

DOCKET: FKMCA-048013

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

Cite as: M.S. v. A.M.D., 2006 NSFC 38

BETWEEN:

**M. S.
-APPLICANT**

AND

**A. M. D.
-RESPONDENT**

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATE HEARD: OCTOBER 10, 2006

DECISION DATE: OCTOBER 31, 2006

**APPEARANCES: THOMAS R. MACEWAN FOR THE APPLICANT
PHILIP S. GRUCHY FOR THE RESPONDENT**

DECISION

ISSUE: Child Support, fact specific

By the Court:

1. This is the decision in the matter of an application by the mother of two children, aged 6 and 4, for ongoing child support, a contribution towards child care costs, and to enforce arrears in child maintenance pursuant to an alleged agreement.

2. The Respondent father argues that his income is closer to \$20,000 per year and not the \$60,000 or so that the Applicant maintains that it is or should be imputed to be. Further he says that as he has the children in his care at least forty percent of the time the maintenance should be set pursuant to section 9 of the Child Maintenance Guidelines, (shared parenting), which would better recognize his obligations and contributions. Lastly he maintains that there was a child support agreement only from December of 2005 through February and he paid that. Further he says that even though there was no agreement in place he paid a somewhat comparable amount through to June, and that he has paid what he could, \$518.50 per month, since then, although, as of the date of the hearing, not yet for October.

THE PARTIES' BACKGROUND AND FINANCIAL CIRCUMSTANCES

3. The Applicant is a German national, the Respondent is an American. They met on the internet and she moved to his home in New York city where they subsequently went through a wedding ceremony. Not being able to remain in the U.S. she moved to Nova Scotia in 2001 and he followed after some time. Since the separation in the spring of 2005 the Applicant has commenced employment locally as a "sales and marketing administrator" and now, as of recently, she works 34 hours weekly and expects to earn (from commissions) between \$26,000 and \$27,500 per year.

4. She has the two children in daycare, the older one for just after school. The evidence is that the monthly cost depends on the number of workdays per month. She says she was invoiced \$652.59 for September and \$690.14 for October. She says that if she doesn't use the day care on any given day she has to pay anyway in order to keep the space. She can claim the daycare expense for tax purposes. (It is her right and responsibility to make the daycare arrangements per an order of Justice Warner of the N. S. Supreme Court. The matter was before Justice Warner earlier this year until it was realized that the marriage was a nullity as the Respondent's divorce from a previous wife had not been finalized at the time. Quite properly for the sake of the children Justice Warner exercised his *parens patriae* jurisdiction to make the order and that order has been followed.

5. To get an average monthly amount for the child care, (recognizing that the average may be thrown off in the summer when the older child is not in school and when the parties will have, again per the order, different care arrangements), I have simply split the difference between the two bills to yield an average monthly child care cost of \$671.37. I have done some rough calculations and note that with a combined federal-provincial tax rate of 23.79 per cent at her income, (15% federal and 8.79% provincial), her average after-tax cost is \$511.65. Given the need to maintain the child care spaces I will take that figure to be operative year round unless the parties subsequently agree to, or a court orders, a different amount.

6. The Respondent has attended two post-secondary educational institutions completing neither. According to the Applicant he is fluent in English, German and Spanish. He has had a varied career in the construction and computer fields. Immediately prior to leaving New York and then from his home in Wolfville, he worked as a "software architect" until the spring of 2004 when he lost the

\$118,783 (U.S.) per year job. He built the family home near Wolfville which when sold yielded each party a net of \$128,000.

7. He has started a company doing renovations, and earns some income selling old Land Rover parts on e-bay and, at least on one occasion, doing some web design. He says that he might net up to \$24,000 this year, almost all from the renovation business. He notes that as his business is still relatively new he still has startup costs such as tool acquisition. He says that he is busy at present and his testimony suggested that he was optimistic that this business could continue and not be affected by the changing seasons. He said that his gross income was low this year to date because the Applicant injured him badly in February and this impacted negatively on his ability to work for upwards of two months, because the weather in the spring and early summer was dreadful, because he was still acquiring tools and because he wanted to and wants to spend as much time as he could with his children.

8. The Respondent is 41 years old and, by appearances at least, in good health. He says that he does not want to return to work in the computer field, (“not really interested”), and that the income he earned in that field could not be duplicated in any event as his training and qualifications are in fact quite limited and dated. He did not dispute that he had been offered a job at N.S. Power in 2001 for \$82,000 per year which he declined. He indicated he hadn’t looked for work as the family’s “needs were modest”. I am unable to say for sure, based on the evidence, but it appears that the Applicant likely acquiesced, at least initially if not now, to his more laid back approach to earnings. He relishes his present circumstances as he has the freedom to choose the jobs he wants and to be able to spend time with the children.

9. There was a good deal of paper filed and time spent on the matter of the income and expenses of, and prospects for, of the company solely owned and operated by the Respondent. Although I followed that evidence closely I choose not to deal with it detail in this decision. The real story for our purposes is not what he reports he earned or will earn in 2006, but rather, taking at look at his background and present circumstances, what might he reasonably earn were he to turn his mind to it.

10. There was an air of unreality to the Respondent's evidence, a disconnect between his words and his actions, between his evidence and his demeanour. He reports a 'draw' of about \$1,900 monthly from his company. He reports monthly expenses of \$2,812.75, (Exhibit #5). An ex-wife has registered a judgment of "\$39,000 to \$40,000" for support arrears against him, which sum is being held in trust from the house sale proceeds. He says he has borrowed some \$9,000 from his mother, two sisters and current girlfriend to help him meet expenses including the child support payments he has been making. Literally a week and a half before the hearing he travelled to Florida to buy a used Saab convertible and bring it back, (which is, by the way, a strategy I would be slow to recommend to Respondents pleading poverty). It seems that he is either he knows something I don't know about his finances or he is in the grips of a desperate folly.

11. The circumstances the Respondent attributed to his having a relatively low income in 2006 are not likely to repeat themselves, at least in their totality, in the future. His evidence as to his short and medium term prospects were optimistic. He was clear that he didn't need to advertise as there was a high demand for his skills. Now that the parties are living under two roofs, and therefore have increased expenses, the family's needs can no longer be described as "modest". As a

consequence it is no longer reasonable for him to earn an income far below what a person of his background and talents might be expected to earn. He strikes me as being a person with a very supple mind and I do not accept his evidence to the effect that the world of technology has so utterly passed him by that he cannot make himself employable in that field once again. It is less of an answer than he might wish to state simply that he is “not really interested” in working in his previous field.

12. Regardless of his reports of his income to date, I conclude that even in his present field if he applied himself, prospectively, he should be able to earn \$40,000 per year. That income would be generated were he to work 40 hours weekly for 50 weeks a year at \$20 an hour net after expenses. He testified that he charges \$25 an hour now from which he might net considerably less, given that he had has to still has to acquire tools. Whether that would be a reasonable income in the future I would leave to other courts to assess if and when it came to that as the issue of the potential for more remunerative employment in the technology field remains. For the present I shall impute the \$40,000 per year figure to the Respondent as his income for the purposes of this application.

SHARED PARENTING?

13. As previously indicated the parties have been operating on the parenting arrangements mandated by Justice Warner. His order provided that the children “shall reside with the Respondent during the following times...” and then he set forth specific times. As phrased, I take the wording to “reside with” in this situation to be the equivalent of having the “right of access to, or...physical custody of” as set forth in section 9 of the Child Maintenance Guidelines, the “shared

parenting” section. Without setting forth my calculations in detail, suffice it to say that of the 8760 hours per year, Justice Warner’s order would have the children in the Respondent’s care about 3309 of them, about 37.87%. Thus, the Respondent’s time with the children falls below the 40% figure so that, absent some other reason why not, the “tables” of the Guidelines apply.

MAINTENANCE AWARD

14. The maintenance payable for the two children at the Respondent’s (imputed) income of \$40,000 is \$579 per month and that amount is so ordered payable.

15. I will take the Applicant’s income to be \$27,000 per year. The Respondent’s income would be 59.7% of the combined incomes of the parties. Having taken into account the factors set forth in section 7 of the Guidelines I see no reason in this instance not to apply what I take to be the dominant, if not presumptive, route of having the Respondent be responsible for payment of 59.7% of the Applicant’s net after tax child care cost of \$511.65. This equals \$305.46 per month and that amount too will be ordered payable by the Respondent. Unless the parties agree otherwise in writing the \$305.46 will be paid twelve months of the year for a total monthly payment of \$884.46.

ARREARS

16. I accept the Respondent’s evidence that he met his obligations under the agreement that lasted from December, 2005 through February of this year. Contrary to the position of the Applicant I reject the conclusion that an agreement had been arrived at whereby the Respondent would pay \$1,177 for the month of

March, 2006 and \$1,037 monthly thereafter until varied by further agreement or court order. It may well have been that those figures were arrived at but I hold that that 'agreement' was subsequently repudiated by the Applicant or her counsel by seeking to make it subject to further terms or conditions. I don't see why the Applicant should consider the Respondent bound by the terms of that 'agreement' but not herself.

17. Notwithstanding the repudiation of the agreement by or on behalf of the Applicant the Respondent continued to pay the \$1,037 monthly through June. After that he paid half that amount, \$518.50, at least through September. He may well have paid October and November's payments by now.

18. Given his substantial 'overpayment' through the spring I will make no order for retroactivity of child support for the difference between the \$579 and the \$518.50 for the period for July, August and September. For similar reasons plus the absence of particulars of costs, I will make no order for retroactivity in child care costs prior to September 1, 2006.

DECISION

19. The Respondent is ordered to pay child support to the Applicant for the support of the two boys in the amount of \$579 per month as of the first day of October, 2006 and on the first of each month thereafter until further order of the court. In addition the Respondent is ordered to pay to the Applicant the sum of \$305.46 per month towards child care costs, this sum commencing September 1, 2006. The amount for child care contribution by the Respondent shall be subject to the parties agreeing to any different amount or to the sum not be payable in some

months if the agreement is reduced to writing and signed by both parties. The said sums shall be paid directly to the Applicant unless either party registers the order with the Maintenance Enforcement Program in which case the payments shall be made through that office as directed.

20. I would ask Mr. MacEwan to prepare the order.

Bob Levy, J.F.C.