

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Simms - Rideout v. Rideout, 2010 NSSC 276

**Date:** 20100709

**Docket:** 1201-64410, SFHD-069237

**Registry:** Halifax

**Between:**

Patti Simms - Rideout

Plaintiff

v.

Jeffrey Ford Rideout

Defendant

**Judge:**

The Honourable Justice Beryl MacDonald

**Heard:**

July 5, 2010, in Halifax, Nova Scotia

**Written Decision:**

July 9, 2010

**Counsel:**

William Leahey, counsel for Patti Simms - Rideout  
Vanessa Tynes, counsel for Jeffrey Rideout

**By the Court:**

[1] On May 21, 2010 the Mother commenced an interim application pursuant to the *Divorce Act*, R.S. 1985, c.3 in which she is seeking interim custody, interim child support and interim spousal support including a lump sum payment to assist her in moving from the matrimonial home. The Father is requesting a shared custodial arrangement and while he recognizes the wife has an entitlement to spousal support he objects to her request for a lump sum award. The Father is also seeking exclusive possession of the matrimonial home.

**Parenting Plan**

[2] The wife does not resist the Father's request for exclusive possession of the matrimonial home. She and my husband are both presently living in the matrimonial home because she has no means by which to remove herself and the children from the home. She has no income. The children are 17 and 13 years of age and she expects they both will live with her the majority of the time. She has no objection to the children living with their Father for whatever periods of time they should wish. Given their ages she considers it inappropriate to attempt to design a shared parenting schedule to which she and the children will be obliged. In addition the Father, at least for the upcoming year, will be away at sea for the month of August, for a month some time in the fall before Christmas and for a month and a half to two months in the spring.

[3] I will not impose any shared parenting arrangement on these parties. They will have joint custody of their children. It is expected they will be primarily parented by the Mother but they are free to place themselves in the care of their Father for such periods of time as either or both request. Because the Father has not previously been involved in the direct purchase of the children's clothing, toiletries, extracurricular activities, and many other of the expenditures that need to be made on their behalf, these will still be paid by the Mother. Irrespective of the parenting plan preferred by the Father he did not suggest he should pay an amount for child support other than what is required by the table of the Federal Child Support Guidelines. Perhaps he did so in recognition of the wife's direct involvement in paying for the financial needs of these children.

**Child Support**

[4] In order to determine the appropriate table amount to be paid pursuant to the Federal Child Support Guidelines, the Father's total annual income must be calculated.

[5] Section 16 of the Federal Child Support Guidelines states that income is to be determined "using the sources of income set out under the heading Total Income in the T1 General form issued by Revenue Canada". This section requires the determination of income to be made by reference to the "sources of income" set out in the Income Tax Return. The basic responsibility of the court is to determine the appropriate figure to use for current income after conducting an analysis of the income information provided. Section 16 does not direct the court to determine income on the basis of the amount set out in the preceding year's Income Tax Return, although, when no better information is available to the court, the previous year's income may be used to set the current child support obligation.

[6] The Father's 2009 Income Tax Return reports \$103,258.60 as total income on line 150. Unfortunately his T4 was not attached so an appropriate breakdown of the sources of this income could not be analyzed. The Father's pay stub information indicates that his base pay per month, including taxable allowances, is \$8,014.00. Over a 12 month period this will provide him with a total income of \$96,168.00. It is known he will be paid for sea duty over the next 12 month period and this will provide him with an additional annual income of \$8,400.00. Adding these two income sources together will provide a total annual income of \$104,568. The Father will begin to receive income for his sea duty on or about August 1, 2010. In this interim proceeding I will not be dealing with any calculation for support owing prior to August 1, 2010. Calculations for the period from January 1, 2010 to July 31, 2010 would be based upon his regular force pay, his taxable allowances for submarine specialty and post living differential and may also include those items shown on his pay statement as "non-taxable fringe benefits". I have not included these in my calculation of income beginning as at August 1, 2010 because more information is needed about these benefits and whether they should properly be included as "income" for the purposes of the Federal Child Support Guidelines. Clearly the guidelines do require the inclusion of "taxable benefits", for example, the taxable benefit resulting when a company makes a car available for an employee's use is included as part of that employee's annual income for child support purposes. However these benefits appear under a category called "taxable benefits". The Father's additional benefits are described as

“nontaxable fringe benefits” and may be the amount of money paid by the employer into various insurance or medical benefit plans. While I don’t have the case citations I do believe there are decisions that have eliminated these payments from any calculation of an employee’s income for guideline purposes.

[7] The child support to be paid by the Father to the Mother for their two children pursuant to the Federal Child Support Guidelines table on an income of \$104,568 is \$1,400.00 per month and this amount shall be paid beginning August 1, 2010 and shall continue on the first day of each month thereafter.

[8] The Mother has also requested that the Father pay for orthodontic treatment required by their daughter. He does have access to a dental plan through his employment although it is unclear whether this treatment will be covered. The Father considers the treatment to be unnecessary although the dentist involved has stated in a letter entered as Exhibit 2 “ It is advised that the above mentioned patient commence Orthodontic Treatment as soon as possible to avoid any complications later on in life”. This child is 13 and the Mother testified she has been trying to convince the Father to pay for this treatment for at least 3 years. Unfortunately the letter from the dentist is not specific. I do not know what the “complications later in life” may be. The Mother testified her daughter has an overbite and her slight lisp may be caused by this. I am not prepared at this time to order the Father to pay for this expense but I urge him to meet with the dentist who is recommending this treatment to understand why this treatment may be of benefit to his daughter. Whether this treatment is “necessary” as required by the provisions of the Federal Child Support Guidelines will be a subject for the final hearing if the parties have not resolved this issue by that time.

### **Spousal Support**

[9] The Mother’ entitlement to spousal support is recognized by the Father although there has been no complete analysis of the compensatory claim to which she may be entitled. It is clear the wife does have a considerable non-compensatory claim.

[10] She has no income. She has a grade 11 education and was a stay at home parent until approximately seven years ago when she began working part time as a retail clerk. In 2007 her total income was \$4,187.00; in 2008 \$1,515.00 and in 2009 \$527.00. Her testimony is that she was required to leave this employment

because of a herniated disc. The Father disagrees but in any event the wife has no present income nor any prospect of immediate employment that would alleviate her need for spousal support. Because she was concerned about her future self sufficiency the Mother, in March, 2010, cashed out an RRSP and used the funds to enroll in a private career college to be trained as a veterinarian's assistant. This is a one year program and requires her attendance five half days per week. The Father suggests the Mother has time available to her to obtain employment. Even with spousal support the Mother may be required to obtain some type of part time employment but I am not imputing any income to her at this time.

[11] The most contentious issue is whether the Mother should receive a lump sum spousal support award. Section 15.2 (2) of the *Divorce Act*, R.S. 1985, c.3 does provide a court with jurisdiction to "... make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, **or such lump sum and periodic sums**, as the court thinks reasonable for the support of the other spouse.....". (my emphasis) The factors to consider are the same as those to be considered upon making a final award. (*Moge v. Moge* [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow* [1999] 1 S.C.R. 420 )

[12] In *Vermeulen v Vermeulen* [1999] N.S.J. No. 193, Chief Justice Glube reviewed cases in which lump sum awards were ordered and said:

- 13 A lump sum award may not be used to redistribute assets (see: *Johnson v. Johnson* (1994), 10 N.S.R. (2d) 624 (N.S.S.C.A.D.)). Among the situations where a lump sum award will be upheld, is where there is an immediate need and an ability to pay (see: *Hemming v. Hemming* (1983), 58 N.S.R. (2d) 65 (N.S.S.C.T.D.)). Lump sum awards are appropriate to provide funds towards the purchase of a house in certain circumstances (*Johnson, supra* ) and in some cases for retraining (see: *McGuigan v. McGuigan* (1991), 105 N.S.R. (2d) 170 (N.S.S.C.T.D.) and *MacIsaac v. MacIsaac* (1996), 150 N.S.R. (2d) 321 (C.A.)).

[13] The Court of Appeal in *Gray v. Lace* 2009 NSCA 26 (N.S.C.A.) refused to overturn an award of both a lump sum and periodic spousal award granted pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. The lump sum was required by the applicant to pay considerable debt she had accumulated during the relationship. The principles applied to lump sum and periodic awards for spousal support pursuant to the *Maintenance and Custody Act* R.S.N.S. 1989, c. 160 are similar to those applied pursuant to the *Divorce Act* , R.S. , 1985, c.3.

[14] A review of the case law suggests a lump sum award is granted to compensate a specific or immediate need when it is clear the other party has the ability to pay the award. The Mother has a specific and immediate need. She needs to find an apartment and move from the matrimonial home. She has requested a \$5,000.00 lump sum award to make this move affordable. Periodic support will not be sufficient to pay the immediate expenses required by the move. She already has depleted a capital asset to fund her re-education and she has no further personal assets that can pay for the move. The Father suggests, if a lump sum amount is awarded, it should be categorized as a payment against her interest in the matrimonial home. If the Mother did not have a compensatory as well as non-compensatory entitlement to spousal support, this might be an appropriate mechanism to provide her with money to meet an immediate need. Although a lump sum award is not confined to compensatory entitlement situations it most often is awarded when the spouse primarily has a non-compensatory claim and is asset poor. ( *see: Gray v. Lace* 2009 NSCA 26 (N.S.C.A.)) In this case the Father does intend to buy out the Mother's interest in the matrimonial home. That home is mortgage free and has significant value. However, I do not consider it appropriate to force the Mother to deplete the value of this asset in order to provide what may be a temporary home for her and the children. Her long term plan is to purchase a modest home if she is able. The parties relationship lasted almost 13 years. The Mother was in no position during those years to accumulate assets. Everything owned by this couple resulted from the income provided by the Father. The Mother was completely dependent upon him and she still is. I am satisfied the husband has sufficient income upon which, if necessary, to borrow a sufficient amount to pay a lump sum award. The lump sum award may become a factor in assessing the quantum and duration of spousal support at the final hearing. The husband is to pay the wife, as a lump sum spousal award, the sum of \$5000.00 not later than 30 days from the date of this decision, unless the Mother consents to a later payment date in writing.

[15] I have reviewed the Statement of Expenses filed by the parties in this proceeding. I have reviewed the wife's estimates of her expenses to rent and live in an apartment with her two children. These documents are often wish lists and there are always items that can be reduced or eliminated. The expenses estimated by the Mother in Exhibit 1 filed in this proceeding are modest. Her food cost may decline depending upon how frequently the children are in the care of their Father. Perhaps she personally will have to do without any holiday or entertainment that would

result in the \$100 a month item she has shown on her budget. However, removing this item and reducing the food cost to \$600 a month, for instance, would only reduce her budget by \$300 leaving a total of \$3,222 per month still required to set up and maintain her household. The Father complains about the Mother's expenditures while they lived together but he admittedly does not do the shopping and therefore has little idea about the cost of food, clothing and footwear, toiletries, cleaning supplies, pet food and so on. I do not find the sum of \$200.00 per month for these items for three people to be extravagant. However, even though the Mother's budget is modest, the Father may not have the ability to pay spousal support in the amount required.

[16] The Father may have reduced expenses because he is going to be away for approximately 4 months in the next year. This may result in a reduction in the cost of electricity, food and gas for his motor vehicle. Because the Mother has the car payment for her vehicle in her budget it should be removed from his expenses. The budget item for repairs to the matrimonial home and its contents may need to be reduced. Perhaps the Father should re-examine the \$150.00 amount he budgeted for his clothing in light of his complaint about the Mother's \$200.00 per month expenditure for three persons for clothing and toiletries combined. Since it is the Mother who will pay for the children's extracurricular activities this item can be removed from the Father's budget as can school supplies and children's allowances. He also may need to reduce or eliminate expenditures for magazines, charitable donations, holidays, and entertainment. In short the Father will also need to make adjustments. I have attempted to do so on a reasonable basis and have determined the Father requires approximately \$2,500.00 to support a modest lifestyle. This eventually will be increased by any loan or mortgage payments he will incur to pay a lump sum award to the wife and eventually to purchase her interest in the matrimonial home. If he amortizes these debts over a sufficiently long-term he may keep this budget item to \$500.00 or \$600.00 per month which would increase his budgetary need to a potential maximum of \$3100.00 per month.

[17] The Mother will receive \$1,400.00 per month as child-support. Accepting her expenditures for three people at \$3,522.00 per month will leave her with a shortfall of \$2,122.00 per month. Based upon the circumstances of these parties the spousal support guidelines suggest a range of spousal support from a low of \$1,721.00 per month to a high of \$2,267.00 per month. The choice within the range

may affect the overall duration of the spousal support award but that is an issue for the final hearing.

[18] The computer calculations used to generate the spousal support ranges also provide the net disposable income remaining to each party. These calculations are useful but are guides only. They are not often exact but they do provide a general picture of the money likely to be available to either party. The low end of the range will provide the Father with a net disposable income of \$3,106.00 and the Mother with a net disposable income of \$3,772.00. The Father's net income does not give him much flexibility and may hinder his ability to access funds to pay the lump sum spousal award and purchase the Mother's interest in the matrimonial home which may provide him with less expensive housing than a lease.

[19] A periodic spousal support payment of \$1,500.00 per month will provide the Father with a net disposable income of \$3,241.00 and provide the Mother \$3,600.00 per month. I have determined this is the appropriate amount of spousal support to be paid on a periodic basis. It shall begin to be paid August 1, 2010 and shall continue on the 1<sup>st</sup> day of each month thereafter.

[20] The costs, if any, to be awarded as a result of this application shall be considered as part of the final hearing. The lawyer for the Mother is requested to prepare this order required as a result of this decision.

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Beryl MacDonald, J.S.C.