240 N.R. 312; 138 Man. R. (2d) 40; 202 W.A.C. 40 at paras. 10 - 13.

ANALYSIS:

(i) Mr. Dillon's Income:

[20] Mr. Dillon says the judge erred in fixing his income for 2003 and 2004. The first alleged error concerns the inclusion of an RRSP withdrawal in 2003. Line 150 of his T1 return for that year shows total income of $75,311.35. That is comprised of his employment earnings of $65,294, using rounded figures, plus approximately $10,000 representing cashed out RRSP contributions. For the purposes of calculating child support, the parties agree that Mr. Dillon's union dues of $1166 should be deducted from his income. This would leave a net figure of $74,145.

[21] The employment earnings of $65,294 also included new RRSP contributions which were a combination of Mr. Dillon's own contribution from earnings and a matching amount contributed by his employer on his behalf. The new contributions totalled approximately the same amount as the RRSP contributions which were withdrawn that year. Mr. Dillon says that by adding the cashed out RRSP contributions to income the Court double-counted. The RRSP monies withdrawn, he says, were the same funds that had been contributed that year.

[22] Calculation of annual income is governed by ss. 15 through 20 of the Federal Child Support Guidelines as adjusted by Schedule III. Section 16 provides "a spouse's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 General form . . . and is adjusted in accordance with Schedule III". Section 17 provides:

> **17.** (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income,

> the court may have regard to the spouse's income over the last three 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.

[23] The Guidelines do not say that "annual income" for child support purposes is necessarily the same as "Total Income" - (i.e. income at line 150 of the T1 General Form). The court is directed by s.16, in calculating "annual income", to use the "sources of income" under the Total Income heading on the T1 Return, which includes lines 101 to 150. Section 17 cautions the judge to use the "fairest determination" of the spouse's income. Schedule III provides for deductions from income of certain amounts, none of which are relevant here (save for 1(g) - dues as are agreed by the parties here to be a deduction.).

[24] As stated above, Mr. Dillon says the RRSP withdrawal in 2003 should not have been included in income. To do so, he submits, would be a double counting. Mr. Dillon both contributed to the RRSP and withdrew the contributions in the same year, resulting in the same funds being counted twice as income.

[25] Citing **Stevens v. Boulerice** (1999), 49 R.F.L. (4th) 425; O.J. No. 1568 (Q.L.) (Ont. Sup. Ct.) and **Francis v. Filion** [2003] O.J. No. 1138 (Q.L.)(Ont. Sup. Ct.), Ms. Dillon says, where there is a pattern of withdrawing RRSP contributions to supplement income, it is not error to include the withdrawals in total income.

[26] In **Stevens v. Boulerice**, **supra**, the custodial mother sought a variation in child maintenance to bring the pre-Guidelines support to the level required by the Guidelines. Since the fixing of the original child support order the father had retired and the parties' RRSPs were divided. The father withdrew regularly from his accumulated RRSPs to supplement his pension income. The judge rejected the father's submissions that these regular RRSP withdrawals should not be added to his pension income in assessing his ability to pay child support.

[27] In **Francis**, **supra**, the judge adopted the reasoning in **Stevens** and included RRSP withdrawals in income for the purposes of calculating child support. As in **Stevens**, there was a regular pattern of withdrawing from the accumulated RRSPs to supplement the father's income.

[28] The propriety of including an RRSP withdrawal as income for child support calculation purposes is fact dependent (see, for example, **Stevens v. Stevens**,

[1999] A.J. No. 1550 (Q.L.) (Alta. Q.B.)). Here, unlike the case in **Francis, supra** and **Stevens v. Boulerice**, **supra**, there was no accumulation of RRSP contributions. The non-locked in RRSPs had been cashed or lost in bankruptcy. The withdrawal was clearly from current contributions.

[29] To include both the contribution as well as the withdrawal as income is indeed a double counting. In these circumstances, this would not be a fair calculation of his income for child support purposes (Guidelines, s.17). The double counting of the RRSP resulted in a material overstatement of Mr. Dillon's income. This, in turn, directly affected the amount of monthly child support both for the year 2003 and on an ongoing basis. This error is, in my respectful view, a palpable and overriding error of fact. From Mr. Dillon's "Total Income" of $75,311 should be deducted the RRSP withdrawal of $10,017 and the union dues of $1,166 resulting in an income for child support purposes of $64,128.

[30] The second alleged error is the judge's use of Mr. Dillon's 2003 income level to calculate ongoing child support. It was Mr. Dillon's evidence at trial that the 2003 gross employment income of $65,094 included about one month's extra wages. This was because he received higher pay for a brief period when he filled in for the second mate. He says, therefore, the judge erred by imputing income for 2004 at the same rate as 2003, with no evidence that the brief opportunity to earn higher pay would be repeated. Providing a pay stub purportedly representative of his bi-weekly earnings, Mr. Dillon testified as to his regular rate of pay.

[31] Ms. Dillon submits the judge made no error in using the 2003 income as representative of Mr. Dillon's earnings in 2004. She says a single pay stub is not sufficient evidence from which to reliably extrapolate his year's earnings. Section 15 of the Guidelines directs that a spouse's annual income is to be determined in accordance with ss. 16 through 20. Section 21(1)(c) obliges an employed spouse to provide "the most recent statement of earnings indicating the total earnings paid in the year to date...". The June 12, 2004 pay stub provided by Mr. Dillon would appear to comply with that requirement.

[32] The trial judge found Mr. Dillon's regular income to be $61,000 in 2002. (This figure was not appealed). His regular 2003 income was about $60,000 (the actual 2003 income was $64,148 which included about an extra month's pay (roughly $4300) which would result in a base pay of about $60,000). Mr. Dillon's counsel says the evidence supports a 2004 income level for child support purposes

(gross pay including employer's contribution to the RRSP less union dues) of $60,500. I would agree that this is a fairer estimate of his income, looking at his pay stub and his income in 2002 and 2003.

[33] The judge made no specific finding as to Mr. Dillon's 2004 income. She fixed the ongoing child support, however, using the 2003 figure. Implicitly, then, she assumed his 2004 income would equal that in 2003. Taking into account the evidence of Mr. Dillon's current income and his testimony that his 2003 income was higher due to the availability of the short period of work at higher pay, I would find, with respect, the judge erred in ignoring the evidence of current income. It was open to her to expressly accept this evidence or reject it. Had she found that the evidence of current income was not satisfactory, and used that from the previous year, I would not have found error. However, it was error to fail to address the clear evidence of his current income. (The projected figure was excessive in that it also included the double counting of the RRSP addressed above.)

(ii) Ms. Dillon's Income:

[34] Mr. Dillon says the judge erred by significantly underestimating Ms. Dillon's annual income at $15,000. The evidence of Ms. Dillon's income was confusing.

[35] Ms. Dillon is employed as a waitress earning minimum wage which is supplemented by tips. It was her evidence on direct that she averages 35 hours weekly, with some additional hours for special events. At her rate of $7.00 hourly (not including special events), her base monthly income would be $1060. She further estimated monthly tips of $360, for a total monthly income of $1420. Annualized, and allowing for a period of vacation, this evidence would support estimated annual earnings of about $16,000. Ms. Dillon testified that she declared approximately 15% of her hourly wages as tips - this would be $160 monthly. Therefore, of her total income, about $200 monthly is tax free.

[36] On examination at trial, Ms. Dillon estimated tips of about $600 monthly, acknowledging that the figure for gratuities on her Statement of Financial Information ($320) was too low.

[37] In 2003 Ms. Dillon reported total income of $11,192. It was her evidence that in the past she had reported tips in addition to income at the rate of 50% of her hourly salary. In the years 2000 and 2001 her total income, using that method was about $11,500. In 2002 her reported hourly income was $9,700 with tips reported at $1,400, for a total of $11,100. In 2003 her hourly income was reported as $11,192 with approximately $1,700 reported as tips ($140 per month). Assuming her tips to actually be $600 monthly, it would be appropriate to add the differential of $460 monthly to her annual income - for an estimated gross annual income of about $16,712 ($11,192 plus ($460 x 12)). The judge estimated her income to be $15,000. The child support payable, under the Tables at $15,000 is $127 and at $16,700 is $134. The evidence of income was not clearly presented. It has taken some mining of the transcript to come up with the above revised figures. In these circumstances, I am not persuaded that in modestly under-estimating Ms. Dillon's income, the judge made a palpable and overriding error of fact. I would not disturb her estimate.

(iii) The Division of Matrimonial Property:

[38] Each party asserted at trial that the other spouse had unreasonably impoverished the assets entitling him or her to an unequal division (**Matrimonial Property Act**, R.S.N.S. 1989, c. 275, s. 13(a)). Mr. Dillon maintained that Ms. Dillon had wasted $75,000 to $90,000 gambling throughout the marriage. Ms. Dillon said Mr. Dillon spent irresponsibly and lavishly, well beyond their means. He had a prior bankruptcy, which she submitted, demonstrated his poor money management. Mr. Dillon's allegations of Ms. Dillon's misspending were not well developed. The evidence fell far short of substantiating his claims. The judge found that Mr. Dillon's estimate of the amount of funds Ms. Dillon had misspent was grossly overstated. She concluded that the money wasted through her gambling may have been in the $10,000 range. Nor was she persuaded that Mr. Dillon's poor money management supported an unequal division. I am not persuaded she erred in dividing the assets equally.

(iv) Retroactive Child Support:

[39] Mr. Dillon submits the judge erred in ordering retroactive child support. The interim child support orders had permitted direct payment of the son's expenses, including his tuition at the National Ballet School, clothing, personal expenses and allowances. The son returned to live with Ms. Dillon in June 2001.

She made immediate application, for child support, applying both in July and October of that year. As explained above, the interim application was not heard. The judge reviewed the circumstances and found, as a fact, that there had been no delay on Ms. Dillon's part in making application for support. She said:

> [10] In relation to the retroactive support, I consider the Nova Scotia Court of Appeal case of *Conrad v. Rafuse* which was referred to by both parties and I look at the factors. I find that there was a need on the part of Kelly Dillon. Evidence in the affidavit shows that she was struggling at that time. She made a request to Mr. Dillon for child support which he did not provide. There was no delays in bringing the application. It would have already been heard except for the intervening circumstances which I've indicated which were the hurricane and other intervening events. Mr. Dillon certainly had notice that she was seeking child support. It was clear since 2000 when she filed her Answer and Counter Petition. I have to consider whether the order would cause unreasonable or unfailed [sic] burden to Mr. Dillon and I find that it will not. He was aware of the requests and I don't find it would be a redistribution of the wealth.

[40] This finding is supported by the record. While it was undisputed that Mr. Dillon contributed directly to the son's expenses after his return to live with his mother, he kept no reliable record of his contributions. It is estimated that he was contributing about $400 monthly — the evidence before the trial judge was unclear. In recognition of the direct child support payments the judge declined to award retroactive spousal support. In view of the inadequate evidence of Mr. Dillon's contribution, I am not persuaded the judge erred in crediting his contribution in this way. Taking into account the dramatic differential in the parties' incomes; the fact that this was a traditional marriage; Ms. Dillon's timely application for interim spousal support; and the fact that Mr. Dillon had paid none, an award of retroactive spousal support would have been otherwise warranted. In this way Mr. Dillon therefore received effective credit for his direct payments of child support.

[41] While there were interim consent child support orders in place, they were clearly directed at the son's living arrangements while at the National Ballet School and contemplated Ms. Dillon remaining in the matrimonial home. Both of those situations had changed by the time of the support application. I am not persuaded that the judge erred in awarding retroactive child support in the face of those existing orders.

[42] In **L.S. v. E.P.** (1999), 50 R.F.L. (4th) 302 (B.C.C.A.) (leave to appeal to the Supreme Court of Canada denied [1999] S.C.C.A. No. 444), endorsed by this Court in **Rafuse v. Conrad** (2002), 205 N.S.R. (2d) 46; N.S.J. No. 208 (Q.L.) (C.A.), Rowles, J.A., for the court, thoroughly canvassed the issue of retroactive child support orders both for the period of time pre-dating judgment and for the time preceding the application for support. When faced with such a request, factors to be considered by the court include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end (**L.S. v. E.P., supra** at para. 66). It is important to note that the order on appeal is not one for "retroactive" child support which pre-dates the application date.

[43] Here, Ms. Dillon applied for a variation in the support in both July and October of 2001. Mr. Dillon clearly had notice that she was seeking alteration of the direct payment of support, given the change in both her and their son's circumstances. The applications were not heard until the trial which commenced almost three years later. There is no evidence that this delay was due to Ms. Dillon's failure to pursue relief. Indeed, the judge found to the contrary. In the interim, Ms. Dillon used the small monthly payments on her share of the household contents to support herself and their son, thereby encroaching on capital.

[44] Mr. Dillon says he was warranted in not making child support payments directly to Ms. Dillon because of her misspending due to gambling. The judge found that his claim was grossly overstated. While it is undisputed that Mr. Dillon did make direct payments to the son for his benefit, he kept inadequate records in that regard. The judge did the best she could with the evidence before her. Summarizing the circumstances relevant to the award of retroactive child support: despite a request for support and notice of the application, Mr. Dillon did not provide funds to Ms. Dillon to defray housing and related expenses; Ms. Dillon encroached upon capital to provide for their son; at Ms. Dillon's modest income level she clearly had need for child support; Mr. Dillon had the ability to pay support; Mr. Dillon's financial disclosure was untimely and incomplete necessitating a disclosure order; there was no delay on Ms. Dillon's part in

pursuing the child support. I would find no error in the awarding of retroactive child support.

[45] The retroactive award must, however, be recalculated for 2003 and 2004 on the basis of Mr. Dillon's adjusted income. I will provide those figures below.

(v) Ongoing Child Support - Guidelines Section 9:

[46] Effective March 1, 2003, the parties began sharing custody on a month by month rotation. Mr. Dillon says the judge erred in using a "set-off" of the Table amounts to calculate the child support payable. He advocates for no order of child support or an amount substantially reduced from that which results from a set-off.

[47] It is Mr. Dillon's submission that the judge's approach to fixing support does not meet the requirements for shared custody as prescribed in **Contino v. Leonelli-Contino** [2005] S.C.J. No. 65 (Q.L.) (S.C.C.). **Contino** was released by the Supreme Court of Canada after the decision on appeal. There, the Court endorsed a flexible approach to determining child support in a shared custody situation. Section 9 of the Guidelines requires the exercise of discretion taking into account: (a) the amounts set out in the applicable tables for each spouse; (b) the increased costs of shared custody; and (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought, with the weight given to each factor varying with the circumstances of each case. There is no presumption in favour of payment of the full Table amount nor is it presumed the Table amount should be reduced in shared custody situations.

[48] Here the trial judge considered the case law and determined that the "set-off" approach was appropriate. She rejected a multiplier to increase the net difference. She considered and rejected a reduction of the net difference. Relevant to her exercise of discretion was the significant disparity in the parties' incomes. While I have found that Mr. Dillon's income for the years 2003 and 2004 was overstated, even at the reduced figures, there remains a substantial differential — Mr. Dillon's $60,000 to Ms. Dillon's $15,000. This clearly impacts the ability of each to contribute equitably to their son's needs and maintain a comparable standard of living, home to home. The Court in **Contino** does not rule out fixing the support on the basis of a set-off of the Table amounts provided in so doing, the additional factors in s. 9 are considered. I am not persuaded that in ordering support at the

set-off figure in these circumstances the judge erred in principle or that the order results in an injustice.

(vi) Time Limited Spousal Support:

[49] Mr. Dillon accepts that some short term entitlement to spousal support is appropriate, but maintains the trial judge should have time-limited the order. The proposal that the spousal support be time-limited was not raised at trial. It was Mr. Dillon's then position that no support should be payable.

[50] The judge made several findings of fact relevant to this issue: the marriage was of relatively long duration; Mr. Dillon was away from home for up to ten months of the year, leaving Ms. Dillon solely responsible for their son's care; Mr. Dillon wanted Ms. Dillon to limit her work outside the home; Ms. Dillon's current marketable skills restricted her to waitressing; she is working as much as possible in her current position and full time work is hard to find; she suffered economic disadvantage from the marriage and the breakdown; the fact that she is living with a common law partner and sharing expenses reduces, but does not eliminate, her need for spousal support.

[51] Ms. Dillon had been primarily responsible for their son's care throughout the marriage and during separation. At the time of the decision on appeal she remained responsible for his care, half time. It was far from predictable within what time frame she would achieve self-sufficiency, if ever. Nor was a time limited support order sought by Mr. Dillon. The parties separated in May of 2000. Mr. Dillon paid no spousal support up to the time of judgment in 2004. In that time period Ms. Dillon had made all reasonable efforts to maximize her working opportunities and care for and provide a home for their son. She had exhausted the proceeds from the furniture division, which was her only available capital. I am not persuaded the judge erred in ordering support without a time limit (see **Phinney v. Phinney** (2002), 211 N.S.R. (2d) 135; N.S.J. No. 540 (Q.L.)(C.A.)). This is not to suggest that the spousal support shall continue indefinitely nor does it preclude a future application by Mr. Dillon to vary or terminate spousal support. The judge recognized that Ms. Dillon is obliged to make all reasonable efforts to reach self-sufficiency.

[52] I would conclude, however, that the material overestimation of Mr. Dillon's ongoing income inevitably impacted the amount of spousal support. Instead of

earning $75,000 annually, he is earning approximately $60,500. Accordingly, I would reduce the amount of spousal support, proportionately, to $400 monthly.

SUMMARY:

[53] In view of the correction to Mr. Dillon's 2003 and 2004 incomes, the retroactive support requires recalculation. Using a 2003 income of $75,310.00 the judge ordered Mr. Dillon to pay retroactive support of $604.00 per month for January and February 2003. I have found his 2003 income to be $64,148 which would result in child support in the Table amount of $525 monthly - the support payable for that period would therefore be $1,050 (down from the $1,208 ordered by the trial judge).

[54] From March 1, 2003 to December 31, 2004, when the parties were sharing custody, using the set-off approach, the judge ordered a net payment by Mr. Dillon of $477.00 per month. Following the same set-off method, that figure should be adjusted to ($525 less $127) a net payment by Mr. Dillon of $398 per month from March 1, 2003 to December 31, 2003 (a total of $3,980). Using his 2004 income at $60,500, which results in Table support of $498 monthly, for January 1, 2004 to December 31, 2004 the net monthly payment would be $371 ($498 less $127) for an annual total of $4,452 ($371 x 12).

[55] This recalculation reduces the retroactive support for January and February 2003 from $1,208 to $1,050 and for March 2003 through December 2004 from $10,494 to $8,432 ($3,980 plus $4,452). The total reduction is $2,220 resulting in arrears of $17,744 (including the retroactive support for 2001 and 2002 which amounts were not appealed).

[56] The ongoing support commencing January 1, 2004 would be at the rate of $371 monthly, subject to any intervening order of the Family Division or changes in the custodial arrangements. The parties were ordered to exchange T1 filings on or before June 15th of each year. That requirement will remain in place. One such exchange should have already occurred.

[57] Mr. Dillon's net monthly pay after deductions, based upon the 2004 income is approximately $2,441 (that amount would not be adjusted for tax relief on any spousal support). Assuming continuation of the shared custody, from that net he would be obliged to pay $371 monthly in child support and $400 in spousal

support leaving a net disposable income of $1,670 (subject to adjustment for tax relief on the spousal support). He is required to maintain accommodations for their son to facilitate the shared custody. He has little capacity to satisfy the arrears of maintenance. The above net figure is after deduction of his monthly RRSP contribution. Assuming Mr. Dillon continues to cash out his contributions annually, he would have some funds at that time to apply to the arrears of child support. In the event the arrears of support have not been paid, I would order that they be paid by lump sum payments of $6,000 commencing February 1, 2006 and continuing annually on that date until the arrears are satisfied, with the last payment being adjusted to the amount of arrears then owing. The outstanding arrears shall not bear interest, unless any sum due is not paid on the date due, in which case it shall, from the due date, bear interest at the rate applicable to interest on judgments.

[58] The calendar year 2005 has now almost passed. Custodial arrangements may have changed. The ongoing support ordered above is subject to any adjustments that have been made during the past year and credit for any overpayments by Mr. Dillon. I will assume counsel can make any necessary adjustments without intervention of the court.

[59] As Mr. Dillon has had only partial success on the appeal and Ms. Dillon is represented by Dalhousie Legal Aid, I would not order costs.

[60] Counsel for Mr. Dillon shall prepare a new Corollary Relief Judgment incorporating these adjustments, on or before January 15, 2006, and submit it to counsel for Ms. Dillon for her consent as to form. The finalized judgment shall be provided to this Court on or before January 30, 2006.

Bateman, JJ.A.

Concurred in:

Cromwell, JJ.A.

Oland, JJ.A.