

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Pierce v. MacIntyre, 2010 NSSC 84

**Date:** 20100323

**Docket:** 1217-000359

**Registry:** Port Hawkesbury

**Between:**

John Robert Pierce

Applicant

v.

Debbie Marie MacIntyre

Respondent

**Judge:**

The Honourable Justice Moira C. Legere Sers

**Heard:**

February 8, 2010, in Port Hawkesbury, Nova Scotia

**Counsel:**

John Robert Pierce, self represented

Debbie Marie MacIntyre, self represented

**By the Court:**

[1] Mr. Pierce made an application on February 16, 2009, seeking to have the oldest child removed from the child support order and to have custody changed to a joint custody arrangement for the youngest child.

[2] The respondent opposes this application and seeks a review of child support. Originally, she sought this review retroactive to January 1, 2006. She has agreed to fix December, 2009, as the date child support ceased for the oldest child as he is no longer in school. She seeks the full amount of child support for the remaining child in accordance with the guidelines. She seeks to have notice from the applicant when he is arriving and leaving the province for the purposes of effecting a transfer of their child from one home to the other.

[3] The parties were divorced by Divorce Judgment on May 20, 2005.

[4] At the time of the divorce, the applicant herein (respondent in the divorce proceedings) declared an income of \$67,200.00. His subsequently filed income tax returns show an actual income of \$71,129.44.

[5] The agreement /consent order recognizes the parties have joint custody of the children, with the mother having primary care and control. The parties agreed that if the two children were living in the care of the mother, she would be entitled to \$884.00 per month according to his disclosed income (not his actual income). Instead, they agreed that the father would pay \$422.00 per month, payable on the first day of each month, commencing December 1, 2004. At that time, the respondent was traveling to his place of employment out of Newfoundland to work of 28 days on and off 28 days.

[6] The father was required, on an annual basis, to pay one half the cost of the children's extra curricular activities, specifically, but not limited to, hockey and football expenses.

[7] The father was required to provide his completed income tax returns, together with his notices of assessment and re-assessment received on or before June 30<sup>th</sup> of each year.

[8] All payments were to be made through the Director of Maintenance Enforcement.

[9] The applicant was to have reasonable access at reasonable times every second month for a three to four week period. During this period of time, the mother was to have reasonable access to the children at reasonable times upon reasonable notice. The parties were to have liberal telephone access to the children.

[10] Circumstances have changed. The parties admit that the oldest child ought to be removed from the child support order effective December 31, 2009.

[11] A pre trial conference on December 8, 2009, resulted in a direction to provide medical plan coverage for the children. Paragraph three of the pre trial memorandum, dated December 8, 2009, states as follows:

“Mr. Pierce shall immediately provide to Ms. MacIntyre a copy of his medical card containing his group ID number and sufficient information regarding his employment medical plan to facilitate the children’s access to the plan benefits when they are living with Ms. MacIntyre.”

[12] The father admits that he has not provided the medical insurance card, other than for the purposes of this hearing, as directed by the Court. He admits he gave her a copy of the card in February, 2010, and not before. He advised that he believed the children were covered under the mother’s plan, thus he did not provide the details.

[13] He also acknowledges that he has not provided, on a regular basis, one half of the cost of extra curricular activities, including hockey and football expenses, despite being asked by the mother to contribute on a regular basis. He provided no reasonable justification to the Court.

[14] He acknowledges that Maintenance Enforcement has been required to obtain from him, by way of garnishee, his contribution towards the extracurricular activities.

[15] He also advises that he has not provided, until the court date, the proper documentation regarding his income tax returns since 2005.

[16] In addition, the mother has difficulty communicating with her children when they are in the care of their father.

[17] It is clear that Mr. Pierce does not have any intention to abide by the court order or provide information on a voluntary basis nor will he volunteer to pay any contribution towards extraordinary expenses in spite of having agreed to do so by way of court order.

[18] Neither has he adjusted the child support payable in accordance with his income.

[19] The father's tax summaries indicate he earned in 2005 - \$71,129.44; 2006 - \$72,804.27; 2007 - \$81,094.00; and 2008 - \$75,520.00. Prorating of his current pay stubs indicate that his 2009 income is \$75,240.36.

[20] Subsequent to the hearing, I directed the parties to file their T4's and other income slips. The father's income from MFR Rescue Ltd for 2009 was \$650.00 and from Atlantic Towing was \$75,991.45 for a total \$76,641.45.

[21] The mother's 2005 income was \$19,511.00; 2006 - \$24,804.00; 2007 - \$24,290.00; and 2008 - \$11,859.00, together with \$13,235.00 for her post bankruptcy income tax return for a total in 2008 of \$25,094.00.

[22] Her subsequently filed income slips total \$18,136.02. This includes \$8000.00 from Employment Insurance and the balance from the School Board.

[23] Her Notice of Assessment for 2009 shows total income of \$19,662.

[24] The mother currently provided an income statement from Employment Insurance indicating that she received no income from her employment for May and June and is currently in receipt of employment insurance. She believes she will earn \$23,000 in 2010.

[25] The mother has paid medical expenses in 2007 of **\$211.80** and on October 26, 2009, of **\$70.00** with no contribution from the father.

[26] The mother paid for her son Colby's attendance at the community college for the 2009 year a total of **\$1,7061.84** with no contribution from the father.

[27] When the mother contacted the father and asked for a contribution towards the community college, he refused to talk to her. She then called his mother and she refused to pass on the messages to her son. There is no realistic method to insure that he is going to volunteer to contribute to the college costs.

[28] Since he will not communicate, an agreement assuming he will is not realistic.

[29] She has provided evidence that in the 2009 year, she has contributed towards the purchase of clothing for the children, including school supplies, for a total of \$863.92.

[30] In addition, she had provided from September 20, 2007 - **\$450.00** for hockey; August 31, 2007 - **\$100.00** for football; November 6, 2008 - **\$475.00** for hockey; and August 24, 2009 - **\$28.24** for soccer, again with no voluntary contribution from the father.

[31] The mother indicates that the youngest child is currently with the applicant for two and a half to three weeks out of an eight week period. The respondent indicates that the child is there for three weeks and four days over a two month period.

[32] On the totality of the evidence, the mother's evidence tends to be more accurate. Other than for their differing opinions on the amount of time the children spend with the father there has been no dispute about the father's conduct.

[33] It appears that this joint custody situation reflects more the father's desire not to be tied financially to the mother by way of child support payments than it does address the best interest of the children since many of the costs are not covered or shared appropriately.

[34] As a result of the father's refusal to contribute towards the costs, including costs of community college, the mother has had to absorb those costs herself. One of the consequences of this is that she has not been able to re-enroll her youngest son in hockey for the current year.

[35] The mother is asking the Court to conclude that the father is not prepared to pay voluntarily. She is asking for contribution towards monthly costs reflecting the fact that for the majority of the time, the child is with her. In addition, she is responsible, regardless of where the child lives, for the bulk of the purchases, including school clothing, and is not able to obtain contribution from the father.

[36] She has also advised that the applicant told her in the past that he could not afford to keep paying for the medical insurance. She operated on the assumption that this statement was true and has been reluctant and has actually avoided obtaining dental services for the children.

[37] The father acknowledges that he did not, in fact, take the children off his medical plan. He also acknowledges that he did not provide her with the proper documentation to ensure that coverage for the children could be obtained through his employment medical plan.

[38] In short, unless there is a court order with enforcement remedies, the father is not likely to volunteer any increase in child support or provide court ordered financial information or contribute to any extraordinary expenses.

[39] The mother's function is as the primary parent responsible for the health and welfare of the children, for purchasing the clothing, for ensuring the dental supplies are properly covered.

[40] For the 2009 year, the mother spent \$865.92 equipping the child with clothing and school supplies for community college. That amount would normally be encompassed in the base amount and for that there is no recovery.

[41] From 2007 to 2009, the mother has incurred certain medical expenses for which she had not been compensated; October 26, 2009 - \$70.00 and November 6, 2007 - \$211.00 dentist bill. In any event, the arrears under the medical only amount to \$211.00 plus \$70.00.

[42] The receipts provided for community college total \$1,761.84. Hockey, football and soccer costs since 2007 amount to \$1,053.24.

[43] Adding together the community college, the medical and the hockey, the total equals **\$3,095.24**. For 2007, the applicant's portion would be 76 percent; 2008 - 75 percent, and 76 percent for 2009.

[44] I have calculated his portion of these 2007, 2008 and 2009 expenses based on 76 percent.

[45] Of the total amount of \$3,095.24, **the applicant shall pay 76 percent, equal to \$2,352.38, payable forthwith.**

[46] Maintenance Enforcement will have to be advised that of that \$3,095.24, I have included \$1,053.24 for the four receipts for hockey and football for which they may have already collected some arrears. However, they would have only collected based on 50 percent and not on the 76 percent I have determined appropriate as his share.

[47] The father has benefitted from the mother's consent to determine the end of the payment for one child as of December 2009. There was, therefore, no retro active valuation regarding the older child which would adjust the child support amount to account for his increase in salary and likely would have resulted in a larger lump sum payable by him.

[48] His current income from his T4 slips results in an annual income of \$76,641.75. If payable on the full amount, the child support relative to his salary for one child is \$660.00.

[49] There is no agreement on how much time the remaining dependant son spends with the father. The father indicates it is three weeks and four days, which would equate to 44 percent of the time and the mother indicates it is two to three weeks, which would account for 37 percent of the time.

[50] I am not restricted to an arbitrary application of the guidelines and am able to increase the amount payable although the child is with him for block periods of time when he returns to Nova Scotia.

[51] His history of non compliance, failure to voluntarily pay, failure to provide his income tax statements on a regular basis and failure to contribute without garnishee are indications of his lack of intent to abide by the spirit and intent of his

obligations to pay child support without having to access the Courts for enforcement.

[52] The current annual income going forward is \$76,641.75. Among other things I have considered the time the father spends with his son and the father's past conduct (failure to abide by the spirit and intent of the order).

[53] I order him to pay \$500.00 per month commencing January 1, 2009, that being the date of his application and reflecting his 2009 income; continuing on the first of each and every month until further order of the Court.

[54] The parties shall share extracurricular activities agreed upon in the Corollary Relief Judgement pro rata and medical expenses exceeding \$100.00 not covered by the applicant's medical plan in the same manner.

[55] The mother shall keep her receipts. In the event there is not agreement, she may apply to the Court for a variation.

[56] I note that the Maintenance Enforcement statement indicates that there are arrears of \$1,462.95, which will have to be recalculated based on the award herein and adjusted to reflect a set off in favor of the father for any monies paid towards hockey, football, and soccer in either September 2007; August 31, 2007; November 6, 2008; or August 24, 2009. This shall be re-adjusted accordingly to indicate the increase in his *pro rata* share and the retroactive adjustment in monthly support.

[57] The parties shall continue to exchange their income tax returns on an annual basis in accordance with the current order.

[58] I have directed each party to file immediately their 2009 income tax returns when completed in full.

[59] The father shall further continue to provide medical coverage for the child as long as he is employed and while the child remains a dependant child.

[60] The father shall give the mother 3 days notice in writing, by e-mail or phone message, of time of arrival and time of departure to ensure the mother is notified when her son is expected to be in the day to day care of his father.

[61] **Notice , courtesy and civility are the cornerstones to a well functioning joint custody arrangement.** Should the father fail to give this notice (he should keep his copy to verify he has done so), the mother may determine and advise the father in writing the date of transfer in accordance with her wishes to finish the school week in one place before transfer.

[62] Requiring written notice in advance with an alternate resolution process will give the father incentive to notify the mother of his anticipated date of arrival and departure and thus the date of transfer of their son to and from his care. The onus will be on the applicant to provide notice and should he fail to do so, the mother will have the right to make the decisions regarding the transfer time for the child.

Moira C. Legere Sers, J.