C. A. No. 100775

NOVA SCOTIA COURT OF APPEAL

Jones, Chipman and Pugsley, JJ.A.
Cite as: Edwards v. Edwards , 1994 NSCA 98

BETWEEN:		
MICHAEL LEE EDWARDS		David S. Green and Alexandra A. MacLean for the Appellant
	Appellant	
- and -		
COLLEEN ANN EDWARDS (PEREIRA)		Deborah K. Smith for the Respondent
	Respondent	
		Appeal Heard: June 16, 1994
		Judgment Delivered: August 22, 1994

THE COURT: The appeal is dismissed with costs as per reasons for judgment of Chipman, J.A.; Jones and Pugsley, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by the father from a decision by Grant, J. in the Supreme Court varying child support for two children payable by the father to the mother.

The parties were married in 1981 and separated in 1989. A **decree nisi** granting a divorce was issued on September 14, 1990. Custody of the two sons of the marriage was awarded to the mother. Minutes of settlement were signed by the parties on August 13, 1990 and incorporated in the **decree**. Pursuant thereto the father paid the mother $550.00 per month per child for a total of $1,100 per month gross.

On May 12, 1993 the mother applied to the Supreme Court for an order varying upwards the child support provisions of the **decree nisi.** On June 28, 1993 the father made an application for an order varying child support downwards and seeking additional access. The matter came before Grant, J. in Chambers on September 2, 1993 and was further heard on November 8, 9 and 16, 1993. Between the hearing dates, the father added three more applications; one relating to certain monies held in trust for the education of the children; another relating to a change of the surnames of the children and another relating to dealings with persons regarding the schooling and medical and dental treatment of the children.

In his decision dated November 23, 1993, Grant, J. referred to the following portions of s. 17 of the **Divorce Act** dealing with the prerequisite of a change in circumstances to an application to vary and the objectives of a variation order:

> Section 17(4)
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> "Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change."
>
> Section 17(8)
>
> "A variation order varying a support order that provides for the support of a child of the marriage should
>
> > (a) recognize that the former spouses have a joint financial obligation to maintain the child; and

> (b) apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation."

Grant, J. found that there were such changes in the circumstances of both parents as to justify variation of the support order incorporated in the **decree nisi**. He reviewed the circumstances of the parties respecting their incomes, expenditures and lifestyle. He found the mother to be a credible person. He found the father evasive and not as credible. As to the cost of the care of the children, he found that such cost was approximately $2,000 per month. He accepted the proposition that the sharing of the financing of child support should relate generally to the relative incomes of the parents, and after considering the evidence relating to such incomes and the liability of the parties for income tax, concluded that the amount of child support should be varied so that the father should pay that sum of money which would bring to the mother the sum of $1,200 free of tax monthly for the support of the children. This worked out to a gross payment of $2,274 a month which was to commence as of November 1, 1993. Having allowed the mother's application to vary upward, the father's application to vary downward was dismissed.

Also dismissed was the father's application for an order directing the mother to use the surname Edwards in identifying the children, rather than the surname Pereira-Edwards as she had been using. The trial judge ordered that the father was entitled to receive copies of school and health records pertaining to the children. He fixed costs of the trial at $11,517 by the application of the tariffs, taking $100,000 as the amount involved in the litigation and applying scale 5 thereto.

The father appeals to this court asserting a number of grounds which raise the following issues:

(1) Whether the award for support was excessive having regard to the condition, means and circumstances of the parties.

(2) Subsidiary issues, including access, costs and admissibility of evidence.

An outline of the circumstances of the mother and father and the findings of the trial judge is necessary before these issues are addressed.

The parties were married on August 22, 1981 and have two sons now ages seven and six. They separated on April 30, 1989. At that time, the father was employed as a chartered accountant with the firm of Collins Barrow and the mother was at home looking after the children. The children were then two years of age and less than one year respectively. Prior to their birth, the mother worked as a laboratory technologist for the Canadian Red Cross. Shortly after the separation, she returned to her work.

Minutes of Settlement were signed on August 13, 1990 and incorporated into the Divorce Judgment pronounced on September 14, 1990. At the time the Minutes of Settlement were signed, the parties had divided the matrimonial assets and debts, the father assuming the majority of the obligations and receiving the majority of the assets. Custody of the two boys was awarded to the mother with access to the father. The mother received no spousal support from the father. The father took the position that as he had a heavy debt load, his ability to provide support for the children was limited. The Minutes acknowledged that he had paid support of $2,500 per month for three months in 1989 and $1,500 per month for five months in that year. The mother did, however, accept child support for both children in the amount of $1,100 per month because, she maintained, she understood the need to give the father an opportunity to sell his assets and reduce his debt load. This figure was to remain in force until varied by a court of competent jurisdiction. At the time the Minutes of

Settlement were entered into, the father was earning a gross salary of approximately $59,000 per annum and the mother a gross salary of approximately $26,500 per annum.

Since the divorce, both parties have enjoyed increases in income. The mother's income, without taking into account child support, increased from $26,500 to $37,769 per annum, made up of salary from employment, overtime and other benefits. She is subject to loss of a week's pay in 1994.

The father's true income is more difficult to ascertain. In October, 1991, he changed employment, becoming a partner with the firm of Lyle Tilley Davidson. His income was frequently stated in terms of gross income or in terms of "taxable compensation". The actual income as disclosed in his tax returns but before the deduction of certain expenses was $74,604 in 1990; $78,511 in 1991; and $84,971 in 1992. A sworn statement of financial information dated June 3, 1993 discloses an income of $5,717 per month or $68,604 per annum. The trial judge stated that he was "considerably uncomfortable with his evidence on his earnings". He referred to the fact that in May of 1992, the father had submitted to his bank a projection of income for the following fiscal year ending January 3, 1993 to be "approximately $80,000".

Since the father's firm had a fiscal year ending January 3rd of each year he would, at the time of trial, be expected to have had a fairly accurate idea of his income for the calendar year 1993 and the taxation year 1994.

The discomfort felt by the trial judge with respect to the father's earnings undoubtedly found its genesis in part in the opulent lifestyle maintained by the father since the divorce. On January 30, 1993, he married Joanne Cormier. On August 7, 1993, the latter gave birth to a daughter. She had been employed with Air Canada but, at the time of the trial, was in receipt of unemployment insurance benefits of $1,363 per month until December 31, 1993. She was on long-term leave of absence from her

employment without pay until at least October 31, 1994. She was, however, entitled to receive all employee benefits paid for by Air Canada during the period of her absence. The trial judge found that she may or may not return to her work.

Since his remarriage, the father sold the previous matrimonial home at 40 Woodbury Drive, Halifax for $155,000 and purchased a new home for $230,000, which was placed in the name of his new wife. He assumed the liability on the mortgage. He had entered into a pre-marriage agreement with her whereby it was provided that she need only pay $300.00 per month for "rent". He incurred expenses of $3,900 for elective eye surgery performed to enable him to no longer wear glasses. He bought a 1993 Pontiac van for $24,000, trading his 1989 Honda. He purchased a ring for his new wife at a cost of $6,000, incurred expenses for a wedding and honeymoon of about the same amount. He has travelled to such places as Disney World, Aruba and Bermuda. His firm pays his membership at the Royal Nova Scotia Yacht Squadron. It also pays some of his expenses there which are in the nature of business promotion. The trial judge found that he had incurred "considerable expenses in the last year or so". The trial judge expressed the opinion that the father had a career where the future was limited to an extent only by his energy. He noted that the appellant's firm was not prepared to have its books looked at for privacy reasons. He said:

> "I have some reservations about the accuracy of his disclosures."

The trial judge found him to be evasive in some respects and not as credible as the mother. A perusal of his evidence does nothing to dispel this impression of the trial judge respecting the father's credibility.

The mother lives with the two children in a modest home which cost $110,000. She walks to work and owns a modest 1989 car. She stated that she was forced to economize, buying used clothes, keeping the heat on low at home, cancelling her fitness classes and a family membership at the Waegwoltic Club. The trial judge

stated that he believed her and that in his view she "scrimps and saves to keep the household afloat". Her future career expectations were, in his opinion, minimal. She was able to save only a little for her older years.

With respect to the cost of upbringing of the children, the trial judge reviewed the evidence of the mother which he accepted. He considered the various items of expense and allowed for the fact that the father incurred expense during periods of access. He found that the cost incurred by her for the two children was $2,000 per month.

The trial judge compared the two incomes, ie. $37,769 for the mother and $68,704 to $72,000 for the father. He noted, however, that in prior years there was considerable "extra" income. The trial judge concluded that the father was in a position to control his income flow and channel it as he saw best for tax purposes and other benefits. A review of the evidence supports that conclusion.

The trial judge reviewed and referred to the relevant authorities and in particular **Moge v. Moge** (1992), 145 N.R. 1 (S.C.C.) at page 65 dealing with the disadvantages encountered by the custodial parent which place limitations and burdens upon that parent. He also recognized the paramount interest of the children when child support is under consideration.

In the face of all this, the trial judge found that the father was in a position to provide the sum of $1,200 after tax in the hands of the mother for the children. He observed that the father was able to deduct for income tax purposes the amount of the payments made by him for child support, whereas such payments were taxable in the hands of the mother.

At the trial, the father declined to produce financial records of his firm which would have confirmed his income and, no doubt, have given other information with respect to the various expenses charged off for tax purposes and from which he

may have benefited. He did file a letter from one of his partners confirming the amount of his capital account and stating his share of partnership income prior to business expenses that he paid personally. This letter purported to confirm that his income was $65,825 for the year ending January 3, 1993. It stated that it was not the firm's policy to release financial statements to an outside party and that the firm would oppose any attempts at distribution of confidential financial statements.

After the trial judge's decision was rendered but before the formal order was drawn up, the father's counsel made application to permit him to file his firm's financial statements. This was after it was known how the trial judge viewed the disclosures made by the father and his firm. The father took the position that such disclosure would then "clear the record on this issue". The trial judge dismissed this application to reopen the case.

On the appeal before this court, the father took the position that the trial judge erred in the exercise of his discretion in dismissing the application to reopen the case and further made an application to this court for the admission of fresh evidence consisting of the financial statements of Lyle Tilley Davidson for the years ending January 3, 1993 and January 3, 1994.

It is convenient to deal with these two matters at the outset.

With respect to the application to reopen the case, this court has repeatedly held that it will not reverse a discretionary order of a trial judge unless wrong principles of law were applied or a manifest injustice ensued. What the father was trying to introduce before the trial judge after the decision was within his knowledge and means of production at the time of the trial. For reasons he considered best (which undoubtedly included his relations with his partners), he chose not to produce that material. In the exercise of the discretion not to permit him to adduce it after the decision commenting unfavourably on the father's credibility, I cannot say that the trial

judge erred. No injustice can result where the father himself chose not to produce the evidence at trial. No error of law has been shown to have been made and I would reject the ground of appeal from the trial judge's discretionary decision.

As to the application to produce the two sets of financial statements before this court, I refer to the principles governing the admission of fresh evidence before an appeal court;

(1) The evidence should generally not be admitted if by due diligence it could have been adduced at trial.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue at the trial.

(3) The evidence must be credible in the sense that it was reasonably capable of belief.

(4) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Dealing first with the statements for the year ending January 3, 1993, the case for their admission fails glaringly to meet the first condition and for this reason the motion respecting such statements must be dismissed.

With respect to the statements for the year ending January 3, 1994, I have already pointed out that by November of 1993 the father and his partners must have been in possession of sufficient information respecting the income for that period that reliable evidence could have been given. The firm would know all of its expenses and earnings for nearly 11 months of a 12 month period and could have provided a very accurate picture of the father's taxable income and his expense benefits for that period. I believe that the evidence fails the first condition. I am satisfied as well that it fails the fourth condition because when taken with the rest of the evidence, it would be of little

assistance in view of the trial judge's comments respecting the appellant's credibility regarding his earnings, coming as it would from the same source. I would therefore reject as well the motion for fresh evidence as it related to the second set of financial statements.

ISSUE ONE - SUPPORT

The father does not challenge the trial judge's finding that there has been a change in the circumstances of the parties. Rather, he submits that such changes that there were did not warrant the large increase in the support for the children awarded to the mother. This issue breaks down to a review of the trial judge's assessment of the cost of the children's support and the ability of the mother and the father to bear their share of that cost.

1. Cost of Support:

The trial judge's finding was that the mother's cost of supporting the children was approximately $2,000 per month. The father challenges this, arguing that instead of assessing the evidence, the trial judge blindly accepted the mother's statement as to the cost of the children. With respect, I do not agree. The mother gave extensive evidence respecting the costs of maintenance of the children. It is to be kept in mind that these children were the children of an up-and-coming professional man and his wife. The evidence leads to the conclusion that throughout the duration of the marriage, the parties maintained an excellent lifestyle as would be typical of such a couple. They resided in a very comfortable suburban home with an in-ground swimming pool. They belonged to clubs and had a one-half interest in a 24 foot sailboat. They had an expensive car and other comforts enjoyed by persons fortunate enough to have a high income.

While the cost of supporting these children may seem high, this must be judged in the context of the lifestyle of the parents and the fact that, between them, they now have comfortable disposable incomes. The trial judge made specific reference to the fact that the mother was building up a fund for their higher education and that it was being properly managed. It has been said time and again that the child's right to support is paramount. Frequently courts are limited in what they can do by the inability of the parents to pay a fit sum for the support of their children. That is not the case here.

In response to those who complain of inconsistency in support awards it must be kept in mind that the task of fixing support under s. 17(8) is a very individual exercise, tailored to the circumstances of the family under consideration. A study of other awards for comparative purposes is an exercise of limited value. The child's needs and the parents' abilities range over a very wide economic scale. Here, for instance, we are not concerned with just the bare cost of food, clothing and minimal shelter for a child in the city of Halifax for which no doubt statistics can be developed. We are concerned with the application of s. 17(8) to this family. The following statement from the judgment of Kelly J.A. in **Paras v. Paras** (1970), 2 R.F.L. 328 at 331 (Ont. C.A.) is particularly appropriate:

> "Since ordinarily no fault can be alleged against the children which would disentitle them to support, the objective of maintenance should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occurred. To state that as the desideratum is not to be oblivious to the fact that in the vast majority of cases, after the physical separation of the parents, the resources of the parents will be inadequate to do so and at the same time to allow to each of the parents a continuation of his or her former standard of living. In my view, the objective of maintaining the children in the interim has priority over the right of either parent to continue to enjoy the same standard of living to which he or she was accustomed when living together.

> However, if the responsibility for the children is that of the parents jointly, neither one can justifiably expect to escape the impact of the children's maintenance. Ideally the problem could be solved by arriving at a sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective income and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody." (emphasis added)

The mother offered detailed evidence respecting the costs of shelter, food and clothing for these children. As the trial judge pointed out, she was in the best position to know these matters. He had confidence in her credibility. On reviewing the record, I cannot say that the trial judge erred in his acceptance of the figure of $2,000 per month, which was less than the mother's calculation of over $2,200.

2. <u>Ability to pay - Mother</u>:

The mother has a gross income of about $37,000 per year, not counting support received. At the time of the trial, the support amounted to $1,100 per month which the trial judge found was a net pay-out of $607.00 by the father after his tax deductions. After taxes, this only amounted to a net payment to the mother of $585.00.

The trial judge reviewed the evidence respecting the mother's lifestyle. He accepted her evidence that she had, relative to the father's position, a low wage job with minimal future career expectations. She spent her money carefully and was able to save little for her future years. Any illness or injury or job loss would put her and the children in a precarious financial situation. The payment ordered of $1,200 after tax means, in effect, that the mother was being called upon to provide $800.00 per month after tax for the support of the children. This seems fair and reasonable. However, the correctness of the burden placed upon the mother cannot be judged without comparison with the burden placed by the trial judge upon the father.

3. Ability to pay - Father:

The father's income tax returns for the years 1990, 1991 and 1992 were produced. They show a wide difference between gross total income, total income and taxable income. The gross totals were $74,605, $78,511 and $84,971 for the three years respectively. The totals were $57,933, $45,802 and $26,823 respectively. The taxable income in each of the three years was far less still. A number of write-offs were taken, many of which are difficult to assess. It appears, however, that some of these included expenses of a type which many other taxpayers would not be able to claim from their gross income. Deductions for the year 1992 totalled $11,238, broken down as follows:

80% of Business Promotion, Miscellaneous	$ 2,570
Interest	$ 1,785
Auto Expenses	$ 5,026
Capital Cost Allowance	$ 1,857
TOTAL:	**$11,238**

I have already referred to the lifestyle of the father. He has purchased an expensive new home, which he has placed in the name of his second wife and for which he has assumed the financial responsibilities. He has purchased a new vehicle (equipped with a cellular phone), the costs of which he is able to write-off in part at least. He has made substantial expenditures for recreational travel and appears to be maintaining an excellent lifestyle - far better than that of the mother.

The father's calendar 1993 income was not finally determined at the time of hearing but of significance was the fact that his latest statement of income made on June 3rd showed a gross of $68,604 per annum. As well, he testified that he received a draw of $4,200 per month ever since joining Lyle Tilley Davidson in October of 1991. It was the policy of the firm to keep the difference between this draw and his estimated annual partnership profit in an account to fund income tax liability at tax time and a

capital account. He testified that he was able to persuade the firm that the amount of tax relief he would be receiving was such that he could safely withdraw some of this money, and in September 1993 he received a payment of $10,000 from the capital account. At about the same time, he withdrew $35,900 from his capital account to pay a mortgage and then immediately replenished the capital account with the proceeds of a loan in the same amount. This produced a tax advantage for him. His statement of property as of June 1, 1993 stated the estimated value of the capital account to be $31,990. At the time of the trial he estimated it to amount to $45,500 as appears from information provided by him to his bank. As already pointed out, the details of the father's income for most of the 1994 tax year and the 1993 calendar year were within the ability of the father to be produced had he chose to do so.

I accept the statement of counsel for the mother that it is difficult to know what the father's true income is. The father challenged the trial judge's finding that he has a career where the future is limited to an extent only by his energy. The father himself said:

> "I do have earning potential. That's what I do have. My wife has assets. That's how our arrangement works."

This, in my opinion, furnishes the answer to this argument of the father. From all the evidence, I consider it safe to infer that the father enjoys an after tax disposable income of more than $4,200 monthly. The trial judge has imposed upon him an obligation to support his children in the amount of $1,200 monthly after tax to the mother. The father's earnings are higher but his marginal rate appears to be no higher so that the cost to him is about $1,200 - $1,300 after tax. This leaves him a disposable income of about $3,000 a month beyond the support ordered for his two children. He is not required to support the mother.

The father maintains that $3,000 is insufficient to support his new family and maintain his expenses. In his factum, the father lists the following monthly expenses:

Mortgage	$1,108.00
Heat	$ 150.00
Electricity	$ 72.00
Food	$ 500.00
Gasoline, Tokens	$ 155.00
Vehicle Payment	$ 431.00
TOTAL:	**$2,416.00**

This would leave him over $600 to take care of the following expenses which he lists but does not quantify in his factum:

- Municipal taxes
- Property - Fire Insurance
- Toilet Supplies/Housewares
- Telephone, Postage
- Newspaper/Magazines
- Motor vehicles
  - license inspection
  - insurance
  - parts, repairs, service
- Hair, Grooming
- Christmas, Birthdays & Gifts
- Allowance, Pets, Dances
- Drugs
- Dental, Glasses
- Repairs to house
- Church, Donations
- Life Insurance
- Laundry
- Dry Cleaning
- SAVINGS
- RRSP's

The father filed a monthly budget statement to which was attached his income tax return for the taxation year 1992 (which would relate to taxable income for the period ending January 3rd of that year) and his last pay stub for the period ending May 31, 1993. The list of items not quantified in the factum can, for the most part, be found and total approximately $1,500. However, the statement as a whole shows on an income of $5,417 monthly a monthly deficit of $2,103 on the basis of child support of $1,100 only. This would mean that the father was carrying on with a deficit at the rate of $25,200 yearly. This is not credible in the face of the evidence of his consistently high standard of living and (with one exception respecting an RRSP

collapse) the absence of evidence of major capital injections to account for his ability to carry on at such a massive deficit. The statement merely served to confirm the trial judge's opinion of the father's evidence regarding his income and expenses.

If all these remaining expenses are such that $600.00 or more a month cannot cover them and the father finds himself in a deficiency position, he can sell his expensive home and acquire a smaller one similar to that which the mother has been obliged to accept as a consequence of this divorce. He can otherwise curtail his rich lifestyle. With respect, he cannot set the expenses of his new family and his lifestyle at such a high amount as to avoid payment of a fair contribution to the support of his first two children. Another option is for his second wife to return to her former job or otherwise make some contribution to the new family to which he now refers in support of his argument that his obligations to the old one must be reduced. When she moved in, she was aware that he had two children by his previous marriage to whom he had obligations. The new wife is a partner of the new family and must, in my opinion, carry her share of its liabilities.

She is not unable to do so. I refer to the trial judge's finding that she may or may not return to work. She was at the time of trial in receipt of unemployment insurance benefits due to conclude on December 31, 1993. However, she had continuing benefits during her unpaid leave of absence with Air Canada, not the least of which was the right to resume work. She had seniority of 13 years with her employer. Her 1992 tax return filed on February 27, 1993 indicated an income of $37,639, pension contributions of $1,766 and R.R.S.P. contributions of $2,400. In giving testimony, she was unable to state the accumulated value of her R.R.S.P. and pension funds. She owns a two bedroom cottage in Enfield in which she had lived year round for seven years. The father, in a statement to his bank, valued the equity in this house at $88,000. It also appears that she rented the property in 1993 for $6,600. She

has a 1987 Honda car, as well as shares in Air Canada. She professed to place little value on these, although she did not know how many she had.

With respect to the element of a second family, Professor MacLeod in an annotation to **Greco v. Levin** (1991), 33 R.F.L. (3rd) 405 at 406 (Ont. C.J.) refers to six guiding principles. He notes that they are internally inconsistent as to a degree they are. They do, however, constitute factors which a court should weigh in facing this difficult issue. They are:

1. A payor cannot avoid his or her obligation to his or her first family by forming a second family.
2. A person who becomes involved with an individual subject to a support obligation must accept that person in his or her weakened financial condition.
3. If a second relationship results in increased child-care obligations, the court should not prefer the children of one relationship to the children of the other.
4. A court should not divert so much money away from the second family that it becomes unable to function.
5. A natural parent's support obligation should take precedence to that of a step-parent.
6. Remarriage does not entitle a payee to support; however, a court is entitled to assume that the second partner is able to meet the dependants' ongoing living expenses.

A case-by-case approach is the only way to proceed, the six factors and other matters carrying such weight as the circumstances warrant. The role of the trial judge is often difficult and requires a delicate balancing of interests. An appeal court should be slow to interfere, doing so only where there is manifest error.

A fair balance here implies at least as to the second family, the new spouse must certainly contribute her fair share and the father cannot, as he has tried,

rely on its existence to diminish his fair share of the contribution to the support that his first two children require. This does not mean that the new wife is responsible for these two children. It does mean, however, that her resources are available to the father in meeting his obligations to the second family. Her ability to contribute is in part an answer to the father's plea of a new family in mitigation of his obligations to the old. I agree with Mason, J. in **Snelgrove-Fowler v. Fowler** (1993), 13 Alta. L.R. (3d) 432 at 442 (Alta. Q.B.).

> " The new spouse of the non-custodial parent must accept the fact that the non-custodial parent is charged with the obligation of child support. That charge is fixed not only against income but also against all profit, except property exempted for the purpose of earning a livelihood."

See also **Hersey v. Hersey** (1993), 47 R.F.L. (3d) 117 (N.B.C.A.); **Kerr v. Kerr** (1992), 41 R.F.L. (3d) 264 (Ont C.J.); **Davis v. Colter** (1973), 12 R.F.L. 84 (Sask. Q.B.); **Burt v. Burt** (1990), 25 R.F.L. (3d) 92 (Nfld. T.D.) and N. Weisman's article "The Second Family in the Law of Support" 37 R.F.L. (2d) 245 at 259 **et. seq**.

The after tax contribution by the mother was $800.00 per month. The after tax contribution of the father at about $1,200 per month is thus 60% of the total of the cost of the children. The father has not shown that he has insufficient funds to support himself and contribute properly to his new family after meeting the obligations set for him by the trial judge.

Generally, I agree with McDonald, J. in **Lebsack v. Lebsack** (1992), 132 A.R. 78 (Alta. Q.B.) that once the threshold of change required by s. 17(4) has been surpassed, in applying the proportionality test under s. 17(8) the court is not restricted to considering only the extent of the change. True, s. 17(4) provides that the court shall take into consideration that change, but the legislation does not confine the court to that. A searching and far reaching investigation into the means of the parents is not only permitted but necessary in the best interests of the children. See **Snelgrove-**

Fowler, supra. The court may consider all relevant circumstances. In this case, the trial judge has done just that. He made the specific finding that the father had not previously been making an adequate contribution. He referred to it as a "comparatively free ride" enjoyed by the father.

Having regard to all the evidence and particularly the respective incomes of the parties, I cannot say that the trial judge erred in his assessment. This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact. The degree of deference accorded to the trial judge with respect to factual findings is probably no higher anywhere than it is in matters relating to family law. Hart, J.A. put it well when he said on behalf of this court in **Corkhum v. Corkhum** (1989), 20 R.F.L. (3d) 197 at 198:

> "In domestic matters the trial judge always has a great advantage over an appellate court. He sees and hears the witnesses and can assess the emotional aspects of their testimony in a way that is denied to us. Unless there has been a glaring misconception of the facts before him or some manifest error in the application of the law, we would be unwise to interfere."

Before leaving this subject, I refer to the fact that in their factums counsel raised the issue respecting taxation presented by the decision of the Federal Court of Appeal in **Thibaudeau v. Canada (Minister of National Revenue - M.N.R.)** (1994 - unreported FCJ 577 Appeal No. A-1248-92). This issue was not pursued on the argument because the judgment in **Thibaudeau** has been stayed pending an appeal to the Supreme Court of Canada. It goes without saying, however, that should the laws of taxation be altered so as to relieve the receiving spouse of the burden of taxation, the result here could vary substantially. A court on application would have to review

carefully the support payments received by the mother in the context of the changes in the burden of taxation.

Since drafting these reasons, I have read the, as yet unreported, decision of the Alberta Court of Appeal in **Levesque v. Levesque** (1994), A.J. No. 452, Appeal Nos. 9203-0113-AC, 9103-0541-AC. It is a very instructive judgment dealing with the general principles applicable to an award of child support in the case of two income families. With respect, the approach taken by the trial judge in this case is in accord with the general guidelines laid down by the Alberta Court of Appeal.

In particular, the Alberta Court of Appeal's observations on the following points are fitting here: (1) the prime obligation of both parents to support their children; (2) that parents, not the children, should absorb the increased costs resulting from the divorce and separation; (3) that the selection of an appropriate amount of support is a matter of judgment upon the application of the relevant principles to the evidence; (4) the calculation of the combined annual gross income of the parties is the starting point; (5) the emphasis must be on income earning capacity, not merely earned income; (6) the goal for the children should be a standard of living commensurate with the incomes of the parents, regard in the first instance being to the standard of living chosen for the children by the parents when they lived together; (7) access parents are not to receive concessions that compete with or challenge the role of the custodial parent; (8) after calculation of the combined gross income and reasonable child care costs, the court apportions the responsibility of each parent; (9) the dramatic impact of taxation in cases of middle income earners plays a significant role. However, the laws of taxation do not necessarily apply in assessing the ability to pay support.

The suggested guideline of 32% of gross combined income as reasonable support for two children is only a "litmus test" of reasonableness. The result arrived at by the trial judge here falls generally within this range. This is particularly so having

regard to the fact that costs enabling the custodial parent to work do not enter the equation. Then, as the Alberta Court of Appeal observed:

> "In the ordinary course, each parent should contribute that proportion of the calculated child care costs that his or her income bears to the total gross income of the parents."

As I have already pointed out, I believe the trial judge has accomplished this result.

In short, a review of the decision in **Levesque v. Levesque** only serves to strengthen my confidence in the analysis of the issues and the results arrived at by the trial judge here.

ISSUE TWO - SUBSIDIARY MATTERS

1. Access

The mother has voluntarily extended the father's access to the children. The trial judge found that this was done by her in the interest of the children. He was not prepared, however, to formally extend the access provisions without the consent of both parties. In his reasons, he expressed the concern that the father was using increased access as an excuse to justify a reduction in the child support payments.

The father submits that this informal arrangement should be formalized saying that "good paper makes good friends". While, as a generality, this dictum might have much merit, the question again is whether the trial judge erred in the exercise of what was clearly his discretion. I am far from prepared to say that he did.

Contrary to the father's submission, the trial judge did give reasons which shed considerable insight into his view of the father's merits as an access parent. In this connection, he referred to the father's apparent rage at a name change which led to his alteration of the children's scribblers. He referred to the father's combative approach to this dispute which has prolonged it and led to greatly increased expense. He said that there had been a scarring effect upon the children. Moreover, there was

evidence before the court that the father had refused in times of difficulty to relieve the mother of her custodial burdens.

I would not vary the terms of the order respecting access.

2. Costs

In a supplementary decision respecting costs, the trial judge reviewed the history of the proceedings, made a number of findings and awarded costs by the application of Scale 5 of the Tariffs to an amount involved which he fixed at $100,000. This produced costs of $10,325 plus disbursements of $1,192.32, for a total of $11,517.32. The father claims that this was harsh and excessive.

Costs are in the discretion of the trial judge. We must examine his reasons to see if he has erred by the application of erroneous principles or the working of a manifest injustice.

The trial judge referred to the applications of the mother to increase and the father to reduce support and to four further applications of the father respecting other matters. With one minor exception, the father was wholly unsuccessful.

The hearing took place on four separate days.

The mother had made a formal offer to settle for $1,800 a month - a figure less than awarded. The father offered to settle for $800.00 a month - less than he had been paying previously.

The father had failed to produce documentation as ordered by Richard, J. at a pre-trial conference. Most of it finally came on the table as the result of a further order from the trial judge.

The entire application got out of hand, in the opinion of the trial judge "primarily because of the conduct of the father". For example, the new wife's income and assets were not divulged in a timely manner. As pointed out by Mason, J. in

Snelgrove - Fowler v. Fowler, **supra**, full financial disclosure of the relative financial strengths of each second family unit is crucial. The trial judge considered that some of this delay was to frustrate the preparation and conduct of the mother's case.

The trial judge referred to the following rules of court:

> "57.27(1) Where the proceeding is for a divorce or matrimonial cause, the court may from time to time make such order as it thinks fit against a party for payment or security for the costs of the other of such parties.
>
> 63.02(1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
>
> (a) award a gross sum in lieu of, or in addition to any taxed costs;
> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
> (c) direct whether or not any costs are to be set off.
>
> (2) the court in exercising its discretion as to costs may take into account,
>
> (a) any payment into court and the amount of the payment;
> (b) any offer of contribution;
>
> 63.04(1) Subject to Rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.
>
> (2) In fixing costs, the court may also consider
>
> (a) the amount claimed;
> (b) the apportionment of liability;
> (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
> (d) the manner in which the proceeding was conducted;
> (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;

> (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
> (g) the neglect or refusal of any party to make an admission which should have been made;
> (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, of where, although they were defended by the same solicitor, they separated unnecessarily in their defence;
> (i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and
> (j) any other matter relevant to the question of costs.

In fixing the amount involved, the trial judge referred to the increase in support payments of about $1,100 per month resulting from the application. On an annual basis, it was over $13,000. The children were then five and six, and he pointed out that running this up to age 16 was over ten years or approximately $130,000.

The father says that any such figure should be discounted to reflect present value. This was not a lump sum award but periodic payments. However, the trial judge went on to say that this figure of $130,000 was not an absolute. Payment could be reduced or increased in the future or carried beyond the ages of 16 years. There were other applications made by the father which were unsuccessful. Mere reference to this figure by the trial judge does not constitute the entirety of his reasoning. He also took into account the offers to settle and the fact that, as in **Chaddock v. Chaddock** (1993), 121 N.S.R. (2d) 274 (S.C.), the father attempted to thwart the mother's efforts to place relevant information before the court and put her to great expense. The trial judge also referred to the risk that parties run when getting involved in litigation.

All of these considerations led the trial judge to fix the amount involved at $100,000 and to order the application of Scale 5. In so doing, he declined suggestions of a gross sum for costs or awarding them on a solicitor and client basis.

I have set out the trial judge's reasoning at length because I believe it furnishes its own justification. I would affirm his conclusions respecting costs.

3. Admissibility of Evidence

The father's notice of appeal challenged the admissibility of two affidavits. These were introduced at trial to establish relatively minor matters not involving the credibility of the affiants. Counsel for the appellants had previously indicated no objection to their admissibility. The trial judge gave counsel an opportunity to contact the affiants and file further information relating to the matter disposed to. He did not do so. This point was not pressed on the hearing of this appeal. I would not interfere on this point.

In the result, I would dismiss the appeal with costs to the mother in the amount of 40% of the trial costs; that is, $4,130 plus disbursements.

Chipman, J.A.

Concurred in:

Jones, J.A.

Pugsley, J.A.