SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Woodford v. Horne*, 2015 NSSC 208

Date: 20150716
Docket: *Halifax* No. 1201-057613
Registry: Halifax

Between:

Gail Carolyn Woodford

Applicant

v.

Barry David Horne

Respondent

Judge:	The Honourable Justice Mona M. Lynch
Heard:	June 24, 2015, in Halifax, Nova Scotia
Counsel:	Terrance Sheppard for the Applicant Janet Stevenson for the Respondent

By the Court:

Background:

[1] The parties were married in June 1989. They have two children, one aged 18 who just finished her first year of University and the other aged 16 and just finished grade 9 in a private school.

[2] The parties separated in August 2002 and were divorced in June 2004 after having reached a comprehensive Separation Agreement and Minutes of Settlement which was incorporated into the Corollary Relief Order (CRO).

[3] During the marriage, the mother was the primary caregiver for the children and her career was secondary in the relationship. After separation the mother resumed her education but continues to work less than full time and earns $43,000 per year.

[4] The father is a lawyer and has been a partner in a law firm. Since 2013 the father's remuneration from the law firm is paid to a corporation which then distributes funds to a service corporation which pays the father a salary, pays a dividend to a holding company and the holding company pays a dividend to a trust.

[5] The CRO provided for calculation of the father's income based on how he was paid, how child support was to be paid and provisions for an accounting in each year to ensure that the father paid child support on his actual annual income. Overpayments and underpayments of child support were dealt with in the CRO. There is a provision for annual disclosure of income tax information.

[6] The CRO provided that the father pay spousal support to the mother.

[7] For extracurricular expenses the parties agreed to equally share those expenses which were agreed upon. Certain expenses were to be paid 100% by the mother and others, including dance, were to be paid for 100% by the father. The parties agreed to proportionately share other s. 7 expenses that were agreed to by both parents.

[8] The father agreed to maintain the children on his health insurance.

[9] In March 2012 the CRO was varied, by consent, to terminate spousal support and to cap the father's obligation for dance expenses to $10,000 per year.

[10] In 2013, the father's firm received a class action settlement which resulted in a payment to him or the corporation of $223,298. He did not pay any of this amount to the mother for child support.

[11] In the Fall of 2014, the older child started university in Nova Scotia but away from the mother's residence. Also, in the Fall of 2014, the younger child started attending private school in Halifax. The father did not contribute to the university or private school expenses.

[12] On November 5, 2014 the mother applied to vary the child support, both Table and s. 7 of the CRO, and to address arrears. The mother sought the variation of the order effective January 1, 2013.

[13] The matter was before the court for a Motion for Directions on February 4, 2015 and set for a settlement conference and one day hearing.

[14] On June 8, 2015 the father filed a Response to Variation Application seeking changes to child support, both Table and s.7, and a determination that there were no arrears of child support owing.

[15] The matter was heard on June 24, 2015.

Issues:

[16] 1. Has there been a change in circumstances?

2. How should the father's income be calculated for child support purposes?

3. Should the class action settlement amount be included in the father's income for child support for 2013?

4. Should income be imputed to the father due to him taking income in the form of dividends?

5. Should income be imputed to the mother?

6. What is the appropriate amount of Table child support to be paid?

7. What are the shareable s. 7 expenses?

8. What is the appropriate s. 7 sharing?

9. What is the appropriate contribution by the older child to her university expenses?

10. Miscellaneous.

Position of the Parties:

[17] The mother is asking that the father's income be calculated as provided for in the Separation Agreement incorporated into the CRO. This, she submits, would include the class action settlement amount from 2013. She asks that s.7 expenses be shared as in the CRO – proportionate for s.7 except equally shared for

extracurricular expenses agreed upon. She is asking that the father's dividend income be grossed up to account for the lower tax paid. She is asking that the father be ordered to pay the costs of the younger child's tutor and for her driver's education. She is asking that income not be imputed to her.

[18] The father is asking that the manner of child support payments be changed. He wants the class action payment to be excluded from his income as a nonrecurring amount that is not captured by the CRO. He wants the class action amount to be paid into the trust and for an amount of up to $30,000 be paid to his older child who will then be responsible to pay for her university expenses and her younger sister's private school fees. He asks that income be imputed to the mother as if she worked full time. He asserts that the education costs for both university and private school should be covered by the Table amount of child support paid. He asserts that the expenses for driver's education and the tutor are not extraordinary when you take into account the Table amount of child support. He wants his older child to be responsible for one-third of her own education expenses and to contribute $5,000 in 2015/2016.

Has there been a change in circumstances?

[19] The parties agree that there has been a change in circumstances since the time of the CRO and last variation order. Changes include the father's new manner of receiving income, the older child commencing university and the younger child attending private school.

How should the father's income be calculated for child support purposes?

[20] The CRO provides for detailed definitions, principles and formulas to calculate the father's income for child support purposes. At the time of the agreement, the father was earning over $150,000. The CRO sets out the three different ways the father received his income. Based on evidence in the variation hearing, the agreement on how to calculate the father's income came as a result of negotiations between the parties and a lot of back and forth.

[21] While the father changed the manner in which he received his income in 2013, the manner in which the law firm paid him and the three different sources of income did not change.

[22] The principle for calculation of child support was set out in paragraph 1 of Schedule B of the Separation Agreement which was incorporated into the CRO.

That principle is "child support is payable on all income received by (the father) as it is received".

[23] Both s. 9(2) of the **Divorce Act**, R.S., 1985, c. 3 and s. 15(2) of the **Federal Child Support Guidelines**, SOR/97-175, (the *Guidelines*) encourage agreements by parties. Agreements reached by parties should be given great weight. The agreement in this case was reached after give and take and back and forth.

[24] The parties reached an agreement as to the fairest manner to determine the father's income for child support based on the manner of remuneration to the father. The agreement was reached after negotiations and back and forth. The manner of payments from the law firm has not changed and the manner of calculation of income set out in the CRO is still the best way to calculate the father's income.

Should the class action settlement amount be included in the father's income for child support for 2013?

[25] In 2013 there was a settlement of a class action suit which resulted in a large payment to the law firm and ultimately to the lawyers who had a partnership interest in the firm. The father's share of this payment was $223,298.

[26] The father asks that I exclude the settlement amount under s. 17 of the *Guidelines* as a non-recurring amount. The evidence shows that while the amount of this settlement was unusual, receiving extra draws and bonus payments over and above his regular draw was not unusual. It occurred every year.

[27] Non-recurring payments have been excluded in some cases cited by counsel for the father such as **Leet v. Beach,** 2010 NSSC 433, however in that case there was not an agreement as to how the payor's income was to be calculated. In **McKenzie v. Perestrelo,** 2014 BCCA 161 at paragraph 98, the court says: "However, as the authorities make clear, the fact of non-recurrence is not on its own sufficient reason to deny a spouse or child the benefit of the income." Also in **Fraser v. Fraser,** 2013 ONCA 715 at paragraph 97, the court considers a non-recurring amount and finds that RRSP income received in a particular year is presumptively part of a spouse's income for child support purposes as it is included in "Total income" on the T1 tax form pursuant to s. 16 of the *Guidelines.* The court in **Fraser** also notes in paragraph 98 that:

> "Section 17 of the *Guidelines* permits a court to depart from the income determination made under s. 16 where it is satisfied that would not be the fairest determination of income".

In the present case I am satisfied that the parties' agreement regarding the determination of income contained in the CRO is the fairest determination of income.

[28] Would the determination of the father's income in the CRO include the class action amount? This requires an examination of the calculation of the father's income set out in the CRO. As set out above, Schedule B of the Agreement incorporated in the CRO starts with the principle that child support is payable on all income received by the father as it is received. The Agreement sets out the three ways the father receives income as: regular draws, extra draws and bonus payments. The settlement amount would not be a regular draw and the evidence does not show that it was determined through a committee process as is anticipated for bonus payments. The evidence from the father was that his regular compensation includes draws which are given when income of the firm exceeds the budgeted income for a particular year. In 2014 he received $86,000 in extra draws. It was not the payment of the extra draw that was unusual in 2013; it was the amount of the extra draw, $223,298, that was unusual.

[29] The payment of $223,298 is included in the definition of extra draws in Schedule B of the agreement incorporated in the CRO and should be included in the father's income for 2013.

[30] The father's income for child support purposes in 2013 is $561,972 and for 2014 is $446,022.

Should income be imputed to the father due to him taking income in the form of dividends?

[31] The mother asks that I impute income to the father based on s. 19(1)(h) of the *Guidelines* based on dividend income and a lower tax rate.

[32] As described above, in 2013 the father began receiving his remuneration through corporations. His partnership interest was transferred to a corporation. He receives a salary from one corporation and dividends from another corporation. He has set up these corporations to reduce and defer taxes. I accept the father's evidence that between the tax he pays on the portion of his income which he takes as salary, the corporation taxes and the taxes on dividends paid to him, that the combined tax rate is close to 50%. I will not impute income to the father.

Should income be imputed to the mother?

[33] The father asks that I impute full time income to the mother of $66,414. The mother responds that full time at her current employment would be approximately $58,000. The mother left work after the birth of the younger child and was out of

the workforce for five years. The father was working long hours at that time. Around the time of separation the mother returned to the workforce and has worked less than full time hours since that time. She currently works 24 hours per week.

[34] While s. 19(1)(a) of the *Guidelines* allows me to impute income to a spouse who is under-employed, I find that the mother's under-employment is required by the needs of one of the children. The younger child has struggled with her mental health in the past few years which has resulted in the mother having to take a lot of time off work. Her hours are scheduled around the younger child's school hours so she can take her to and from school. The younger child also has medical appointments and extra-curricular activities. I accept that the mother not working full time is related to the needs of the younger child and I will not impute full time income to her.

What is the appropriate Table amount of child support to be paid?

[35] Sections 3 and 4 of the *Guidelines* read:

> 3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
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> > (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

> (b) the amount, if any, determined under section 7.
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
>
> …
>
> 4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
>
> (a) the amount determined under section 3; or
>
> (b) if the court considers that amount to be inappropriate,
>
> (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
>
> (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
>
> (iii) the amount, if any, determined under section 7.

[36] The older child is just about to reach the age of majority. She was living away from the mother's home in the 2014/2015 schoolyear from September to April. The father continued to pay the Table amount of child support because she was still under the age of majority. However, s. 3(2)(b) of the *Guidelines* gives

discretion as to payment of the Table amount for a child over the age of majority if I find the Table amount to be inappropriate.

[37] Also, the father has income over the amount of $150,000 per year and s. 4 of the *Guidelines* allows me to deviate from the Table amount if I consider the Table amount to be inappropriate. The father's income was over $150,000 at the time of the agreement.

[38] In both 3(2)(b) and s.4 of the *Guidelines*, the presumption is that the Table amount is appropriate.

[39] The father asks that I find the Table amount of child support to be inappropriate both because the older child is not living at home during the school year and because of the amount of child support with his income. The mother asks that I award the Table amount of child support and she will pay all of the older child's living expenses while she is at university.

[40] The mother filed a statement of expenses for the older child with her living expenses while at university, including room, meal plans, extra groceries, car payments and insurance, personal needs and clothing. The mother's position is that the father's proportionate share of the expenses is less than the difference between the Table amount for two children and the Table amount for one child.

The mother has concern that she will be chasing the father for his share of the older child's expenses. This concern is based on the father's failure to reimburse her for medical expenses for the children for which he received reimbursement and his failure to contribute to the university costs or private school costs for 2014/2015 despite the CRO and numerous requests.

[41] The father suggests that the expenses for the child are overstated. The father submitted many cases where less than the Table amount of child support was ordered for income over $150,000. The mother submitted cases where the Table amount of child support was ordered for income over $150,000. The proper amount of child support is to be determined on the facts of each particular case.

[42] The leading case on the term "inappropriate" is **Francis v. Baker, [**1999] 3 S.C.R. 250, 1999 CanLII 659. Principles and factors which can be distilled from **Francis**, include:

1. Section 4 requires the balancing of the objectives of predictability, consistency and efficiency on the one hand with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children". (paragraph 40)
2. Inappropriate means unsuitable. (paragraph 40)
3. Child support undeniably involves some form of wealth transfer to the children and will often produce an indirect benefit to the custodial parent. (paragraph 41)

4. While standard of living may be a consideration in assessing needs, at a certain point, support payments will meet even a wealthy child's reasonable needs and a court may conclude that the *Guideline* figure is so excessive of the child's reasonable needs that it must be considered a wealth transfer or *de facto* spousal support. (paragraph 41)
5. Parliament intended that there be a presumption in favour of the Table amount. (paragraph 42)
6. The *Guideline* figures can only be increased or reduced under s. 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate. Courts should not be too quick to find that the *Guideline* figures enter the realm of wealth transfers or spousal support. (paragraph 42)
7. There must be clear and compelling evidence for departing from the *Guideline* figures. (paragraph 43)
8. The sheer size of the *Guidelines* amount does not make it inappropriate. There is no cap or upper limit on child support payments. (paragraph 52)

[43] The New Brunswick Court of Appeal recently considered "inappropriate" in **L.P.S. v. M.S F.,** 2015 NBCA 23 in relation to a child over the age of majority who lived away from home while attending university. The child received funding for tuition, books and residence fees along with an allowance for travel from her First Nations Band. The court found that there was no reversible error made by a trial judge in ordering the Table amount of child support for a child. The mother was helping the child in that case as the mother is in this case. And they said at paragraphs 17 - 21:

[17] A payor who seeks to exclude the application of s. 3(2)(a) of the *Guidelines* has the onus to prove the table amount is "inappropriate" once the child has been determined to remain a child of the marriage: *Rebenchuk v Rebenchuk*, 2007 MBCA 22 (CanLII), [2007] M.J. No. 130 (QL), at para. 64; *M.V. v. D.V.*, 2005 NBQB 412, 269 N.B.R. (2d) 275; and *W.P.N. v B.J.N.*, 2005 BCCA 7, 2005 BCCA 7 (CanLII), [2005] B.C.J. No. 12 (QL).

[18] The fact that a child receives third party assistance with the payment of their post-secondary education is a legitimate consideration when assessing parental contribution towards the eligible s. 7(e) expenses under the *Guidelines*, but is not necessarily relevant to the analysis pursuant to s. 3(1). This section requires the trier of fact to apply the table amount, firstly, and secondly to add the applicable share of s. 7 expenses. If this approach is deemed "inappropriate", the court may exercise a discretionary deviation pursuant to s. 3(2)(b). The legislation does not specify the applicable criteria; however, a deviation is considered to be "exceptional": *Lewi v. Lewi*, 2006 CanLII 15446 (ON CA), [2006] O.J. No. 1847 (C.A.) (QL), at para. 129 and *Rebenchuk v. Rebenchuk*, at para. 28.

[19] In *Pollock v. Rioux*, Richard J.A. adopted and applied the analysis in *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, [1999] S.C.J. No. 52 (QL) at paras. 37-40. The word "inappropriate" was broadly defined and there must be clear and compelling evidence to convince the trier of fact a deviation is warranted in the circumstances of the case. In the absence of such evidence, the trier of fact should not deviate from the table amount. This same principle was applied by Green J.A. in *Simon v. Adey*.

[20] In this case, the motion judge concluded H. continued to be a child of the marriage following her 19th birthday; her mother's home was her primary residence, she was not able to withdraw from parental control and she required financial assistance. The judge found the mother assisted H. with car repairs, grocery and living expenses, clothing purchases, and provided her with "care packages". The motion judge further found the mother provided this support from her limited means, and without the child support payments that were withheld by the enforcement officer at the request of the father's counsel commencing in December 2010 (see discussion below). These facts were not disputed by the father.

[21] The motion judge concluded the mother maintained a "household" for H. This conclusion was independently corroborated. At para. 28 of the decision, the judge stated the mother "continued to provide financially for H., both at home and while [she] was at university". She correctly concluded the father did not rebut the application of the presumptive rule (para. 41).

[44] The father's argument appears to be that the shear amount of the Table amount for 2013 when the settlement is included is inappropriate. The Supreme Court of Canada rejected that argument in paragraph 52 of **Francis v. Baker**, supra**.** Although child support was not considered by the Supreme Court of Canada in **Quebec (Attorney General) v. A**, 2013 SCC 5, the monthly Table amount in that case **was** $34,260 a month plus tuition and other expenses (paragraph 7).

[45] The father's other argument is that the expenses set out for the children appear to include amounts not attributable to the children. There is a dispute as to whether car payments and insurance for the older child are appropriate. I accept the mother's evidence that the expenses shown are attributable to the children and that the car payments and insurance are for the older child. I am also mindful of what the Supreme Court of Canada said about children's expense budgets in **Francis v. Baker,** supra, in paragraphs 48 and 49:

> 48 It is clear that "preparation of a budget is not an exact science": *Lucia v. Martin*, [1998] B.C.J. No. 1798 (QL) (S.C.), at para. 16, and that the custodial parent is prone to overestimating or underestimating the amounts, because "[t]ypically, the custodial parent has little experience in the pricing of child-rearing in a separated household, or at all": *Levesque v. Levesque* (1994), 1994 CanLII 4486 (AB CA), 116 D.L.R. (4th) 314 (Alta. C.A.), at p. 322. Nevertheless, there is nothing objectionable per se about recognizing that trial judges have the discretion to require custodial parents to produce child expense budgets in cases in which s. 4 of the Guidelines is invoked. Along with other factors, these budgets speak to the reasonable needs of the children, a factor expressly included in s. 4(b)(ii). What is objectionable, however, is that in the pre-Guidelines jurisprudence,

> custodial parents often had the burden of proving the reasonableness of each budgeted expense on a balance of probabilities. As explained above, under the Guidelines, custodial parents are entitled to the Table amount unless that amount is shown to be inappropriate. It follows that, while child expense budgets may be required under s. 4 in order to allow for a proper assessment of the children's needs, custodial parents need not justify each and every budgeted expense. Courts should be wary of discarding the figures included in their budgets too quickly. They should, however, make allowances for any obvious duplication of expenses or other readily apparent anomalies.
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> 49 While child expense budgets constitute evidence on which custodial parents can be cross-examined, their inherent imprecision must be kept in mind. Where one figure is overestimated, it is possible that another is underestimated. Furthermore, as the trial judge recognized and counsel for the appellant conceded in oral argument, the unique economic situation of high income earners must be acknowledged. Child expenses which may well be reasonable for the wealthy may too quickly be deemed unreasonable by the courts. Of course, at some point, estimated child expenses can become unreasonable. In my opinion, a proper balance is struck by requiring paying parents to demonstrate that budgeted child expenses are so high as to "excee[d] the generous ambit within which reasonable disagreement is possible": *Bellenden v. Satterthwaite*, [1948] 1 All E.R. 343 (C.A.), at p. 345.

[46] Expenses for the child, such as car expenses for the older child, were disputed by the father but they are not unreasonable considering family income. They are not so high as to "exceed the generous ambit within which reasonable disagreement is possible". The children are entitled to benefit from their father's income. One of the objectives of the *Guidelines* in s. 1(a) is: to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation.

[47] The mother's wish to have a set amount for the Table amount rather than have the father dispute the expenses for the older child is reasonable. The mother

is accepting less than she would be entitled to but I accept that in recent years there have been disputes with the father over expenses that she wishes to avoid.

[48] Based on all of the evidence, the father has not shown on clear and compelling evidence that the Table amount of child support is inappropriate.

[49] The father will continue to pay child support in the Table amount for two children. The father will pay child support for two children for the years 2013 and 2014.

What are the shareable s. 7 expenses?

[50] The expenses that the mother asks to be proportionately shared for 2014/2105 are: the university expenses for the older child for 2014/2015 including tuition as well as books and fees of approximately $7,700; the private school expenses for the younger child for 2014/2015 which were $18,740; the younger child's tutor for 2014/2015 at $1,390; and the younger child's driving education at $699.00. For 2015/2016, the mother seeks the university expenses, the private school expenses and the tutor.

[51] Section 7 of the *Guidelines* reads:

> 7. (1) In a child support order the court may, on either spouse'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 spouses and those of the child and to the family's spending pattern prior to the separation:

(a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

(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 counselling 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.

(1.1) For the purposes of paragraphs (1)(d) and (f), the term "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, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

(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, where 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, and
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> (v) any other similar factor that the court considers relevant.
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> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
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> (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.
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> (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.

[52] Post-secondary expenses and medical expenses need not be extraordinary under s. 7 of the *Guidelines*. Secondary education costs and extracurricular activities do need to be extraordinary.

[53] For the post-secondary expenses and the medical expenses, I find that they are in the best interests of the older child and are reasonable expenses in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation. The university expenses are being incurred to prepare the older child for her life as an adult and launch her on her way in the world. The medical expenses are in the best interests of both children, reasonable in relation to the means of the spouses and the children and to the family's

spending pattern prior to the separation. Both are valid s. 7 expenses. The children are entitled to be supported by both parents. The net cost of the university expenses is shareable by the parties.

[54] Secondary school expenses and extracurricular activities do need to be extraordinary under s. 7(1.1) of the *Guidelines*. In considering s. 7(1.1) of the *Guidelines*, I must consider that the mother went into debt in 2014/2015 covering the university and private school expenses. The private school expenses were almost $19,000 in 2014/2015 and will be almost $15,000 on an ongoing basis. There is no doubt that the private school costs are in the best interests of the child and reasonable. The younger child has no means to contribute to her expenses.

[55] As the Table amount of child support paid in 2014/2015 still required the mother to go into debt to cover the university and private school expenses, I find that the private school expenses are extraordinary when combined with the other expenses that the mother has to cover, including covering $17,551 in expenses for the older child plus visits home and providing for her full time from April to September. The Table amount of child support at approximately $61,000 plus the mother's salary of total income of $43,000 do not cover the annual expenses of approximately $105,000 set out in the mother's sworn statement of expenses. While the mother may be able to cover those expenses under s. 7(1.1)(a), under s.

7(1.1)(b), when considered with the other expenses, the private school costs are extraordinary.

[56] The other expenses of the tutoring costs of about $1,400 to $2,400 a year and the driver's education costs of $700 are not extraordinary. Those costs can be covered by the Table amount of child support.

[57] The father says he did not agree to the older child attending the particular university. The CRO and the variation order require consent to incur s. 7 expenses. The father is not exempted from sharing the older child's university expenses because he did not consent to the specific university. The older child chose where she wanted to go after considering several universities. The father attended the open house at the university she attended and he knew that the older child was considering this university. The same can be said for the choice of private school for the younger child. The school was recommended by the mental health professionals working with the younger child. The father cannot be exempted from contributing to these expenses because he did not explicitly agree to the choice of schools. He agrees that the younger child needs to be in private school. He implicitly agreed to the private school and the university and cannot be exempted from sharing these expenses.

What is the appropriate s. 7 sharing?

[58] The guiding principle in s. 7(2) of the *Guidelines* is that the expenses are shared proportionate to income. In the CRO, the parties agreed to proportionately share s.7 expenses except for extracurricular activities which they agreed would be shared equally and those that they agreed would be covered 100% by one parent.

[59] The father requests that s. 7 expenses for university and private school be paid through the trust. There are a number of concerns with this manner of proceeding. The older child would have complete control over the payment of her university expenses and her sister's private school expenses. The court has no ability to order the older child to pay these expenses as that would compromise the nature of the trust. While I have no doubt that the older child is responsible and mature, I have concerns. The mother has experienced problems in getting the father to pay some of the expenses in the last few years, including medical expenses, for which he received reimbursement. The father did not pay any of the education costs or other expenses for the children in 2014/2015. The trust would make this an exchange between the father and the older child. While I accept that trust would reduce taxes and benefit the entire family, it is something that would be appropriate if all relevant parties were in agreement. It is not something that the court is willing to order.

[60] The father also asks that he not be required to contribute to s. 7 expenses as they can be covered by the mother with the Table amount of child support. As stated above, if the mother were to cover all of the costs, all of her income and all of the Table amount of child support would be used to cover those costs.

[61] The mother was asked what she would do with any child support that was not needed to cover expenses. The mother indicated that she would use the money to do things with the children that she has not been able to do such as take a vacation with them or help provide for their futures. This will be after she pays the debt she incurred from paying all of the university expenses and private school expenses for 2014/2015.

[62] In their comprehensive negotiated agreement, the parties agreed that s.7 expenses, other than extracurricular expenses, would be proportionately shared. I still find that the agreement made is in the best interests of the children and fair and reasonable in the circumstances. The net expenses for university tuition, fees and books will be proportionately shared after the child's contribution is calculated. The expenses for private school will be proportionately shared by the parents.

What is the appropriate contribution by the older child to her university expenses?

[63] The older child had little paid work in the summer of 2014. The older child's contributions to the 2014/2015 school year will be the bursary of $1,283 and scholarship of $2,000 she received. This leaves the after tax cost to be proportionately shared by the parents at $3,261.

[64] For 2015/2016 the father asks that the university costs be shared one-third by the mother, one-third by the father and one-third by the child. As I stated above, the parents' share will be proportionately shared. The older child is not expected to receive a bursary or scholarship. The older child is working at a coffee shop for the summer and her total wages for the summer will range between $3,800 and $5,000. The father asks that the older child be required to contribute $5,000 to her university expenses. While I agree that the older child should contribute to her own education, it is not realistic to expect her to save every penny of her summer employment to contribute to her university expenses. Counsel for the father also questioned the mother about the older child getting a student loan. In **Selig v. Smith,** 2008 NSCA 54, the court said at paragraphs 18 - 20:

> [18] With respect to whether all of Ashley's income from employment and half of her student loans should have been included in her share of the educational expenses, it

appears that in some cases judges do not include all of the child's employment income, and in other cases the availability of student loans is not considered unless the parents are unable to meet the total educational expenses. For example, in **A.W.H. v. C.G.S.**, 2007 NSSC 181, Justice Beryl MacDonald, stated:

¶ 15 Section 7(1) directs a court to examine the "reasonableness" of the child's educational expense "in relation to the means of the spouses and those of the child". I consider it therefore appropriate to look first at the amount of the expense inclusive of the child's living expenses, next at the means of the child to determine what he or she should contribute from sources other than debt instruments, and finally at the ability of the parents or a parent to contribute either in whole or in part to the remaining expense. In conducting this review I am mindful of the comment of Justice Rogers in **R.J.C. v. R.J.J.**, [2006] B.C.J. No. 2150, 2006 BCSC 1422 (S.C.) at para 20: ...

[19] In **Rebenchuk v. Rebenchuk**, 2007 MBCA 22, after reviewing numerous cases on these points, Chief Justice Scott, wrote:

¶ 53 Most courts seem to accept that it is reasonable for a child to be able to obtain one degree with the support of a non-custodial parent, with entitlement to subsequent degrees being very much a fact-driven issue. There is no set pre-determined cut-off for support, although I have been unable to find a case that required support past the age of 26 or 27. I agree with the view that, ordinarily, student loans ought to be required only when the means of the child combined with the means of the parents leave a shortfall. It is to be remembered that student debt delays the cost of education. It is not a reduction. In his annotation to **Mabey v. Mabey**, 2005 NSCA 35 (CanLII), 2005 NSCA 35, 12 R.F.L. (6th) 403, Professor McLeod notes (at p. 407):

> Most courts are reluctant to allow a payor to avoid child support by insisting the child maximize his or her contribution by student loans, since student loans are just cost deferrals. When the child is finished school, the loans must be paid.

¶ 54 Most courts assume a child will earn income during the summer and this is usually taken into account one way or another in determining the amount of the child's contribution. While the authorities are not consistent on the subject, I much prefer a simple requirement that adult children contribute a "reasonable amount" of their total earnings to their education rather than placing a more onerous burden upon them, leaving the precise determination to the exercise of the trial judge's discretion. [emphasis added]

[20] However, there is no hard and fast rule that student loans should be the last resort. In other cases, for example, **Everill v. Everill**, 2005 NSSF 8, and **Houston v. Houston**, 2007 NSSC 277, the child was expected to contribute the full amount of any available student loans. Each case depends on its own particular facts and although the trend seems to be leaning towards determining the parents' ability to contribute before resorting to student loans, it cannot be said that it is an error in principle or a palpable and overriding error of fact in a case where the divorced parents' total income approximates

> $100,000 for a judge to assume that an adult child will be expected to borrow to finance post-secondary education. The higher the parents' income, the less the student should be required to contribute. There is no exact right answer in these cases. So long as the amount ordered is reasonable in the circumstances, this court should be slow to intervene. Here the trial judge deducted one-half of the loans. If the trial judge had deducted one-quarter of the student loans or none of them, that would likely have been seen as reasonable as well. The same can be said of the income from employment of the student. There is a wide range of possibilities that fit within the reasonable standard. Given the highly deferential standard of review required in cases of child support for adult children, I am not persuaded that we should interfere with the decision under appeal.

[65] I do not find it reasonable, with the parents' incomes, that the older child would have to apply for a loan and go in debt to finance her university education. I find it reasonable that the older child contribute $2,000 towards her 2015/2016 university expenses. The net remainder will be proportionately shared by the parents.

Miscellaneous:

[66] The CRO was not varied with regard to the timing of payments. I understand that the father has paid the medical expenses owing to the mother. I also understand that on an on-going basis, those medical payments will be made directly to the mother. The CRO requires that payment from "extra draws", "holdback cheques" and "bonus payments" be made to the mother within one week of receipt by the father. This has not changed. The calculation of income for the

father and the deductions permitted from his income will be calculated as it has been since 2004.

[67] The mother requests that the father pay interest on the amounts outstanding from 2013 forward. The CRO required the father to pay child support on the class action settlement. The CRO required the father to pay the proportionate share of the university costs and the private school costs. The CRO required the father to reimburse the mother for the medical expenses. The father did not pay any of those amounts to the mother until he paid the medical costs just prior to the hearing. The mother incurred debt to finance the children's expenses. It is reasonable that the father pay interest from the date when the child support payments were due.

[68] I expect that counsel will make the calculations necessary to determine the amount owed by the father to the mother. If counsel are unable to agree on the amount, the court will hear counsel.

Disposition:

[69] The parties have agreed that there has been a change in circumstances since the CRO in 2004 and the Variation Order in 2014.

[70] The father's income will continue to be calculated as provided for in the CRO.

[71] The class action settlement "extra draw" will be included in the father's income for 2013.

[72] No income will be imputed to the father due to him taking income in the form of dividends.

[73] No income will be imputed to the mother because she works less than full time as her reduced hours are required by the needs of the younger child.

[74] The Table amount of child support is not inappropriate.

[75] The university expenses of the older child and the private school fees for the younger child are to be shared proportionate to the incomes of the parties. The costs of the tutor and driver's education are not extraordinary.

[76] The older child will contribute $2,000 to her 2015/2016 university expenses. Her 2014/2015 contribution was her bursary and scholarship.

[77] The father will pay interest on the amounts owing to the mother from the date they should have been paid.

Lynch, J.