NOVA SCOTIA COURT OF APPEAL
Citation: ***Staples v. Callender***, 2010 NSCA 49

Date: 20100603
Docket: CA 319356
Registry: Halifax

Between:

Tracey Lee Ellen Staples

Appellant

v.

Mark Anthony Callender

Respondent

Judges:	Bateman, Beveridge and Farrar, JJ.A.
Appeal Heard:	May 20, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Beveridge and Farrar, JJ.A. concurring.
Counsel:	appellant in person respondent in person

Reasons for judgment:

[1] By order dated September 22, 2009, Justice Elizabeth Jollimore of the Nova Scotia Supreme Court (Family Division) fixed Mark Callender's obligation to pay support for the parties' two children. Tracey Staples appeals both the quantum of support and its commencement date.

BACKGROUND

[2] Ms. Staples and Mr. Callender have two children who were eleven and three and one half years old at the time of the application. The parents were not married and have never lived together. He admits that he is the biological father of the children.

[3] Ms. Staples first applied for child support on November 7, 2005 (the younger child having been born October 1, 2005). That application, which was apparently not pursued, was discontinued on September 3, 2008. On August 18, 2008 Ms. Staples filed another application. In her supporting affidavit of August 25, 2009 she claimed custody (which was never in issue), the Table amount of child support and "a contribution to special expenses for child care and any medical expenses for both children". She asked that the child support be made retroactive to the birth of the younger child (October 1, 2005) "due to the fact [that] before this Mark Callender was not regularly employed".

[4] Neither party was represented by counsel at the hearing of the application. The children's entitlement to support falls under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160 and associated *Child Maintenance Guidelines*, N.S. Reg. 53/98.

THE ISSUES:

[5] Ms. Staples says the judge erred:

> in that the computation of Mr. Callender's income for support purposes did not adequately account for the overtime hours (s. 16, *Child Maintenance Guidelines*);

in not awarding an appropriate sharing of day care expenses (s. 7(1), *Child Maintenance Guidelines*);

in declining to order retroactive child support.

Standard of Review

[6] The starting point on any appeal is to consider the standard upon which the judge's decision should be reviewed. It is difficult to express that standard in terms accessible to a lay person. At the risk of oversimplifying: an appeal to this Court is not an opportunity for three judges to retry the case on the basis of a written transcript. Our principal role is to ensure that the trial judge applied the correct legal principles in reaching a result. If the judge applied wrong principles which are material to the outcome then this Court is entitled to intervene. Where the question involved is a purely factual matter, significant respect is given to the findings of the trial judge who had the advantage of hearing and seeing the witnesses. Appellate intervention on factual issues is permitted only if the trial judge is shown to have made a clear factual error that has materially affected the result (**Leigh v. Milne**, 2010 NSCA 36 at para. 17). The Supreme Court of Canada has confirmed that this is the standard applicable to the review of support orders (**D.B.S. v. S.R.G**, [2006] 2 S.C.R. 231, 2006 SCC 37, at para. 136).

[7] In **Hickey v. Hickey**, [1999] 2 S.C.R. 518, L'Heureux-Dubé, J., writing for the Court, explained the reason for a highly deferential standard where a judge is determining spousal or child support:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> ...

> 12 . . . This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
> (Emphasis added)

ANALYSIS

Mr. Callender's Income

[8] Ms. Staples is an employee of Metro Transit, earning about $46,000 annually. Her financial information provided to the Court for the years leading up to the hearing was not representative of her actual income or expenses due to her maternity leave in 2005; another maternity leave in 2008 (Mr. Callender is not the father of that third child) and the fact that she worked two jobs in 2007. She provided up-dated information for the hearing.

[9] The *Child Maintenance Guidelines* govern the amount of child support under the **Maintenance and Custody Act**. The custodial parent's income is irrelevant to the Table amount of child support which is based upon the income of the non-custodial parent ("the payor"). Consequently, the Table amount is not based upon the child's need for support, but is fixed in accordance with the non-custodial parent's ability to pay. Adequate financial disclosure, particularly by the payor parent is key to determining the proper amount of support.

[10] In an organizational pre-trial held on August 11, 2009, Jollimore, J. directed that Mr. Callender file an up-dated Statement of Income including a letter from his employer. At that time the Court had only the financial information filed by him in early 2009 which consisted of a series of 2008 pay stubs from Advantage Personnel, the temporary agency through which he was then employed, and a print-out summary of each of his 2006 and 2007 Income Tax filings showing earned

income of $2,020 and $14,632 respectively. The judge wanted more current information for the upcoming hearing.

[11] In 2008 Mr. Callender had commenced working for Kent Building Supplies through Advantage Personnel. He worked on the Kent delivery trucks. On June 4, 2009, which was about three months before the hearing, he had been hired to work directly for Kent. Notwithstanding Justice Jollimore's direction, the only additional information provided by Mr. Callender was two recent pay stubs from his work with Kent.

[12] Mr. Callender's Statement of Income filed on January 5, 2009 showed monthly earnings of $2,059.40, for the time he had been working with Kent through Advantage. Had Mr. Callender worked a full year at that rate, his annual income would have been $24,712.80. However, his guaranteed wage with Advantage Personnel was $1,645.40 monthly based upon a 40 hour work week ($19,744.80 annualized). The difference in the two monthly amounts reflected the overtime that had been available to him through the Kent job. In his written commentary accompanying the January Statement Mr. Callender noted that Kent was removing two of seven trucks from service, consequently, he would lose that source of employment and would be back working varied jobs through Advantage Personnel. He was not guaranteed five days of work per week. In fact, he was laid off for the first six weeks of 2009.

[13] At the September 2009 hearing Jollimore, J. was concerned that Mr. Callender had not filed the material directed but determined that she would proceed with the hearing and, if possible, make a decision based upon the information available. Such are the choices frequently facing judges in family matters, particularly when self-represented persons appear. In fact, the two September 2009 pay stubs contained a summary of his total earnings since commencing work with Kent on June 4, which was the most relevant information. The judge was obviously satisfied that she could estimate his income from Advantage for the first months of 2009. As I have noted above, he was laid off for six weeks at the start of the year. Given Mr. Callender's employment history and the nature of his work it did not appear that he was hiding income. Ms. Staples' application had now been pending for about a year. It was important not to further delay the matter, if avoidable. I would not conclude that the judge's exercise of her discretion to proceed with the hearing in the absence of more formal disclosure was in error.

[14] As indicated above, Mr. Callender had started as a full time employee at Kent on June 4, 2009. On cross-examination by Ms. Staples, he testified that Kent was reducing overtime. His basic work week was 40 to 42 hours at an hourly rate of $10 (annualized $21,840).

[15] In response to questioning from the judge, Mr. Callender testified that he had not filed an income tax return for 2005 when his only work was as a DJ. He had earned about $23,500 for 2008. The Advantage Personnel pay stub for November 22, 2008 showed a year to date total of $21,484, consequently, the judge was able to verify his evidence of earnings by estimating Mr. Callender's total income for that year.

[16] The two pay stubs he provided for the Kent employment were each for two week periods ending September 5, 2009 and September 19, 2009. His gross pay for the first period was $937 including 8.5 overtime hours at time and one half. For the second two week period he earned $837 with no overtime hours (annualized $21,762). The only source deductions were income tax, employment insurance and Canada Pension premiums. After these deductions his net bi-weekly pay, deducting income tax, CPP and EI, was $758 and $687. The year to date earnings were $7,346, which, starting June 4, would result in an average weekly pay of $459 (using 16 weeks) and assuming overtime continued at the same rate. That would result in annualized pay of $23,874. However, as stated above, it was Mr. Callender's evidence that he did not anticipate continuing to have overtime at Kent. The pay stubs somewhat corroborated that evidence in that there were no overtime hours included in the most current bi-weekly pay.

[17] With a six week layoff at the commencement of 2009 Mr. Callender would have worked for about 3.5 months for Advantage Personnel before commencing work with Kent. His guaranteed wage was $1,645 monthly based upon a 40 hour work week. That would amount to gross earnings of $5,757. He had earned $7,346 with Kent to September 19. Without overtime he would gross $837 bi-weekly for the remainder of 2009 (approximately 7 more bi-weekly pay periods). This amounts to $5,859. Adding these three sums together his earnings for 2009, without continued overtime, would be $18,969.

[18] It was open to the judge to accept Mr. Callender's evidence about the availability of overtime. I am not persuaded that in estimating an ongoing base income of $19,000 with another $1,000 for overtime, she made a palpable and overriding error of fact such as to warrant our intervention. The Table support amount on that income is $292 monthly for two children.

[19] Ms. Staples says that the judge underestimated Mr. Callender's income by not projecting a sufficient amount of overtime income. The *Child Maintenance Guidelines* permit a Court to impute income in a variety of circumstances. The only subsection relevant here is:

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

[20] Clearly, Mr. Callender had not complied with the judge's direction to provide a letter from his employer detailing his earned income to date, nor an earlier, April 14, 2009, direction from Justice Jollimore that he do so. While the quality of Mr. Callender's disclosure entitled the judge to consider imputing income, in deciding whether to do so, she was called upon to exercise her discretion. Provided the discretion is exercised within acceptable limits, and not arbitrarily, this Court will not interfere (**MacIsaac v. MacIsaac**, 1996 CarswellNS 177, 150 N.S.R. (2d) 321 (C.A.)). It was for Justice Jollimore to determine whether, from the information provided by Mr. Callender, including his testimony, she could satisfactorily determine his income. As I have discussed above, the judge concluded that she had sufficient information from which to do so.

[21] The purpose of imputing income, in the absence of proper disclosure, is to arrive at a fair estimate of income where information is not otherwise available, not to arbitrarily punish the payor for lack of disclosure. In this regard each case must be decided in context. There will be circumstances where a judge concludes that the non-disclosure speaks of a payor attempting to avoid his or her obligations by

hiding the true income information. In view of Mr. Callender's limited work history, relatively low income, provision of year to date figures and recent pay stubs, and apparently truthful testimony about his 2008 income, the judge could reasonably infer that he was not motivated to hide income.

[22] With respect to Ms. Staples' submission that the judge did not attribute sufficient overtime income – the uncontradicted evidence was that Mr. Callender had a spotty employment history. Indeed, in neither 2008 or 2009 had he managed to work a full year. He had only recently gained regular employment. He testified that his opportunity for overtime income was diminishing. As I have said, it was open to the judge to accept his evidence in that regard and she clearly did so. I am not persuaded that she erred in her determination. Absent error, we are not entitled to intervene.

Special or Extraordinary Expenses (s. 7, ***Child Maintenance Guidelines***)

[23] These expenses are addressed in the *Child Maintenance Guidelines* as follows:

> 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:
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> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
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> (b) that portion of the medical and dental insurance premiums attributable to the child;
>
> (c) health related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counseling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

(1A) For the purposes of clauses (1)(d) and (f), “extraordinary expenses” means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse’s income and the amount that the spouse would receive under the applicable table or, if the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) if clause (a) is not applicable, expenses that the court considers are extraordinary, taking into account all of the following:

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, if the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities,

(v) any other similar factor that the court considers relevant.

(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.

(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.
>
> (4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

[24] Determining the obligation, if any, of the payor to contribute to special or extraordinary expenses requires a judge to exercise her discretion. Discretionary orders are deserving of a high level of deference (**Hickey**, **supra**, at para. 7 above).

[25] Ms. Staples says the judge did not order an appropriate sharing of daycare expenses. She says this occurred because the judge underestimated Mr. Callender's income (as I have discussed above), overstated her income and made insufficient allowance for the day care expenses. Allowable s. 7 expenses, where contribution is ordered, are generally shared in proportion to the parents' incomes.

[26] The judge found Ms. Staples' income to be $46,000. Ms. Staples says her income was, in fact, $44,614. On the financial statement filed by Ms. Staples, her gross annual income is $46,017. The lower figure was that reflected on her 2009 income tax return which had not yet been filed at the time of the hearing. Ms. Staples was on maternity leave for the month of January 2009, hence the lesser amount. Ms. Staples believes that the evidence that she was on maternity leave in January 2009 was before the court - that is not supported by the transcript of either the hearing or the organizational pre-trial before Jollimore, J. In any event, to the extent that the contribution to the s.7 expenses here was calculated on a go-forward basis, I am not persuaded the judge erred in using Ms. Staples actual income as contained on her financial statement.

[27] Under the Nova Scotia *Guidelines* "income" means the parent's "Total Income" as reported for Income tax purposes (ss. 2(1)(c) and 15 to 20). Section III of the *Guidelines* incorporates Section III of the *Federal Child Support Guidelines*, SOR 97-175 (the "*Federal Guidelines*") which provide for certain adjustments to income. Relevant here is the following provision in Schedule III of the *Federal Guidelines*:

> 1. Where the spouse is an employee, the spouse's applicable employment expenses described in the following provisions of the *Income Tax Act* are deducted:
>
> ...
>
> (g) paragraph 8(1)(i) concerning dues and other expenses of performing duties;

[28] Ms. Staples' financial statement shows monthly union dues of $51.14. Those should have been deducted from the gross income which would produce an annual income of $45,392 for s. 7 sharing purposes.

[29] The judge found that Ms. Staples' child care expenses totalled $3,639 before taking into account any tax relief received by her, resulting in an after tax cost of $1,954 at Ms. Staples estimated rate of income tax (Nova Scotia *Guidelines* s. 7(3)). Dividing that figure in proportion to the parties' incomes resulted in an order that Mr. Callender contribute an additional $50 monthly for these expenses over above the Table support of $292.

[30] Ms. Staples takes issue with the total of the expenses allowed by the judge. Her calculation results in "child care" and extraordinary expenses of $5,916.64. The evidence of Ms. Staples s. 7 expenses placed before the judge was, with respect, vague and disorganized. The expenses which she detailed represented a combination of child care expenses (s. 7(1)((a)), health related expenses (s. 7(1)(c), extraordinary expenses for education (s. 7(1)(d)) and extraordinary expenses for extracurricular activities (s. 7(1)(f)). Ms. Staples presented a much more detailed and organized itemization of these costs on appeal. However, we must review the order based upon the evidence that was before the judge. On that record, I am not persuaded that the judge erred in her calculation of allowable s. 7 expenses.

[31] As to Mr. Callender's share, the judge neglected to reduce Ms. Staples incomes to account for union dues. That adjustment would result in Mr. Callender's monthly contribution increasing to $51.50. I am not persuaded the small difference between the contribution to extraordinary expenses actually ordered and the amount which might have been ordered is error sufficient to warrant intervention.

[32] While not relevant to this appeal, I would not endorse the judge's comment that extracurricular sports activities, to warrant consideration as s. 7 expenses, must necessarily be at an "almost" elite level. In my respectful view this is not consistent with the requirements of s. 7(f) and s. 7(1A)(a). In each case the necessity and reasonableness of an expense and the obligation of the non-custodial parent to contribute requires a fact specific analysis.

Retroactive Support

[33] Ms. Staples says the judge further erred in declining to order that Mr. Callender pay retroactive child support – dating back to the birth of their second child on October 1, 2005. Jollimore, J. ordered that the child support would commence on October 3, 2009 and dismissed Ms. Staples' application for retroactive support.

[34] In **D.B.S.**, **supra**, the Supreme Court of Canada addressed the law applicable to a grant of retroactive child support. Jollimore, J. referred to that decision in her reasons for judgment. In **D.B.S.** the Court considered three circumstances in which a request for retroactive support can arise - where there is an existing child support order; where there is a previous agreement between the parties; and, as is the case here, where there has never been an order for child support.

[35] There is no restriction in the **Maintenance and Custody Act** on the date from which a court may order support. It was open to the judge here to make a retroactive award (see **D.B.S.** at paras. 80 to 84) which the judge recognized.

[36] In **D.B.S.** the Court opined that, while retroactive orders are not "exceptional", circumstances may be such that a retroactive order should not be made:

> 95 It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

[37] In assessing the propriety of a retroactive order a judge's discretion is guided by the following factors (**D.B.S.** paras. 94 to 116):

> The reasons for the custodial parent's delay in seeking child support;
> Blameworthy conduct by the payor parent;
> The child's circumstances;
> Hardship caused to the payor parent by a retroactive award.

[38] It is clear from her reasons that the judge was mindful of these considerations. She determined that there was no inexcusable delay by Ms. Staples in seeking support nor blameworthy conduct by Mr. Callender. In the latter regard, Bastarache, J. writing for the majority in **D.B.S**., **supra**, provides examples of a payor's blameworthy conduct such as hiding income; intimidating the custodial parent so as to discourage pursuit of support; misleading the custodial parent about the payor's financial circumstances or intentional underemployment. The list is not a closed one.

[39] In considering the children's circumstances, Jollimore, J. referred to Ms. Staples' evidence that the children have not done without despite Mr. Callender's non-payment of support. This is because her parents generously stepped in to meet the children's needs. While Ms. Staples says on appeal that she is obliged to repay her parents for the amounts they have spent, that evidence was not provided to the trial judge. Bastarache, J. wrote in **D.B.S**.:

> 113 Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her:[*L.S. v. E.P.*, 1999 BCCA 393, leave to appeal to SCC refused...]. This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.

(Emphasis added)

[40] Turning to the final factor – the hardship that a retroactive award may visit on Mr. Callender – the judge observed that for the 2005/2006 years Mr. Callender's income was below the child support threshold. However, his income from 2007 forward was high enough to warrant child support payments which she approximated would total in the order of $10,000. However, she was aware that Mr. Callender would be required to pay any retroactive award out of current income. She concluded that he did not have the ability to do so. Once again, her approach to this issue is not inconsistent with the discussion by Bastarache, J. in **D.B.S** where he recognized that relevant to assessing hardship is an assessment of the payor's current ability to respond to a retroactive order (at para. 115).

[41] In **L.S. v. E.P.**, cited in **D.B.S**, above, Rowles J.A. writing for the court, undertakes an insightful and thorough discussion of the analysis relevant to a retroactive award of child support. On the question of hardship, she observes that a court is less likely to award retroactive maintenance where it believes that such an award would prejudice the non-custodial parent's ability to make ongoing support payments as they become due (at para. 76). Rowles, J.A. quoted with approval the reasons of Esson, J.A. in **E.T. v. K.H.T.**, [1996] B.C.J. No. 2208 (Q.L.)(C.A.), the full court concurring on this issue, where he said:

> 22 In deciding whether to exercise the discretion to order payment of maintenance for a period prior to the hearing, a judge should consider whether such an order will have an impact on the defendant which will make it less likely that the order for future payments can or will be complied with. Where the defendant's means are limited, it will often be right to not create "instant arrears". Other considerations no doubt could justify the refusal to make a retroactive order.

[42] I am satisfied that this was the focus of Jollimore, J.'s analysis here. Mr. Callender has a limited income from which the judge ordered that he pay child support of $342 monthly. His monthly income (as determined by the trial judge) after estimated mandatory source deductions approximates $1,370, leaving roughly $1,028 monthly after payment of child support.

[43] Ms. Staples, while having sought retroactivity dating to the time of the second child's birth, takes particular issue with the fact that the order was not

backdated at least to the date of her application. Where the payor's resources so permit, and particularly where there is no prior support order, I would agree that a judge should consider backdating the order to the date of the application for support. However, there is no fixed rule to that effect. In determining the propriety of such an order the judge must exercise his or her discretion, considering, in particular, the payor's ability to respond to the order.

[44] Here, in declining the request for a retroactive order, the judge expressly referred to each of the years 2007, 2008 and 2009 - which period covered the time both before and after commencement of the application. I am not persuaded that she failed to consider backdating the order to the date of the application. Given the relative recency of Mr. Callender's employment and his modest earnings, and applying the highly deferential standard of review mandated by **Hickey**, **supra**, I am not persuaded that the judge erred in concluding that Mr. Callender did not have the financial ability to respond to a retroactive award of any amount. Her decision reveals no material error, serious misapprehension of the evidence, or error in law.

[45] Unfortunately, the quantum of support is limited by Mr. Callender's ability to pay. The *Child Support Guidelines* do not purport to produce a level of support that is always sufficient to meet a child's reasonable needs. This is the case here. That legislative choice is understandably difficult for custodial parents to accept.

[46] Although I am not persuaded that the judge erred in declining to make a retroactive order, it is appropriate to point out that Mr. Callender's obligation to support his children existed independent of court ordered support. He should have contributed to the children's needs as he was able whether or not Ms. Staples had applied to the court for an order. While he may not have had the means to do so prior to 2007, from that point forward he was earning sufficient income to make some contribution, as the judge found. This legal obligation is set out in the **Maintenance and Custody Act**:

> 8 Every one
>
> (a) who is a parent of a child that is under the age of majority; or
>
> (b) who is a guardian of a child that is under the age of majority where the child is a member of the guardian's household,

> is under a legal duty to provide reasonable needs for the child except where there is lawful excuse for not providing the same.

[47] The circumstances here show Mr. Callender in a very poor light. According to the evidence he has made a minimal, if any, financial contribution over the course of these children's lives. He has been content to have the full weight of their care fall upon Ms. Staples. It is unclear from the evidence the extent to which he chooses to have meaningful contact with the children. One can only hope that from this point forward he will be motivated to continue with his employment and step up to his responsibilities to the children.

[48] The Order provides for an annual exchange of income tax returns and notices of assessment by July 30 of each year. This provision will provide the parties with the requisite information to determine whether a variation application is in order due to increases or decreases in income or changes to the s. 7 expenses.

DISPOSITION

[49] Finding no reversible error by the trial judge, I would dismiss the appeal. While Ms. Staples has not been the successful party, I would find it appropriate that Mr. Callender make a limited contribution to her out of pocket costs of the appeal which I would fix at $283, being the transcription expense. This amount shall be satisfied by Mr. Callender paying a minimum of $25 monthly, in addition to child support, until the costs outstanding are satisfied.

Bateman, J.A.

Concurred in:

Beveridge, J.A.
Farrar, J.A.