

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

**[Citation: A.E.R. v. C.R.S., 2009 NSFC 3]**

**Date:** 20090116

**Docket:** FAMMCA-057504

**Registry:** Amherst

**Between:**

A.E.R.

Applicant

v.

C.R.S.

Respondent

**Judge:**

The Honourable Judge David A. Milner, a Judge  
of the Family Court for the Province of Nova Scotia

**Hearing Date:**

November 18, 2008 at Amherst, Nova Scotia

**Decision Date:**

January 16, 2009

**Counsel:**

Cindy A. Bourgeois, LL.B., for the Applicant  
Anthony J. Morley, Q.C., for the Respondent

**INTRODUCTION**

[1] The decision in this proceeding addresses an unresolved question of child maintenance: specifically, the level of income which should be used for the non-residential parent in applying the tables under the child maintenance guidelines.

**NATURE OF THE PROCEEDING**

[2] This court proceeding involves the applicant, A.E.R. (“the mother”) and the respondent, C.R.S. (“the father”) (jointly referred to as “the parents” or “the parties”) and it concerns issues of custody and child maintenance, in relation to their daughter A.M.S. (“the child”) who is now almost two years old.

[3] The application is under Nova Scotia’s *Maintenance and Custody Act* (the Act) and regulations which include child maintenance guidelines. These provincial

child maintenance guidelines are virtually identical to the *Federal Child Support Guidelines*.

[4] The application contains a request for child maintenance and a contribution towards special expenses. It also seeks a determination of child custody and access issues.

[5] At this stage of the proceeding, with the assistance of counsel and with some direction from the court in an oral decision at the conclusion of the hearing, the parties have been able to pretty much resolve the custody and access or parenting arrangements, and also the sharing of special expenses. If those matters need further attention, counsel could arrange a return to court.

[6] The parents have agreed on joint legal custody, with primary care being with the mother and an arrangement for reasonable parenting time with the father.

[7] The only issue which is left to be addressed in this decision is child maintenance.

## **BACKGROUND**

[8] The mother is thirty-four years old, and the father is thirty-one. They were involved in an intermittent romantic relationship which ended last March.

[9] The mother also has another child, a sixteen year old son, who lived with the parties while they cohabited, and now lives with the mother. This proceeding does not address any family law issues with respect to her son.

[10] While the mother was on maternity leave with the child she worked part time as a restaurant server and received E.I. benefits. Now she works full time, doing ten hour shifts at a call centre.

[11] Since the separation, the mother has been living with her parents, who both work full time and are helping support her and the child by providing their home. They also have been providing child care on occasion, at no cost.

[12] The mother would like to have a separate residence for herself and both of her children.

[13] The father works for a limited company in which he has no ownership interest, but which is solely owned by his own father. He currently earns a modest income as an employee of that company and enjoys certain additional benefits from his employment.

[14] Although the father owns a snowmobile and a motorcycle, he does not own any other motor vehicle. That is because the company vehicle which he uses for his employment is also available, without restriction, for his personal use. Fuel for the vehicle is purchased with a company credit card.

[15] The father currently lives alone in his own home - where the mother, the child, and the mother's son also lived at the time of separation. It is a new house, without a mortgage.

[16] The father's house was built for him with funds he received through a family trust. The trust was established by his own father, who has complete authority and sole discretion as to the use of the trust's property and allocation of its income.

[17] In the years 2005, 2006, and 2007 the father was allocated dividend income from the family trust in the approximate amount of \$87,000 each year. These funds were used to build a house for the father. The current municipal assessment for the house is approximately \$193,000.

[18] Now that his house has been built, the father does not expect to be receiving any more income from the family trust, at least not in the near future.

## **POSITIONS OF THE PARTIES**

[19] After full disclosure of the legal nature and financial details of the family trust, the parties agree that child maintenance should be determined on the basis of income other than income from the family trust: (a) because it was all received in years previous to 2008, when the application was made and when the court hearing was held; (b) because the trust is discretionary and funds are beyond access by the father, and; (c) because income from the trust is not expected to be received again by the father in the immediately foreseeable future. It is also agreed, however, that if income from the family trust is again received by the father, he will promptly disclose it and that income would then be included in determining a new amount for child maintenance under the guidelines.

[20] In the meantime, beginning sometime in 2008, the father has been paying child maintenance to the mother based on the tables under the child maintenance guidelines, using the amount of his total employment income. He proposes that he should continue to pay this amount and no more.

[21] The mother thinks he should pay more than that, because she considers he is able to pay more.

[22] She argues that income should be imputed to the father under the guidelines because he has certain benefits from his present employment - including his personal use of a vehicle, with fuel, and also his personal use of company equipment and tools - which increase the availability of his other income to pay more child support. She makes arguments to the same effect in relation to the father's house which is low maintenance and mortgage free.

[23] The mother also argues that the father is qualified for employment in a job which pays more income. She therefore urges that, if he is content to continue in his present employment, he should nevertheless be required to pay child maintenance based on income at a higher level.

[24] In other words, the mother's position is that - while living comfortably in his new home provided by a family trust, and while working for a modest income in a family business - the father is able to and should be required to pay more child maintenance than he proposes.

## **THE NATURE OF CHILD MAINTENANCE**

[25] Section 8 of the Act provides that parents in Nova Scotia are under a legal duty to provide for the reasonable needs of their children.

[26] In circumstances where both parents live together with the children in the same household, they are usually able to discharge this duty without formality. This includes a requirement to spend money, which directly or indirectly benefits the children. There is usually very little financial accounting or monitoring of such expenditures.

[27] When both parents separate or do not live together with their children, however, the law treats the position of each parent differently.

[28] A parent with whom a child primarily resides (the “residential parent”) will be required to spend money in the course of fulfilling parental responsibilities, frequently with personal sacrifice and regardless of how much or how little income that parent might earn. Those expenditures are frequently overlooked or taken for granted.

[29] Without doubt, however, the residential parent always pays child maintenance.

[30] On the other hand, the other parent (the “non-residential parent”) is expected to contribute financially to the maintenance of the child, by making regular payments of money to the residential parent. Unlike money spent by the residential parent in maintaining a child, the maintenance payments made by the non-residential parent are usually quantified, and monitored.

[31] Section 10 of the Act directs the court to determine the amount of child maintenance in accordance with the guidelines, which are established in regulations under the Act.

**HISTORY OF THE FATHER’S INCOME**

[32] The father’s evidence discloses three categories of income: employment income, dividend income from the family trust, and “other employment income”. While the evidence is not clear, it appears that the “other employment income” amounts likely relate to taxable benefits from the father’s employment, such as his personal use of a company vehicle.

[33] The following is a breakdown of the various income amounts from 2003 through 2008. Most amounts come from the income tax documentation; however, the 2008 figure is an estimate, calculated from the evidence, and it has been assumed there would be “other” employment income in the same amount as the previous two years. While it is not entirely clear, I think it can also be reasonably inferred from the evidence that there would have been such “other” income for 2003 and 2004 and that it has been included in the total income amounts for those years.

<b>YEAR</b>	<b>TOTAL INCOME</b>	<b>EMPLOYMENT</b>	<b>OTHER</b>	<b>TRUST</b>

2003	27,004	27,004	(?)	Nil
2004	42,948	42,948	(?)	Nil
2005	112,348	21,665	3,183	87,500
2006	114,195	23,845	3,343	87,007
2007	114,143	23,300	3,343	87,500
2008	24,143	20,800	3,343	Nil

### APPLYING THE GUIDELINE TABLES

[34] In situations where there is no disagreement about the annual income amounts of the non-residential parent, the guidelines provide for a simple calculation of monthly child support, by including tables which show the different amounts of maintenance payable at the different levels of annual income, depending on the number of children involved.

[35] The guidelines require disclosure of historical income, including provision of the three most recent income tax returns and notices of assessment; however, in fixing child maintenance for the current year, the guidelines do not require that the previous year's income amount must be used, although this is frequently done.

[36] If the current year's level of income can be determined, and if it is significantly more or less than the previous year's income, it would seem reasonable to calculate a non-residential parent's monthly maintenance payment by applying the tables to the current year's income level. [See, for example: *Chalifoux v. Chalifoux* 2008 Carswell Alta 211 (Alta. C.A.)]

### IMPUTING INCOME

[37] The tables are central to the child support guideline system. They provide for comparatively consistent calculations of child maintenance, which fluctuate with the differing levels of income of non-residential parents and the number of children in their families.

[38] In some situations determining the level of income is easy, while in others it is not so easily done. The particular circumstances of each family must be considered.

[39] Many parents choose, for any number of reasons, to be employed in circumstances where they earn less income than they are capable of earning.

[40] Some parents are dishonest and do not report all their income.

[41] In specific family situations, where parents are able to pay more maintenance than would result from applying the tables to their (line 150) total incomes, the courts can order them to do so.

[42] Section 19(1) of the guidelines permits a court to “impute such amount of income to a parent as it considers appropriate in the circumstances ...” (emphasis added.) The section also includes a listing of circumstances which are included; however the list is not exhaustive. In the result, the court is given a broad discretion to impute income.

[43] When income is imputed, the tables are then applied to the parent *as though that parent earned a greater income, whether or not that was the case.*

## CONCLUSION

[44] Not every parent with the same income level has the same ability to pay child maintenance.

[45] A parent who adopts a modest standard of living would have a greater ability to pay maintenance than a parent with the same income who lives more extravagantly.

[46] A parent who pays rent or mortgage would have less ability than one who does not.

[47] A parent who owns and maintains a car would have less ability than one who does not.

[48] I do not consider the guidelines as mathematical formulae to be rigidly applied. They should be flexible, in order to be fair. What is fair in a particular

family situation depends on all the circumstances of both parents, and it should not be ignored that the non-residential parent is also paying child maintenance.

[49] To work in the family company, and to have the job security and satisfaction which goes with that, does not seem inappropriate. In any event, I am not satisfied from the evidence that the father is qualified and easily able to earn greater income elsewhere at this time.

[50] There has been no suggestion that the father is earning income surreptitiously, and not disclosing it.

[51] It does appear, however, that the father's financial well-being is enhanced by virtue of not having to lease or finance the purchase of a motor vehicle. He has personal use of a company vehicle and does not have to maintain it or provide it with fuel.

[52] The evidence is that the father freely uses a company credit card to buy fuel for the vehicle.

[53] While there is some recognition of these benefits in the "other" income attributed to him, that does not appear to be based on any careful accounting of the father's use of the vehicle. It seems to be a flat rate which, perhaps, is to satisfy tax department standards. If the father were to purchase, maintain and operate a car, it is likely that he would spend significantly more.

[54] Similarly, because of the family trust income allocated in previous years, there is a continuing benefit to the father in not having to rent or finance ownership of a residence. Because it is a new building, repairs and maintenance would be less than if the father owned an older house. By not having to pay monthly rent or mortgage payments, the father's financial capacity is greater than it would otherwise be.

[55] In all the circumstances, I consider it is fair and appropriate to impute to the father an additional \$15,000 of annual income, for purposes of applying the child maintenance guidelines. This means that his payment of regular child maintenance to the mother will be based on the tables, using the actual amount of the father's total annual income for 2008, plus the additional imputed amount. If my calculation of his 2008 income is accurate (\$24,143) it would mean that \$39,143 would be income amount used, for one child.



[56] The effective date for beginning the monthly table payments will be May 1, 2008 (the month after the first court appearance) and they will continue, effective on the first day of each month thereafter, until otherwise ordered. These payments will be considered separate and in addition to payments for the special expenses.

[57] The father will be given credit for whatever monthly maintenance payments he has already made.

[58] I thank both counsel for their assistance, and ask that they arrange to take out an appropriate order summarizing the effect of this decision, and including particulars of the other issues which have been previously resolved.

David A. Milner,  
A Judge Of The Family Court  
For The Province of Nova Scotia