SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacDonald v. Rudderham, 2013 NSSC 445

Date: 20130729
Docket: SFSNF 008063
Registry: Sydney

Between:

Vincent Michael MacDonald

Applicant

v.

Tracy Georgina Rudderham

Respondent

DECISION

Judge: The Honourable Justice M. Clare MacLellan

Heard: July 15, 16 and 29, 2013 at Sydney, Nova Scotia

Oral Decision: July 29, 2013

Subject: Variation of Section 3 child support sought to allow Payor to return to school. Child is in a post-secondary program. Child found to be a dependent child.

Issue: Payor seeks relief of Section 3 support UNTIL May 2015 in order to pursue his studies until 2015. He wishes to pay no support to 19 year old child. Applicant alleges older child has sufficient education and should find employment based on one year post-secondary education.

Result: Applicant Payor's application dismissed. Payor support is modest. Child at 19 is dependent while attending a recognized learning institution. She is entitled to continued support. Payor may continue to study once child support obligations are met. This decision does not bar a Section 7 Child Support Guideline Application in the future. Retro orthodontal account for $3,650.00 was due January 1, 2010. The Applicant is to pay the total sum of $3,650 payable in 30 days by the Applicant.

By the Court:

[1] The applicant, Vincent Michael MacDonald, and the respondent, Tracey Georgina Rudderham, are the parents of two children Michaela Alysabel MacDonald, born December 9, 1993 and Katie Anne MacDonald, born June 26, 1995.

[2] The matter before the court is an Application to Vary filed by Vincent MacDonald. He requests the court to grant a variation to the existing child support order to delete his older child, Michaela MacDonald, on the grounds that she is no longer a dependent child within the meaning of *Maintenance and Custody Act*. He requests that the child support he is currently required to pay be varied to delete Michaela on the basis that she is sufficiently educated at the present time and should be actively seeking employment. Secondly, he claims that the course she intends to take in the academic year 2013/14 is substantially the same as the course she already completed and is unnecessary to achieve self-sufficiency.

COURT HISTORY:

[3] The history of court Orders are as follow:

(a) Consent Order issued by the Honourable Justice Darryl Wilson on May 15, 1997, where both parties were represented by counsel. Tracy Rudderham was granted sole custody of the infant children Michaela MacDonald and Katie Anne MacDonald. The father was granted reasonable access. Mr. MacDonald was a grant worker at the Braemore Home and worked as a labourer grossing $222.00 per week. He was required to pay $36.00 every two weeks payable through Maintenance Enforcement.

(b) A Consent Variation Order was granted by the Honourable Justice K.C. Haley on the 18th day of March 2009. The recitals of the Order indicate that Mr. MacDonald earns $27,300.00 per annum is required to pay $410.00 for the support of the two girls pursuant to the *Provincial Child Support Guidelines*. That Order commenced on the first day of February, 2009, and continues on the first day of each month thereafter. Secondly, Mr. MacDonald was required to pay "the balance of the cost of Michaela's orthodontist expenses over and above the amount covered by the medical plan of the applicant Tracey Georgina Rudderham."

(c) All payments were to be made through Maintenance Enforcement Program.

(d) Mr. MacDonald was ordered to advise Ms. Tracey Georgina Rudderham "On a timely basis as to his change of address, his employment or status, and shall supply the

applicant with a copy of his income tax return completed with all attachments even if the return is not filed along with all notices of assessment received by the Canada Customs and Revenue Agency on an annual basis on or before the first day of May of each year commencing on June 1, 2009 and continuing thereafter until otherwise ordered by a court of competent jurisdiction." This order was signed by both parties. Disclosure was never made by Mr. MacDonald.

(e) The final order on record resulted from Mr. MacDonald's request for paternity testing. The order was granted on November 3, 2010. This order authorized DNA testing on the dependent children to determine whether or not Mr. MacDonald could be excluded from the classification of father of the two children. There is no further order determining paternity.

[4] The matter was pre-trialed by Justice Forgeron on June 10, 2013, at which time Mr. MacDonald was to provide an Affidavit as well as financial information from 2009 to present; Statement of Property and debts; up to date outline of efforts to find employment; and a copy of his resume by June 20, 2013. Similar material was to be supplied by Ms. Rudderham to be filed by July 4, 2013.

[5] The hearing proceeded on July 15th, 16th and 29th, 2013. At the commencement of hearing the issues were defined as:

1. Ongoing child support.
2. Is the child, Michaela, still a dependent child?
3. Is Mr. MacDonald underemployed?
4. If so, should his income be imputed to a higher income?

The court heard from Mr. MacDonald, Michaela MacDonald, and Tracey Rudderham. Eighteen exhibits were tendered and summations were set for July 29, 2013. On July 16 I provided counsel with six case citations and copied two decisions to assist with their submissions. The matter reconvened on July 29, 2013, for completion of summation and decision. An oral decision was rendered July 29th, 2013.

EVIDENCE:

[6] Mr. MacDonald endorsed exhibits #1 through 5 as truthful and that these exhibits effectively represent his financial position. He provided exhibit #6 which purports to be an accurate representation of his resume, work experience, and part of his job search. Mr. MacDonald was permitted to provide *viva voce* evidence to augment his exhibited evidence. Mr. MacDonald advised he was laid off in December, 2012, and started school. He attended upgrading at Marconi Campus and completed that course on

the 30th day of June 2013. He intends to continue his studies in September, 2013, and subsequent courses will continue until May 30, 2014, according to Mr. MacDonald's Affidavit. However, upon questioning he indicated that his actual training, if he is able to complete all selected courses, would not finish until September, 2015. He advised his income at present is a training allowance from Employment Insurance. He grosses approximately $1,400.00 per month and nets $850.00 per month. He estimates that his net income is $420.00 every two weeks after tax and child support is eliminated. If he was required to pay no child support he would receive $1,400.00 gross per month. He advised that he has no income during the summer months June, July, and August. He cannot secure any employment during those months in his trained field because employers lose interest in hiring him once informed that he is only available to work during the summer.

[7] Mr. MacDonald advised the court that he is 48 years of age and has only returned to school once, on this occasion, and it is not something that he attempts every year. To quote Mr. MacDonald, "I just want to change things." Mr. MacDonald was required to provide his income for the years 2010 to present. Exhibit #1 contains his income information for the years 2010 to 2012

2010	$15,230.00
2011	$21,097.00
2012	$21,097 or $43,492

[8] There is disparity between the 2012 in Mr. MacDonald's exhibit #1 which was also left unexplained. Paragraph 7 of Mr. MacDonald's affidavit indicates that in 2012 he made $21,097.00. However, attachment "2" to that same document; tax summary Line 150 income represents his income in that year to be $43,492.00 from all sources. This difference was not explained. No negative inference was drawn as the information was all provided by Mr. MacDonald. This discrepancy is a separate issue from Mr. MacDonald's failure to report income on a yearly basis. No evidence was provided to allow union dues deduction. Each year Mr. MacDonald's income consisted of employment income and employment insurance benefits.

[9] Mr. MacDonald was required to provide his job search to the court. Exhibit #6 outlines Mr. MacDonald's skills and includes construction and labouring skills: experience driving a tractor trailer, operated a Porter to transport pulp, painted interior and exterior surfaces of a large institution, provided assistant to oil field operators, worked in the coil tubing department, maintained and repaired equipment, experience as a flagman with

Department of Highways. Under training and certificates: WHMIS, H2S Alive, CSTS, OSSA, General Entry Level, Skills Upgrading Defensive Driving, Safe and Efficient Operation of a Commercial Vehicle, Transportation of Dangerous Goods, First Aid and CPR, Gas Detection Awareness, Fall Protection, Certificate of Training, Flagman Certification. Mr. MacDonald chronicles his work from 1997 to 2011 to be with various companies. The majority of these positions involved his training as a long haul driver or tractor trailer driver. Mr. MacDonald advised that he left his last place of employment because he found the people were difficult; so in December 2011 he did not return to that job. He is unaware whether or not he can go back. Mr. MacDonald denied that he was terminated from that position. On cross examination he was unable to advise why his work resume did not include this last employer. In relation to other employers such as Tom MacDonald Trucking. He advised that he was would be to return to work for that company. He believes he worked well with Tom MacDonald Trucking.

[10] Mr. MacDonald stated that there is work available for him. However, he did not have any success as employers lose interest when told he is only available for the summer employment. Mr. MacDonald's resume indicates that he has worked in the past in Edmonton, Alberta and Red Deer, Alberta.

[11] Mr. MacDonald seeks to vary the current child support because he does not want to do long distance trucking anymore. Currently Mr. MacDonald advised he could go to work in Alberta but he chose to retrain instead. He may eventually go to Alberta once he has completed his training in 2015.

[12] Overall his current job resulted in one (1) face to face interview and seven (7) phone interviews.

[13] Mr. MacDonald also advised that he was open to returning to work in another year and a half and that may include going to Alberta if there is work there for him but his preferred path would be to continue his studies into 2015 where if his plans were successful he will be a certified electrician.

[14] Mr. MacDonald owns his home represented in his Statement of Property. He values his home in Northside East Bay in the amount of $55,000.00. The property is not mortgaged. The property consists of two parcels of 3.33 acres and 4.57 acres.

[15] Mr. MacDonald's Statement of Expenses outlines that he requires $1,730.00 per month to support himself but receives only $850.00 per month as a training allowance for studying nine (9) months of the year. Mr. MacDonald does not reference any debts, although a statement of indebtedness was required by Justice Forgeron at pre-trial. Therefore, I assume he has no debts. Mr. MacDonald advised that he has not sought employment at any call centres. His preferred course is to complete his training in September, 2015. When asked why he would not wait until his children were independent; and what was to happen to his children in absence of support? He advised he didn't know how to answer that question. Mr. MacDonald did advise that if he had to wait until his children were independent he would be in his fifties. I took that comment to mean he believes he would be too old to train for a new profession.

[16] Mr. MacDonald also confirmed that he had never disclosed his income to Ms. Rudderham as required by the 2009 Consent Order. He indicated that he was prepared to pay the balance of the orthodontal required.

[17] Mr. MacDonald maintains that his daughter's, Michaela, proposed course of study for the term 2013/14 is basically the equivalent to the course she completed the year before April 2013. If I understand his

argument correctly, he maintains that this new course is basically the equivalent to her completed course, and adds nothing to her education; and serves only to increase her indebtedness. Mr. MacDonald believes Michaela should be seeking employment now. His daughter was born December 9, 1993 which makes her 19 years old at the present time.

[18] The court next heard from Michaela MacDonald who is 19 years of age and lives in Westmount with her mother. She advised she completed a course at the Cape Breton Business College in Office Administration/Secretarial. She completed the course and graduated with distinction on June 7, 2013. She financed the year at the Cape Breton Business College through a student loan, her work as a clerk at Membertou Market where she worked weekends and evenings plus financial help from her mother. The course cost her approximately $10,645.00. She intends to take another program in the academic year 2013/14 from the Island Career Academy on Alexandra Street. Ms. MacDonald provided her acceptance letter dated April 22, 2013. The total costs of that course are $9,950.00. She is hopeful that she will receive a student loan to assist in financing the program.

[19] Mr. MacDonald's problems in relation to Michaela's future plans are two-fold. Mr. MacDonald believes this course is practically the same as

the course she just completed and therefore is not necessary and, secondly; that she should be out looking for work using her diploma. In relation to the difference between the programs, Mr. MacLeod asks the court to cross compare exhibit #2 tab 3 with exhibit #12. These exhibits outline the course she completed, and the course she proposes to take. In relation to the wisdom of taking the second course at Island Career Academy the questioning of Michaela MacDonald is as follows:

Q: And what prompted you to apply to that particular program?

A: I was talking to my teachers at the business college about it and then made an appointment with one of the directors of Career Academy and she told me there was a lot better career opportunities.

Q: Based upon any discussions you have had with anyone what is your understanding as to what this course can offer you in terms of employment?

A: I feel it would offer me better career opportunities and I want to work internally with a company with recruiting and the hiring, and the policies of the company and I feel there are better...career opportunities with better paying salaries.

On cross-examination the same topic was reviewed.

Q: Would you consider this for a moment. Suppose you get a job and C.B.R.M. paying a good wage would you take that?

A: No. I want to further my education in Human Resources Program.

Q: I understand that but you seem to have given up pretty quickly on the...

A: It's not that I've given up it is that I want to further my education with the Human Resources Program.

Q: Ok but it is pretty well the same course isn't it?

A: Not really, you work internally inside a business with a human resources plan. You have a say in who gets hired, who gets fired, and the policies within the company.

Throughout her testimony Ms. MacDonald maintained that the courses in question were not the same in content. The second diploma would expand her employment eligibility.

[20] Secondly, Mr. MacDonald was queried as to why she was not seeking employment now. She advised she checked Career Beacon daily and has not found any employment using her completed course. When queried on cross examination if she had sincerely looked for a job.

Q: Have you tried to look for work anywhere else?

A: Yes. I have been trying to get a job with the course I just finished but I couldn't find anything.

Q: Well can you tell us a bit more about that I mean did you pass out applications?

A: Yes. I sent out a few applications on Career Beacon.

Q: Can you give us an idea of approximately how many?

A: Not sure. I'm not sure.

Q: Like two or three, twenty or thirty or what?

A: No, I would say, fifteen twenty.

Q: So what kind of places did you send them?

A: Different companies. Target, they have a summer program in North Sydney, Community Services, I am not really sure, I sent out a few.

Q: Well did you send one out to Community Services for part time work in the summer?

A: Yes, they had a summer job opening; and I tried to get on with a temp agency.

[21] Ms. MacDonald was questioned on whether she used her money wisely. In relation to the cost of maintaining a car, she advised that she saved until she could buy the car and to repay her mother who originally paid for the car insurance. The car was necessary for her to go back and forth to school and work. She needs to save money so she can keep the car running. She bought the car with cash and paid $1,923.00 to have the car repaired, registered, and licensed.

[22] Ms. MacDonald has been working at Membertou Market since December 2012. She continued to work throughout the school year and during the summer. Exhibit #11 indicates that her year to date as of the

5th of July, 2013, was a total of $5,048.00 with net earnings of $4,677.00. She is employed part time at Membertou Market and works when required during the summer, weekends, and nights during the winter. She advised:

> "During the summertime we don't have any full time jobs available at our work but for the summer I have been trying to pick up as many shifts as I could to save up my money so I could pay for my insurance and for my gas for when I go back to just working weekends, but, from now on I take as many shifts as I can get."

[23] I have been asked to examine the exhibits, viva voce evidence, and to conclude Michaela MacDonald is essentially taking the same course over again, but at a different location. I am asked to place weight on the fact that both courses require the applicant to have completed grade twelve (12). I place no significance on the fact that both courses require grade twelve (12) before an applicant can apply. Obtaining grade twelve could be the requirement for so many courses and colleges and therefore no relevant connection to Mr. MacDonald's submission has been established.

[24] In relation to a comparison between the job descriptions between the two programs, I find these are not similar based on the descriptions provided. The Cape Breton Business College appears to provide a global understanding of the many aspects of office administration from a secretarial stance. The Island Career Academy job description references

a greater concentration on human resources, employee relations, and human resource planning.

[25] I was impressed with Michaela MacDonald. She is nineteen years old and is effectively paying for all her schooling through her own monies earned during the summer working weekends and evenings. She saved up sufficiently to buy a car, acquire insurance, license, and gas so she can get from Westmount to work and from Westmount to her program. She negotiated loans to supplement her expenses. Michaela completed her first year in post high school graduating with distinction which is quite an accomplishment as she was working during her first year of post-secondary education. I accept that the witness looked for employment with her first course and, contemporaneously, attempted to secure information as to what other opportunities are out there for her to make her more competitive in today's workplace and with the potential of a higher salary. She found this information which requires her to take another year of study. Her work ethic and her objectives are laudable.

[26] It is noteworthy that Michaela is criticized for trying to advance her education at the age of nineteen where she is paying her courses herself and at the same time I am asked to allow Mr. MacDonald who has two dependent children and is only paying $410.00 under a Section 3

Guideline Order to reduce this Order to allow him to begin to study towards a new profession. It is important to remember Mr. MacDonald is asking to delete the $205.00 per month he pays for Section 3 support for Michaela. There is no Section 7 guideline application requiring him to contribute to her extra expenses incurred due to her studies.

DECISION:

[27] Section 3.(1) and 3.(2) of the *Child Maintenance Guidelines* are applicable to the limited analysis I am required to make.

> Presumptive rule
> 3 (1) Unless otherwise provided under these Guidelines, the amount of a child maintenance order for children under the age of majority is
>
> (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 parent against whom the order is sought; and
> (b) the amount, if any, determined under Section 7.
>
> Child the age of majority or over
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child maintenance order relates is the age of majority or over, the amount of the child maintenance 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 parent to contribute to the maintenance of the child.

[28] Justice Freeman in **Martell v. Height**, [1994] N.S.J. 120 N.S.C.A., at para 8:

> 8 It is clear from the various authorities cited by counsel that courts recognize jurisdiction under s. 2(1) of the *Divorce Act* to hold parents responsible for children over sixteen during their period of dependency. How long that period continues is a question of fact for the trial judge in each case. There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier. As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency.

This decision is more accurate today than when decided almost 20 years ago.

[29] Mr. MacDonald does not realize the irony of his request. He asks the court to excuse his obligations under his existing Order so he can advance in a different field at the age of forty eight. He does not appear to appreciate that he is only paying Section 3 *Guidelines* for Michaela and if one was to strictly scrutinize his contribution is $205.00 per month for this young lady who is essentially financing her own education.

[30] Michaela's job search was more extensive than her father's search. I am satisfied she could not find suitable employment with her current training. Mr. MacDonald's job search was not satisfactory. In addition, he advised he could work if he wished to, but prefers to return to school.

[31] Michaela has satisfied me that this second course is indeed an enhancement that may improve her employment opportunities. Ms. MacDonald has maintained employment as she studied. Mr. MacDonald has not. He appears to believe employment such as the call centre is not the type of job he should be required to take while he studied.

[32] The fourth issue I was asked to decide is the orthodontal issue. According to the 2009 Order Mr. MacDonald was to pay the balance of the of the orthodontal expenses, "over and above the amount covered by the medical plan of the applicant Tracey Georgina Rudderham." Mr. MacDonald has failed to do so. The dental balance (exhibit #17) for this amount is $4,900.00 - $1,500.00 = $3,400.00 plus consultation fee of $250.00 which was paid by Ms. Rudderham. That leaves a balance owing for Mr. MacDonald of $3,650.00. I am satisfied that Ms. Rudderham was able to access her Blue Cross plan to cover some of the orthodontal expenses which totaled $5,150.00. Ms. Rudderham advised that Blue Cross paid $1,500.00 from her plan. Her former partner, Mr. Patterson, has been paying the bill in the amount of $200/month from January 2010 until November 2011. He no longer resides with Ms. Rudderham but he volunteered to make these payments. Ms. Rudderham is paying him back at the rate of $100.00 per month. She currently owes him $800.00. Ms. Rudderham was strenuously cross-examined on whether or not her former

partner ought to have covered his step daughter on his Blue Cross Plan. There's two points that come out of that line of questioning.

(a) Mr. MacDonald was obligated to pay for his child's braces by court order issued 2009.

(b) Mr. Patterson had no obligation to pay the these expenses.

Mr. Patterson and Ms. Rudderham were able to work through a plan that enabled this industrious young lady to have braces for orthodontal correction. I accept the figures as offered by Ms. Rudderham, I accept exhibit #17 and I accept that there was a consultation fee of $250.00 so that the balance owing due and payable by Mr. MacDonald is three thousand six hundred and fifty dollars ($3,650.00).

[33] The court is required to follow the directions of the *Maintenance and Custody Act*, Section 9 and Section 10:

> **Maintenance order**
> **9** Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child. 1997
> (2nd Sess.), c. 3, s. 4.
>
> **Powers of court**
> **10 (1)** When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.

(2) The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.
(3) A court may award an amount that is different from the amount that would be determined in accordance with the Guidelines if the court is satisfied that
(a) special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses or common-law partners, or the division or transfer of their property, directly or indirectly benefit a child, or special provisions have otherwise been made for the benefit of a child; and
(b) the application of the Guidelines would result in an amount of child maintenance that inequitable given those special provisions.
(4) Where the court awards, pursuant to subsection (3), an amount that is different from the amount that would be determined in accordance with the Guidelines, the court shall record its reasons for doing so.
(5) Notwithstanding subsection (1), a court may award an amount that is different from the amount that would be determined in accordance with the Guidelines on the consent of both spouses or common-law partners or parents if satisfied that reasonable arrangements have been made for the maintenance of the child to whom the order relates.
(6) For the purpose of subsection (5), in determining whether reasonable arrangements have been made for the maintenance of a child, the court shall have regard to the Guidelines, but the court shall not consider the arrangements to be unreasonable solely because the amount of maintenance agreed to is not the same as the amount that would otherwise have been determined in accordance with the Guidelines. 1997 (2nd Sess.), c. 3, s. 4; 2000, c. 29, s. 8.

[34] I am able to conclude that his income is as follows:

2010 Line 150	$15,238
2011 Line 150	$31,097
2012 Line 150	$43,492
2013 Y.T.D.	$12,600

ISSUE:

[35] Is Mr. MacDonald intentionally under employed within the meaning of Section 19 *Child Support Guidelines* which allow:

> **19. (1)** The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> **(a)** the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
>
> **(b)** the spouse is exempt from paying federal or provincial income tax;
>
> **(c)** the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> **(d)** it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> **(e)** the spouse's property is not reasonably utilized to generate income;
>
> **(f)** the spouse has failed to provide income information when under a legal obligation to do so;
>
> **(g)** the spouse unreasonably deducts expenses from income;
>
> **(h)** the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
>
> **(i)** the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[36] I find on clear and cogent evidence that Mr. MacDonald is intentionally under employed. He is in fact unemployed by his own volition. He left a position earning approximately $43,500.00 a year because he

wanted to improve himself and make a change in his life. Those objectives are laudable but cannot be achieved through the variation of a valid existing child support obligation. I have arrived at this conclusion by reference to the case law interpreting Section 19 *Child Maintenance Guidelines* as set out by Justice Forgeron in **MacDonald v. Pink**, [2011] N.S.J No. 618:

> **24** Section 19 of the Guidelines provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:
>
> **a.** The discretionary authority found in sec. 19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic** 2005 NSSC 291.
>
> **b.** The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49.
>
> **c.** The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivary v. Ross**, 2008 NSSC 339.
>
> **d.** The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi** 2011 NSCA 65; **Van Gool v. Van Gool**, (1998), 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532 (S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.
>
> **e.** A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: **Duffy v. Duffy**, supra; and **Marshall v. Marshall**, 2008 NSSC 11.

25 In **Smith v. Helppi**, 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. in **Gould v. Julian** 2010 NSSC 123. Oland J.A. states as follows:

> [16] Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in **Gould v. Julian**, 2010 NSSC 123 (N.S.S.C.), where Justice Darryl W. Wilson stated:
>
> > [27] Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in **Hanson v. Hanson**, [1999] B.C.J. No. 2532, as follows:
> >
> > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". ...
> >
> > 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
> >
> > 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
> >
> > 4. Persistence in unremunerative employment may entitle the court to impute income.
> >
> > 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
> >
> > 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

...

> [33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

> **26** In **Gill v. Hurst**, 2011 NSCA 100, Bryson J.A. affirmed the trial judge's decision, [2010] N.S.J. No. 645, to impute income where the father's attempt to justify his under-employment for health and educational reasons was rejected: paras. 30 and 31. In addition, Bryson J. held that the trial judge made no error by imputing the "modest sum" of $25,000 to the father.

[37] I am mindful as well, that Mr. MacDonald has indicated that he has worked out west in the past, where it is a recognized fact that such a position yields substantially more income than a similar position in Cape Breton. Mr. MacDonald indicates that he may return out west if he chooses after he has become an electrician. Mr. MacDonald has conducted his affairs as if he were a single man with no obligations. He provides no reasonable excuse or basis to make this employment change when he has dependent children. Mr. MacDonald fails to realize how little he actually is paying to assist his daughter Michaela in her efforts to be competitive in today's job market. Mr. MacDonald is capable of earning an income either in Cape Breton or out west. Mr. MacDonald owns an unencumbered property in Northside East Bay of a number of acres which he estimates at $55,000.00. Mr. MacDonald fails to realize that this is not a Section 7 application but rather one under the *Child Maintenance Guidelines* Section

3(a) and (b). Ms. Rudderham only asks the existing amount be met which is $410 per month for two children. She is not seeking any Section 3 increase. At the date of his application his daughter was not the age of majority, although she has obtained that age during the course of this proceeding, that would make it necessary for me to consider Rule 3(2) which states:

> (2) Unless otherwise provided under these Guidelines, where a child to whom a child maintenance order relates is the age of majority or over, the amount of the child maintenance 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 parent to contribute to the maintenance of the child.

[38] I find that Mr. MacDonald is intentionally underemployed, and that is proven on a balance of probabilities:

(a) Mr. MacDonald has established a history of working in his trained field of operating heavy equipment. He is 48 years old and in good health. He indicated by his own evidence that former employers would hire him again.

(b) He has by his own evidence clearly indicated that he wants to make a change and that included leaving his last employment where he earned $43,492.00.

(c) While Mr. MacDonald can continue his studies, he may only do so if this course permits compliance with his existing child support obligations.

Mr. MacDonald has not provided any evidence to prove that he is medically unable to work as required in **MacKinnon v. Serroul**, 2011 NSSC 386, and **MacGillvary v. Ross**, 2008 NSSC 339.

[39] In conclusion, Mr. MacDonald has not proven on a balance of probabilities on clear and cogent evidence, when the onus is upon him solely that a variation in this order is justified for any reason set out in the three (3) situations in Section 19.1(a). He has not discharged the onus.

[40] Based on Mr. MacDonald's own evidence he is able to generate income in the amount of $43,500.00 which was the amount he made up to December, 2012, when he voluntarily left his position. If I averaged the last three (3) years that Mr. MacDonald worked his income is $26,609.00 which is approximately the amount upon which the 2009 Order was based. The respondent does not ask the court to impute an income higher than the 2009 level. Therefore, the order will stand unaltered in relation to the amount of maintenance Mr. MacDonald has to pay. He is to pay the full amount of the orthodontal bill ($3,650.00), and such payment is to be

made in thirty (30) days. Mr. MacDonald will no doubt find this difficult given the choices he has made, however, his course of conduct since December 2012 is unacceptable. He has assets and I find he has work skills that he can utilize if he chooses to do so. In addition, the full amount for the orthodontal bill is due within thirty (30) days.

[41] I find Mr. MacDonald has engaged in blame worthy conduct by failing to report on a yearly basis as required by the Order, and in relation to that failure I vary the existing order to require Mr. MacDonald to provide his income tax to Ms. Rudderham by the last day of June of the year 2014 together with all attachments and notices of assessment, failure to provide in this manner may result in a retroactive order that does not contemplate basic shelter costs.

[42] The evidence is clear on a balance of probabilities that:

(a) Mr. MacDonald has failed to demonstrate a change of circumstance such that he is relieved from paying the child support ordered in 2009;

(b) Michaela is a dependent child pursuing a reasonable course of study so that she will

become competitive in today's employment market;

(c) Mr. MacDonald is unemployed for no valid reason;

(d) His child support remains the same at the request of the respondent;

(e) He is responsible to pay the orthodontal account within thirty (30) days from the date of this decision;

(f) Any existing arrears remain unaltered.

ANCILLARY ISSUES:

[43] There was discussion in the application and at earlier pre trials in relation to forgiveness of arrears. I have not been requested to do so at hearing. I have no information as to the state of the arrears. However, if there are any arrears these amounts remain due and payable the maintenance enforcement personnel are to enforce those arrears as well. In relation to the orthodontal costs that total sum of $3,650.00 is due and payable within 30 days of this decision.

[44] If in the future Ms. Rudderham or Michaela MacDonald chose to file a Section 7 application to increase maintenance from Mr. MacDonald in addition to or substitution of the $205.00 he is supposed to pay for Michaela; this decision does not preclude a subsequent application.

[45] I was requested to adjourn this decision to the fall to see if Michaela does actually follow through with her course and to reconvene in the fall, in relation to his request, the court discussed whether or not this was tantamount to the applicants splitting the case. I concluded that an adjournment was not appropriate on these facts given that Ms. MacDonald struck me as a sincere, industrious young person is entitled to follow through with her plans, the costs of which I find are modest and reasonable.

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MacLellan, J.