SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Hart v. Talbot, 2010 NSSC 311

Date: 20100729
Docket: SFSNMCA -062474
Registry: Sydney

Between:

Brenda Hart

Petitioner

v.

Darren Talbot

Respondent

DECISION

Judge: The Honourable Justice Kenneth C. Haley

Heard: May 19, 2010, in Sydney, Nova Scotia

Counsel: Ms. Brenda Hart, Self Represented
Ms. Darlene MacRury, for the Respondent

By the Court:

BACKGROUND

[1] This is the application of Brenda Hart who has filed a Variation Application with the Court pursuant to s. 37 of the *Maintenance & Custody Act*.

[2] The amount of $100.00 per month for child support established by way of an Interim Consent Order dated May 22nd , 1997 was increased by consent to $300.00 on February 1st , 2010. The Applicant requests this again be varied to $802.00 per month based upon the Guideline amount. The Applicant also claims section 7 expenses, namely gym membership of $40.00 per month and a cell telephone at $50.00 per month for their son Jordan David Hart, born February 5, 1995.

[3] The Respondent has opposed this Application and has filed an Undue Hardship Application with the Court submitting he has other child support obligations which impedes his ability to pay the table amount of child support based upon his annual income of $95,000.00 .

EVIDENCE AND POSITION OF PARTIES

[4] The Applicant was self represented and testified as follows:

1. That the Respondent is now working in Fort McMurray, Alberta and his income increased from $16,000.00 yearly to $95,000.00 yearly;

2. That the Respondent's material change in income occurred in January , 2009;

3. That the Applicant is currently employed on a full time basis as a community worker and is on leave from Cape Breton County Correctional Centre;

4. That the Applicant presently earns $40,000.00 per year, but had earned up to $60,000.00 when working two jobs;

5. That it was the Respondent's idea to get the cell telephone at a cost of $50.00 per month for their son;

6. That the Respondent agreed to pay the cell telephone account;

7. That it was the Respondent's idea that Jordan join the gym at a cost of $40.00 per month and that amount was initially paid by the Applicant;

8. That Jordan now plays football as opposed to going to the gym but the monthly payment remains at $40.00 per month;

9. That the Applicant seeks the table amount of $802.00 per month plus $90.00 per month for special expenses;

10. That the Respondent has four other children from other relationships that he also supports;

11. That she believes the Respondent's claimed expenses are inflated.

[5] The Applicant also called Alana King as a witness who testified as follows:

1. That the Respondent is the father of two of her children;

2. That she receives $276.00 monthly from the Respondent for the support of their children;

3. That the children received nothing from the Respondent by way of presents or gifts;

4. That the Respondent does not spend any money for entertainment on the two children;

5. That the children did not receive gifts at Easter, Christmas or grading;

6. That she presently has an application before another Court seeking an increase in child support to $1286.00 per month from the present amount of $276.00;

[6] The Respondent then testified as follows:

1. That he agreed that the child support should be increased from $100.00 per month to $300.00 per month;

2. That he purchased the cell telephone for Jordan at a cost of $200.00 but the Applicant was supposed to look after the monthly payment;

3. That he questioned the motive of the Applicant in making this application. He stated: “This is a hate thing going on”;

4. That he works three weeks on and three weeks off;

5. That during his off weeks he is required to leave the camp site in Fort McMurray, Alberta;

6. That it is more cost efficient for him to fly home during his off weeks than stay elsewhere in Fort McMurray, plus it allow him access time with his children;

7. That his mother has assisted with the cost of flying home and he now owes her $5,000.00;

8. That a flight home costs $1047.00;

9. That he pays support for his son Durelle in the amount $170.00 per month;

10. The he pays support to Alana King in the amount of $237.00 per month for two children;

11. That he currently pays the Applicant $300.00 per month;

12. That he pays support in the amount of $250.00 - $300.00 per month for another son named Kendall Delaney, age 16;

13. That there is another pending application for him to support another son, Nathaniel, age 7 in the amount of $200.00 per month;

14. That after he pays all his bills he is in a deficit situation by $595.28 per month and he is: "Robbing Peter to pay Paul";

15. That he cannot afford to pay any more than $300.00 per month to the Applicant in support of their child Jordan.

ISSUES;

[7] 1. Has the Applicant proven a material change in circumstance to warrant a variation of the current order?

[8] 2. (a) If, yes, has the Respondent proven his undue hardship application should proceed?

2. (b) What is the appropriate quantum of child maintenance?

2. (c) Is retroactive child support payable and if so, in what amount?

[9] 3. Are s.7 expenses payable? If so, in what amount?

LAW AND ANALYSIS:

[10] **Issue (1) - change in circumstances.**

Section 37 of the *Maintenance and Custody Act* requires a material change in circumstance to be established before the Court will vary an existing order.

Section 37 states:

> **Powers of Court**
>
> 37 (1) The Court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an

order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

(2) When making a variation order with respect to child maintenance, the Court shall apply Section 10. R.S., c. 160, s. 37; 1997 (2nd Sess.), c. 3, s. 11.

Circumstances for variation

14 For the purposes of Section 37 of the Act, any one of the following constitutes a change in circumstances that gives rise to the making of a variation order in respect of a child maintenance order:

(a) in the case where the amount of child maintenance includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child maintenance order or any provision thereof;

(b) in the case where the amount of child maintenance does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of a parent or of any child who is entitled to maintenance; and

(c) in the case of an order made before August 31, 1998, the coming into force Chapter 3 of the Acts of 1997, An Act to Amend Chapter 160 of the Revised Statues, 1989, the Family Maintenance Act and the coming into force of these Guidelines.

Section 14 amended: O.I.C. 200-554, N.S. Reg. 187/2000.

[11] A material change in circumstance has been defined as one where, had the facts existed at the time of the prior order, the judge would likely have crafted a different order. A material change in circumstance can include a situation where something unexpected happens which fundamentally alters the foundation upon which the current order is based. Alternatively, a material change in circumstance can include a situation where something that was expected to happen does not. Further a minor or temporary change in circumstance is insufficient to justify the court invoking its jurisdiction to vary. The alleged change in circumstance must be significant and long lasting.

[12] The burden of proof is upon the Applicant. It is proof on a balance of probabilities. The Court finds that based upon the acknowledged increase in the Respondent's salary from approximately $16,000.00 per annum to $95,000.00 per annum that there has been a change in circumstance as contemplated by section 37 of the *Maintenance and Custody Act* and the Court thus has jurisdiction to entertain this application.

Issue (2) (a) Undue Hardship:

[13] To the Respondent's credit he acknowledges and agrees that his current child support obligations should be increased, however, he submits that the payment of $802.00 per month as required by the Child Support Guideline, based upon his salary of $95,000.00 would be unduly harsh and he does not have the ability to make such a payment.

[14] The Respondent submits he is required to support his other children from other relationships, plus his travel costs and other monies that he spends on the children would make it impossible for him to pay more than $300.00 per month for the support of his son Jordan. Currently he pays $996.00 monthly for five children, inclusive of the $300.00 per month payable to Jordan. This total amount could be increased dependent upon the outcome of the application regarding a sixth child, Nathaniel and the variation application of Alana King.

[15] Section 10 of the *Federal Child Support Guidelines* states as follows:

> Undue hardship 10(1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request , or a

child in respect of whom the request is made, would otherwise suffer undue hardship.

Circumstances that may cause undue hardship (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(b) the spouse has unusually high expenses in relation to exercising access to a child;

(c) the spouse has a legal duty under a judgment , order or written separation agreement to support any person;

(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(I) under the age of majority, or

(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

(e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

Standards of living must be considered

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the Court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

Standards of living test

(4) In comparing standards of living for the purpose of subsection (3), the Court may use the comparison of household standards of living test set out in Schedule II.

Reasonable time

(5) Where the Court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

Reasons

(6) Where the Court makes a child support order in a different amount under this section, it must record its reasons for doing so.

[16] An analysis of undue hardship was done in **Gaetz v Gaetz,** 2001 NSCA 7 by Freeman J A where he stated at paragraph 15 as follows:

> "The Guidelines authorize the Court to depart from awarding child support as calculated in the tables only when the payor spouse or a child, on whose behalf request is made, would suffer **undue hardship**. This is determined by a two-step test. First, section 10(2)(a) to (e) of the Guidelines, lists circumstances which must be considered: there must be a determination that the spouse has an unusually high level of debts incurred in the family context, high access expenses, or several instances of legal duties of support to a child or other person other than a child of the marriage. Only when circumstances capable of creating **undue hardship** are found does the second step become relevant – the comparison of the standards of living or the households of the payor spouse and the custodial spouse."

[17] In **Wainman v Clairmont**, 2004 NSSC 39, at paragraph 25, Hall J. considered what is meant by the term "unusually high":

> " Whether access expenses are "unusually high", in my view, must be determined based on the relative financial means of the parent responsible for the access expenses. For an affluent person, a few hundred dollars a month for access would be a pittance, while for a person dependent on social assistance for his or her living expenses, it would be an impossibility."

[18] Justice Forgeron stated as follows in **Tutty v Tutty,** 239 NSR (2d) 112 NSCA at paragraph 23 as follows:

> 23 "The discretionary authority stated in section 10 of the Guidelines is not unfettered. Courts must be cautious in granting undue hardship applications. Cogent and specific evidence must be advanced if the table amount of child support is to be displaced. In Child Support Guidelines in Canada 2004, Julien and Marilyn Payne state at pp. 281 to 282 the undue hardship provisions of section 10 of the *Federal Child Support Guidelines* create a fairly narrow judicial discretion to deviate from the Guidelines."

> "Undue hardship is a tough threshold to meet. Furthermore, the use of the word "may" in section 10 (1) of the Guidelines clearly demonstrates that any deviation from the Guidelines amount is discretionary, even if the Court finds undue hardship and a lower standard of living in the obligor's household. Although there is little judicial guidance on when this residual discretion will be exercised, it is inappropriate to exercise it where the parent alleging undue hardship has wilfully refused to pay child support. The Court should not readily deviate from the presumptive rules set out in section 3 of the Guidelines in the absence of compelling reasons for doing so. The presumptive rule under section 3 of the Federal Child Guidelines should not be displaced in the absence of specific and cogent evidence why the applicable table amount would cause an "undue hardship". Section 10 of the Guidelines is only available where excessively hard living conditions or severe financial consequences would result from the payment of the Guidelines amount. A Court should refuse to find undue hardship where a parent can reasonably reduce his or her expenses and thereby alleviate hardship. In the absence of the circumstances that constitute "undue hardship under section 10 of the *Federal Child Support Guidelines* ", a Court has no residual discretion to lower the applicable table amount of child support under the Guidelines. If a parent has difficulty paying the table amount of child support because of other financial commitments that fall short of constituting "undue hardship" within the meaning of section 10 of the Guidelines, that parent must rearrange his or her financial commitments; the child support obligation takes priority. In most cases wherein the undue hardship provisions of the Guidelines are met by the obligor, there is only a reduction in the amount of support; the child support obligation is rarely extinguished, although circumstances may arise where this is the appropriate disposition. Where the obligor has a low income, a Court may order a modest amount of child support as a "symbolic" gesture to reinforce the parental role, but such an order may be deemed unnecessary in light of the attendant circumstances of the particular cases."

[19] In **Poirier v Poirier**, (2004), 220 N.S.R. (2d) 388 (S.C.) Hood J. refused the father's application for **undue hardship** based upon the costs of access and the fact that he had another child to support. In so doing, Hood J. discussed the meaning of **undue hardship** and the difficult test which must be met in order to succeed with such a claim at para. 21:

> 21 Mr. Poirier must satisfy the Court not only that there would be a hardship but that the hardship is undue. In Mayo v O'Connell, Justice Cook said at para. 17:
>
> "**Undue hardship** is a tough threshold to meet. Synonyms for undue include: excessive, extreme, improper, unreasonable, unjustified. It is more than awkward or inconvenient...In other words, the fact that any of the provisions of s. 10(2) of the Guidelines may apply to the Applicant is not, of itself, determinative of the **undue hardship** issue. The hardship must be undue to satisfy the requirements of the s. 10(1)."

[20] The Applicant submits that the Respondent's application for undue hardship must fail because his expenses are excessive and that he has not provided the Court receipts for his claimed rental expense of $400.00 per month payable to his mother; his claimed $1000.00 per month for Christmas, birthdays, events and gifts and his claimed $300.00 per month for entertainment. As stated by Ms. Hart:

> "If Mr. Talbot did give all the expenses he is claiming we wouldn't be here, we would be quite pleased."

[21] I have considered all of the evidence, inclusive of the financial information provided and have carefully listened to the submissions of the parties. The Respondent must establish his claim on a balance of probabilities.

[22] The Respondent now earns $95,000.00 per annum and is currently paying $300.00 per month to the Applicant for the support of his son, Jordan.

[23] The Respondent currently pays a total of $996.00 per month for all his children calculated as follows:

Jordan David Hart	$300.00
Tanisha King Teannah King	$276.00
Kendall Delaney	$250.00
Durelle MacLeod	$170.00
Total:	$996.00

Note: The above amount of $996.00 maybe subject to change by virtue of pending applications before other courts.

[24] The Child Support Guidelines indicate the Respondent would have to pay $2255.00 per month if all of his six children were in the same family unit. This suggests to the Court that the Respondent is benefiting from the current child support order and/or agreement regime.

[25] The Court also questions the reliability of the expenses claimed by the Respondent and absent documented evidence in support the Court finds his evidence, in this regard, is not sufficiently clear, convincing and cogent to satisfy the balance of probabilities test as defined by the Supreme Court of Canada in **C.(R.) V Mc Dougall**, 2008 SCC 53 at paragraph 46.

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious **cases**, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[26] And as stated by Justice Forgeron in **Tutty v Tutty**, supra at paragraph 23:

> "Cogent and specific evidence must be advanced if the table amount of child support is to be displaced."

As referenced earlier in this decision the specific comments of Julien and Marilyn Payne, supra are relevant:

> A Court should refuse to find undue hardship where a parent can reasonably reduce his or her expenses and thereby alleviate hardship. In the absence of the circumstances that constitute "undue hardship under section 10 of the *Federal Child Support Guidelines* ", a Court has no residual discretion to lower the applicable table amount of child support under the Guideline. If a parent has difficulty paying the table amount of child support

> because of other financial commitments that fall short of constituting "undue hardship" within the meaning of section 10 of the Guidelines, that parent must rearrange his or her financial commitments; **the child support obligation takes priority**. (emphasis added)

[27] I accept that the cost of access and related travel is substantial, but I am not satisfied, on a balance of probabilities, that these costs could not be re-arranged or reduced to enable the Respondent to better meet his child support obligation.

[28] Also, I am not satisfied that the Respondent's additional child support obligations in their present form amount to an undue hardship as contemplated by the section 10(2) (d). In this regard, the Court is not able to speculate as to what impact, if any, other court proceedings may have on the Respondent's overall ability to pay child support for Jordan.

[29] Having followed the two step test at outlined by Freeman J in **Gaetz v Gaetz**, supra, and having found there is no undue hardship an analysis of respective household standards of living pursuant to section 10 (3) of the Guidelines is not necessitated.

Issue 2(b) - Quantum of Child Support

[30] Having dismissed the Respondent's undue hardship application I thus set his child support pursuant to the Guidelines at $802.00 per month.

Retroactive Child Support

[31] 37 The Leading case on **retroactive child support** is **D.B.Section v SectionR.G.**, [2006] 2 SectionC.R. 231 (SectionC.C.). Bastarache J., writing for himself, McLachlin C.J. LeBel and Deschamps J.J. summarized his thought at paragraphs 131-135 as follows:

> 131 Child support has long been recognised as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.
>
> 132 In the contest of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.

> 133 In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.
>
> 134 Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.
>
> 135 The question of **retroactive child support** awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while **retroactive child support** awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[32] The Applicant filed her application to vary on January 20, 2009 in a timely manner. The Applicant requests a retroactive adjustment to child support effective January 1, 2009.

[33] The Court is mindful that the result of this decision will increase the Respondent's overall child support obligations by $502.00 per month.

[34] The Court is also mindful that the Respondent either is or may have to deal with other unrelated child support applications which is more relevant to the issue of assessing retroactive maintenance than the primary issue of quantum of child support in terms of hardship to the Respondent .

[35] The Respondent has not been an unwilling or blameworthy payor, but he has been , in the Court's view, an under paying payor primarily based upon his own personal assessment of his ability to pay support.

[36] Generally, the potential award can be made retroactive to the date when the recipient parent gave the payor effective notice of her intention to seek an increase in support payments, however a retroactive support order should seek to strike a balance between fairness to the children who are entitled to support and fairness to the payor parent.

[37] Although the Court has denied the Respondent's "undue hardship" application it is apparent to the Court that the Respondent will be required to make some adjustments to his current claimed expenditures in order to make his new child support obligations a priority.

[38] The Respondent is faced with the potential of further child support adjustments and as a result this Court does not consider a retroactive award effective the date of the application as striking the balance of fairness, it seeks to impose .

[39] In the recent Nova Scotia Court of Appeal case **Staples v Callender**, 2010 NSCA 49 Justice Bateman commented upon the awarding of retroactive child support. At paragraph 34 and 35 Justice Bateman stated:

> 34 In D.B.S., supra, the Supreme Court of Canada addressed the law applicable to a grant of retroactive child support. Jollimore, J. referred to that decision in her reasons for judgment. In D.B.Section the Court considered three circumstances in which a request for retroactive support can arise -- where there is an existing child support order; where there is a previous agreement between the parties; and, as is the case here, where there has never been an order for child support.
>
> 35 There is no restriction in the Maintenance and Custody Act on the date from which a court may order support. It was open to the judge here to make a retroactive award (see D.B.S. at parasection 80 to 84) which the judge recognized.

[40] And further at paragraph 36 Justice Bateman stated:

> 36 In **D.B.S**. the Court opined that, while retroactive orders are not "exceptional", circumstances may be such that a retroactive order not be made:
>
> > 95 It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be

> appropriate for a court to enforce this obligation once the relevant time period has passed.

[41] In assessing the propriety of a retroactive order a judge's discretion is guided by the following factors (D.B.S. paras 94 - 116):

1. The reasons for the custodial parent's delay in seeking child support;
2. Blameworthy conduct by the payor parent;
3. The child's circumstances;
4. Hardship caused to the payor parent by a retroactive award.

[42] This Court has considered same in reaching its decision. Justice Bateman comments at paragraph 41 are relevant to deciding this issue:

> 41 In L.S. v E.P., cited in D.B.S., above, Rowles J.A. writing for the Court, undertakes an insightful and thorough discussion of the analysis relevant to a retroactive award of child support. On the question of hardship, she observes that a Court is less likely to award retroactive maintenance where it believes that such an award would prejudice the non-custodial parent's ability to make ongoing support payments as they become due (at para. 76). Rowles, J.A. quoted with approval the reasons of Esson, J.A. in E.T. v K.H.T., [1996] B.C.J. No. 2208 (Q.L.) (C.A., the full court concurring on this issue, where she said:
>
> > 22 In deciding whether to exercise the discretion to order payment of maintenance for a period prior to the hearing, a judge should consider whether such an order will have an impact on the defendant which will make it less likely that the order for future payments can or will be complied with. Where the defendant's means are limited, it will often be right to not create "instant arrears". Other considerations no doubt could justify the refusal to make a retroactive order.

[43] Therefore upon consideration and review of all the circumstances herein I am satisfied this is not an appropriate case to award retroactive support. In my view a Retroactive Order would prejudice the Respondent's ability to make on-going support payments as they become due. Thus the Application for Retroactive Support is dismissed.

SECTION 7 EXPENSES

[44] The Applicant claims $50.00 per month for cell telephone payment and $40.00 per month for gym and football membership.

[45] Section 7 of the *Child Support Guidelines* reads as follows:

> Special or extraordinary expenses
>
> 7 (1) In a child maintenance order the court may, on a parent'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 parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending 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 counseling 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.
>
> (1A) For the purposes of clauses (1)(d) and (f), “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, if the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
>
> (b) if clause (a) is not applicable, expenses that the court considers are extraordinary, taking into account all of the following:
>
> (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, if 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,
>
> (v) any other similar factor that the court considers relevant.

[46] The parties disagree about who agreed to undertake to pay the cell telephone bill, but the Court nonetheless finds such an expense is not a necessary expense in

relation to the child, Jordan's, best interest. Further it is not a reasonable expense in relation to the means of the parties.

[47] As a result I will dismiss the claim of the cell telephone as a special or extraordinary expense.

[48] In relation to a child's fitness the Court views the gym and football expense differently and finds such an expense is necessary in the best interests of the child and reasonable in the circumstances.

[49] Section 7 (2) of the *Child Support Guidelines* states:

> Sharing of expense
>
> > (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[50] The Applicant earns $40,000. per year. The Respondent earns $95,000. per year, thus there shall be a 60/40 split in the sharing of this expense.

[51] The Respondent will therefore pay an additional sum of $24.00 per month toward the gym and football membership.

CONCLUSION

[52] The Applicant has discharged her burden of proof in establishing that there has been a change in circumstances to warrant a variation of the current court order.

[53] The Respondent has failed to discharge his burden of proof in relation to the undue hardship application and the application is hereby dismissed.

[54] The Respondent will pay $802.00 for the for the support of his son Jordan with payment commencing on August 1st, 2010 and payable each and every month thereafter until otherwise ordered by a Court of competent jurisdiction.

[55] The claim for retroactive support is dismissed.

[56] The Respondent will pay the sum of $24.00 per month or $288.00 per year towards the section 7 expenses of the gym and football membership, such payment to be made upon production of a receipt by the Applicant to the Respondent.

[57] It is ordered that all maintenance payments shall be made payable to the Applicant, Brenda Hart. Payments shall be forwarded to the Director of Maintenance Enforcement, P. O. Box 803, Halifax, Nova Scotia, B3J 2V2.

[58] It is further ordered that the Respondent, Darren Talbot, shall keep the Applicant, Brenda Hart and the Director of Maintenance Enforcement advised on a timely basis as to any change in his address, his employment or income status and shall supply the Applicant with a copy of his income tax return, completed and with all attachments, even if the return is not filed, along with all notices of assessment received from Canada Revenue Agency, on an annual basis, on or before June 30, in every year, commencing June 30, 2011 and continuing thereafter until otherwise ordered by a court of competent jurisdiction.

[59] I would request that counsel for the Respondent draft the order for the Court’s approval and issuance.

_____

J.