

**DOCKET: FKMCA-028063**

**IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA**

**[Cite as: J.D.F. v. G.E.W., 2007 NSFC 15]**

**BETWEEN:**

**J. D. F.**

**-APPLICANT**

**AND**

**G. E. W.**

**-RESPONDENT**

**BEFORE THE HONOURABLE JUDGE BOB LEVY**

**HEARD AT: ANNAPOLIS ROYAL**

**DATE HEARD: MARCH 14, 2007**

**DECISION DATE: MARCH 22, 2007**

**APPEARANCES: THE APPLICANT REPRESENTED HIMSELF  
PATRICIA REARDON FOR THE RESPONDENT**

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**DECISION**

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Facts: Single mother raised the children for many years pretty much on her own after the parties separated and incurred substantial debts in the process. Children then went to live with the father. Father seeks child support.

Issue: Child Maintenance Guidelines, undue hardship. Debts incurred by single parent after the separation of the parties, while strictly speaking outside the purview of section 10 (2) (a), should nonetheless be read into the section per the Interpretation Act (section 9 (5)) to give effect to the obvious object of the Guidelines.

Result: Some relief granted.

## By the Court

1. The parties had a common law relationship ending in 1989. They have two sons from their relationship, currently aged 20 and 18. Both are in school, struggling perhaps, but sticking with it. Both are with their father, the youngest just since mid 2006. Both boys have modest incomes from part-time employment. The father has applied for an order that the mother pay child support just for the younger child retroactive to August, 2006. The mother has pleaded undue hardship.

2. The Respondent mother is employed and in a salaried position but, for several reasons, (illness, overtime and a retroactive pay adjustment), her income has varied somewhat in the past few years. I will accept her counsel's approach, (see Exhibit #9), and determine her income as being the average of the past three years, that sum being \$44,010.71 per year. At that income her child maintenance obligation per the table in the Child Maintenance Guidelines is \$383 per month. The Applicant commenced this application in September of 2006 and I take the tenor of the recent case law to be that all things being equal it would be appropriate to commence payment of child maintenance at least as of September if not indeed August.

## **THE UNDUE HARDSHIP CLAIM**

3. It is essentially the position of the Respondent that she alone for many years parented these two boys with only modest help from the Applicant. Indeed I am familiar with this case as it has been before me off and on for over ten years. The primary cause of her having to shoulder the lion's share of the burden is that until the past few years the Applicant was in the full throes of alcoholism, to the point,

even, that his access to the children had to be curtailed. To his immense credit he hasn't had a drink for a number of years now, a credit, I might say that equally belongs to the Respondent who is also an alcoholic who has been dry since 1991.

4. The Respondent further says that recognizing that the burden of raising these children would fall almost entirely on her, she determined to upgrade her education from the grade 9 level she had. She pursued first upgrading, then a course in human services in community college and then, from 1998-2001 a Bachelors degree. As a result she has a responsible position and double the income she might otherwise have received. Unfortunately, she also accumulated student loans totalling in the tens of thousands of dollars, (I'm left a little confused as to the total, but it is at least \$20,000, and I think it is a good deal more), and, as she points out, by law she cannot receive a discharge on these through bankruptcy.

5. In addition she also has considerable other debt, incurred, she testified, either because of a period of illness she had in 2005, or for the benefit of the children when they were in her primary care. Thus, her bank overdraft stands at \$14,439 (as of November, with a \$15,000 maximum), her Sears account with a \$500 limit stood at \$390.77 as of early December, and her Visa has a balance of over \$3,000. The mortgage on her house, which she says she made a point of buying as it was the younger child's choice and because it had land for her two horses, had a balance owing on the mortgage of \$57,965.77 as of late January.

6. She puts her monthly debt payments for these debts, plus a loan to Wells Fargo and Zellers, at a total of \$1,384.59, almost half of which, \$652, is for the several student loans. She reports a gross monthly income of \$3,840.83 and monthly expenses and deductions of \$5,158.53 for a deficit of \$1,317.70.

7. I accept that her primary motive in pursuing the education was for the children, but it has to be acknowledged that she benefits from that as well. Similarly I accept that many of her expenditures were, and a good portion of her current indebtedness was, for the benefit of the children. But again, the benefits thereof did not entirely escape her, and, it must be said, her debt level seems in part to be the product of imprudent expenditures, (e.g. horses).

8. Section 10 of the Child Maintenance Guidelines reads:

Undue hardship

**10 (1)** On the application of a parent, a court may award an amount of child maintenance that is different from the amount determined under any of Sections 3 to 5, 8 or 9 if the court finds that the parent making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

**Circumstances that may cause undue hardship**

**(2)** Circumstances that may cause a parent or child to suffer undue hardship include the following:

**(a)** the parent has responsibility for an unusually high level of debts reasonably incurred to maintain the parents and their children prior to the separation, where the parents cohabited, or to earn a living;

**(b)** the parent has unusually high expenses in relation to exercising access to a child;

**(c)** the parent has a legal duty under a judgment, order or written separation agreement to maintain any person;

**(d)** the parent has a legal duty to maintain a child, other than a child to whom the order relates, who is

(i) under the age of majority, or

(ii) the age of majority or over but is a dependent child within the meaning of clause 2(c) of the Act; and

**(e)** the parent has a legal duty to maintain any person who is unable to obtain the necessities of life due to an illness or disability, including a dependent parent within the meaning of clause 2(d) of the Act.

**Standards of living must be considered**

**(3)** Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child maintenance under any of Sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other parent.

**Standards of living test**

(4) In comparing standards of living for the purpose of subsection (3), the court may use the Comparison of Household Standards of Living Test referred to in Schedule II.

**Reasonable time**

(5) Where the court awards a different amount of child maintenance under subsection (1), it may specify, in the child maintenance order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

**Reasons**

(6) Where the court makes a child maintenance order in a different amount under this Section, it must record its reasons for doing so.

9. The Respondent's circumstances fall within section 10 (2) (a), although not perhaps exactly so. Firstly, and certainly relative to her income and ability to pay, the level of the Respondent's debts is "unusually high". I have some reservations, as I said, about the wisdom of the extent to which she kept borrowing. To be sure, she had the children to look after, and without a lot of help from the Applicant, but it may be that she was trying too hard to give them things or a lifestyle that was beyond her means. Thus, with respect to a part of her indebtedness, a part difficult to quantify, I question whether the debt was "reasonably incurred". Of course she maintains, and I accept, that the student loans were for the purpose of enabling her to earn a living and my concern does not include those debts.

10. Section 10 (2) (a) addresses only debts, (other than debts to enable the person to earn a living), incurred before the parties separated. Although these people did cohabit for a time it was years ago and many of these non-student loan debts, incurred in large part for the benefit of the children and well after the separation. For no compelling reason obvious to me they seem to fall outside the strict purview of the section. I am prepared however to read the section as being broad enough to include debts reasonably incurred to support the Respondent and

the children even after the separation but before the boys went to live with their father. In doing so I am referring myself to section 9 (5) of the Interpretation Act to ensure the object of the legislation is attained.

11. The Applicant is employed in construction, and has been with the same firm for years and, with consent, I find his 'line 150' income to be \$19,591 per year. His common law partner has an income of \$41,568, (cited as \$1,600 gross bi-weekly). The older child has an income from his employment of over \$7,000 per year. The T4 of the younger one shows an income of \$2,721.28 in 2006. The Applicant gets a little bit of the boys' money to cover lunches and such, but essentially they use their own money as they see fit.

12. Turning to Schedule II, the Comparison of Household Living Standards Test:

**The Respondent:**

Total Income	\$44,010
Tax payable	- <u>8,621</u> (from 2006 tax return - may be a bit high for \$44,010)
	35,388
	- <u>14,215</u> *
	21,173
	- <u>4,596</u> yearly total of maintenance at \$383 per month
	\$16,577 adjusted income

Household income ratio:

$$\$16,577 \div \$10,382 \text{ (one adult-low income measure)} = \mathbf{1.597}$$

\*The Respondent claims monthly debt payments of \$1,384. To account for some imprudent debt I deducted \$200 per month, (roughly 15%), and multiplied by 12 to get the \$14,215.

## The Applicant

Applicant's income	\$19,591	
taxes payable	- 1,115	based on 2003's taxes at same approximate income
	<u>18,476</u>	
partner's gross	\$41,568	
taxes (est.)	- 8,300	
	<u>33,268</u>	
boys' income	9,721	
household income	\$61,465	(\$18,476 + \$33,268 + \$7,000 + \$2,721)
table support amt.	<u>+4,596</u>	
total	\$66,061	

### Household Income Ratio:

$$\$66,061 \div \$21,802 \text{ (3 adults and one child low income measure)} = \mathbf{3.030}$$

13. As the Respondent has a significantly lower household income measure and thus, per the calculations, a lower living standard than the Applicant's household, she is entitled to relief from having to pay the table amount of child maintenance.

14. The willingness of the Respondent to maintain the children on her health and dental plan at a monthly cost of \$97.86 is noted and will be so ordered for so long as she is able to do so.

15. Taking into account all of the above I will order that the Respondent pay to the Applicant, for the younger child, the sum of \$125 per month. Given her acute financial straits I will order that the payments commence April 1, 2007, rather than retroactively. Payments will be direct to the Respondent unless either party wishes for the payments to come through the Maintenance Enforcement Program. The

parties will exchange copies of their income tax returns and notices of Assessment every year by June 1, commencing June 1, 2008.

16. I would ask Ms. Reardon to please prepare the order.

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Bob Levy, J.F.C.