SUPREME COURT OF NOVA SCOTIA
Citation: S.S. v. S.O., 2010 NSSC 269

Date: 20100705
Docket: 1204-002832
Registry: Kentville

Between: S. S.

Applicant

v.

S. O.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	May 18, June 16 and June 22, 2010 in Kentville, Nova Scotia
Final Written Submissions:	June 25, 2010
Decision:	July 5, 2010
Counsel:	Lynn M. Connors, for the applicant, S. S. Donald A. Urquhart, for the respondent, S. O.

By the Court:

Introduction

[1] The applicant, S. S., seeks an order varying the primary care, and the child support provisions in existing Corollary Relief Judgments.

Background

[2] S. S. and S. O. were married in December of 1987. They have two children being:

W. M. S. born * July 1990; and

C. A. S. born * November 1992.

[3] The parties separated on August 22, 2000. They entered into a "Comprehensive Separation Agreement" on June 8, 2001 which was followed by a Divorce Judgment and Corollary Relief Judgment that were pronounced on January 4, 2002. The custody and access terms of the Separation Agreement were

incorporated by reference into the Corollary Relief Judgment, to the extent that the jurisdiction of the court allows.

[4] The material provisions of the 2002 Corollary Relief Judgment are:

> 1. S. S. and S. S. shall share joint legal custody of the following children of the marriage as set out in the parenting plan attached as Schedule "B" to the Separation Agreement dated as of June 8, 2001, the terms of which are hereby incorporated into this judgment:
>
> (a) W. M. S. July *, 1990; and
>
> (b) C. A. S. born November *,1992.
>
> 2. The children's primary residence shall be with S. S. and she will have primary day to day responsibility for the guidance and upbringing of the children while they are in her care. S. S. will have primary day-to-day responsibility for the guidance and upbringing of the children while they are in his care.

[5] Material provisions of Schedule "B" to the Separation Agreement are:

> ...
>
> 2. The parties mutually acknowledge and agree that the primary residence of the children shall be with the Wife. She shall have primary day-to-day responsibility for the guidance and upbringing of the children while they are in her care. Likewise the Husband shall have primary day-to-day responsibility for the guidance and upbringing of their children while they are in his care.

3. The parties further acknowledge and agree that the residential care of the children shall change in favor of the Husband, not limited to but including:

(a) Weekday Parenting times pursuant to the following two week schedule:

Week 1 Tuesday from 5 pm until 8 pm

Wednesday from 5 pm until 8 pm

Friday from 5 pm until Monday morning at 8:30 am, with the Wife having reasonable parenting period with the children on Sunday for approximately 2 to 3 hours, subject to the Wife's, the Husband's and the children's schedules.

Week 2 Wednesday from 5 pm until 8 pm

Thursday from 5 pm until 8 pm

Sunday for approximately 2 to 3 hours to be agreed upon between the Husband the Wife and subject to the wife's, the husband's and the children's schedules.

The parties mutually acknowledge and agree that the schedule can be changed with the consent of both parties as circumstances arise to accommodate the schedules of the parties and the needs of the children. Alterations to the above schedule, which may be necessary for the well-being of the parties children, shall be discussed and mutually agreed upon by the parents.

> (b) Alternating March Breaks, if the parties agree that they shall not take the children for the whole of the March break, then they shall divide March Break equally between the parties, subject to the respective work schedules and the children's schedules.
>
> (c) The additional day of a statutory long weekend shall be divided equally between the parties.
>
> (d) That in relation to the Christmas school holiday period the parties agree that they shall equally alternate on an annual basis Christmas Eve, Christmas Eve overnight, Christmas Day, New Year's Eve, New Year's Eve overnight and New Year's Day. The rest of the Christmas holiday period shall be divided equally between the parties.
>
> (e) In relation to the children's school summer holiday schedule, the parties shall have an opportunity to have equal block vacation time with the children. The rest of the school summer holiday period shall be governed by paragraph 3 (a) of Schedule "B" of this agreement.

[6] Child support provisions in the Corollary Relief Judgment and the Separation Agreement required that Mr. S. pay the amount required under the **Federal Child Support Guidelines,** together with a proportional share of section 7 (Special or Extraordinary) expenses.

[7] The evidence suggests that over the years the parties were very successful in building flexibility into the parenting schedule to allow for times when either of the parents could not be present during their regular parenting time or, alternatively,

when the children had commitments that were inconsistent with the parenting schedule.

[8] Notwithstanding these *ad hoc* arrangements, the basic schedule set out in the Agreement was maintained for a number of years. This ensured that the children had predictability in their lives. It was understood by parents and children alike that the primary residence was at their mother's house and that, but for informal variations, time would be spent with their father on the schedule.

[9] In approximately 2006, W. obtained her driver's license and, once permitted to do so, was allowed to transport herself and her sister back and forth between the homes of the parents. It was agreed that one of the two weekday nights would be extended to an overnight visit, and the length of the other weekday visit was extended so that it began after school and ended at 9:00 p.m.

[10] As W. was finishing her high school education the parties, with some foresight, engaged legal counsel to assist them in revising the child support arrangements to reflect changing circumstances. The result was a detailed Consent Variation of the Corollary Relief Judgement, which was issued on March 9, 2009.

It sought to provide a child support plan for both girls after they left for university studies.

[11] For the immediate term, the order provided that Mr. S. would pay the amount of $1,000 per month to Mrs. O. for C.'s support, on the basis of his income in the amount of $120,000 per annum. I note that the actual Guideline amount payable for this income level is $989. Paragraphs of the earlier Corollary Relief Judgment and of Schedule "B" to the Separation Agreement, and which determined C.'s primary residence and Mr. S.'s parenting times were unchanged. As such the 2002 schedule was not amended to reflect the actual time being spent with Mr. S..

Issue 1: ***Has there been a change in the condition, means, needs or other circumstances of the children of the marriage since the issuance of the 2009 Corollary Relief Judgment*** **?**

[12] Section 17 of the **Divorce Act** sets out the jurisdiction of the court to consider this application, and the principles that the court must consider in

determining whether to grant a variation order. The relevant provisions to this application are:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> > (a) a support order or any provision thereof on application by either or both former spouses; or
> >
> > (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
> >
> > ...
>
> Terms and conditions
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
>
> ...
>
> Factors for custody order
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> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take

> into consideration only the best interests of the child as determined by reference to that change.
>
> Maximum contact
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> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

W.

[13] On the first day of the hearing the parties consented to a variation of the existing provisions of the Corollary Relief Judgments as they related to W.. She is about to turn 20 years of age. After completing her first year of university in April 2010, she moved to * where she is employed.

[14] Her parents accept that she is no longer a child of the marriage within the meaning of the **Divorce Act** and so I granted an order declaring that to be the case and terminating the child support obligations of the parents effective as of May, 2010. It was suggested that I "suspend" operation of the provisions for support of W. in anticipation of her ultimate return to university. In my view that option is

not available. If she reestablishes her status as a "child of the marriage" then the parties can address the appropriate support regime at that time, and having regard to the circumstances then in existence.

C.

[15] In the latter part of 2009, C. expressed a desire to move her principal residence to her father's house. She and her mother were not getting along well. Mr. S. took the position that while he would love to have his daughter with him more, he did not want it to be as a result of disputes between mother and daughter.

[16] It is difficult to say what factors motivated C., but her behaviour at her mother's home was seen by the respondent and her husband, D. O., as increasingly challenging and disrespectful. The tension erupted into a physical and verbal altercation on December 30, 2009, that in turn resulted in C. moving her principal residence to her father's home.

[17] There was a substantial amount of evidence adduced about the events of that evening. I prefer the evidence of Mr. O. to that of Mrs. O. as to much of what took

place. He candidly acknowledged the history of problems with C., his reactions to her on the 30th, and the desirability of a change that saw her move to her father's home. His evidence made it clear that there was a need for, and in fact there has been a change in the circumstances of C.'s parenting arrangements.

[18] I find that there was an argument at the dinner table and C. left the table. She, her mother, and her sister met in the bathroom to talk. Mr. O., at one point, asked to enter into that conversation. He was permitted entry to the bathroom but the conversation was confrontational. C. left the area and, as she did, she made a remark to Mr. O. that he found disrespectful. He followed her to a lower level of the house where he grabbed her arms and pulled her a distance of approximately six feet, telling her, in less polite terms, to get out of the house. W. struck him and he released C..

[19] Following this, Mr. O. left the house for the night at the request of Mrs. O., who recognized that there needed to be a cooling off period. On January 1, 2010 C. packed the majority of her personal items and moved to the residence of Mr. S. where she continues to make her principal residence.

[20] Mr. O. explained that he reacted as he did to shock C. into recognizing her own bad behaviour. He acknowledges that he made a serious error in assaulting her, and that his actions "backfired". I do not accept that his actions were as calculated or controlled as he would suggest. The evidence of raised voices and high emotions leads me to conclude that his actions were not premeditated, and were born out of frustration with C.'s attitude.

[21] In reflecting on the history of events, Mr. O. believes that C. was acting out to achieve her goal of moving to her father's house. He feels that overall things are much better since she left and that C.'s relationships are improved with her mother and himself.

[22] C. did not stay overnight at her mother's residence in January 2010. In February she stayed with her mother on a few occasions when Mr. O. was out of town on business. Following the March Break, C.'s time with her mother took over the same schedule that had previously been exercised by her father, that is, the parenting time of the parents reversed, which has continued.

[23] Mrs. O. and her daughter attended counseling on two occasions, and Mrs. O. feels their relationship is back on solid ground again. I accept that is generally so.

[24] There has been no serious attempt by Mr. or Mrs. O. to offer C. independent counseling to deal with her relationship issues with Mr. O.. It should have been undertaken. With respect, I do not accept that the counseling of C. and her mother by Dr. C. A. had that goal or effect, as Mrs. O.'s testimony would suggest. It was directed at trying to re-establish Mrs. O.'s relationship with her daughter and not with the direct relationship of stepfather and stepdaughter.

[25] I infer that, in part, this has been motivated by Mrs. O.'s desire to minimize the possibility of police involvement arising from Mr. O.'s assaultive behaviour on December 30. I am reinforced in this view by what I saw as the minimization of Mr. O.'s misconduct in the evidence of Mrs. O. and her close friend, Ms. W.. One example is the use of the term "escorted" in describing how Mr. O. grabbed and pulled C.. "Escorted" does not connote an action where sufficient force was employed so as to cause marks to appear on C.'s arms. Further, Mrs. O. demonstrated a selective memory of what occurred during the altercation, and she

and Ms. W. were both selective in describing what was discussed after Mr. O. left the home that night.

[26] Counsel for the applicant has suggested and I accept that Mrs. O. casts blame on C. for the problems that bring this matter to court, and has tried to minimize C.'s concerns or opportunity to voice her views in this proceeding.

[27] There is evidence that shows that C. maintains some of her items of clothing and personal keepsakes, such as sporting trophies, at her mother's home. She still has a bedroom there and uses it when she stays over. She is welcome there. The arrangements would seem to be the mirror image of her situation prior to January 1, when most of her things were at her mother's and some, but not the majority of her things, were at her father's.

[28] Overall, the result is that C. has made her choice of residences, and has done so for reasons that constitute a rational response to the problems being encountered while at her mother's. While the events of December 30 were the clear catalyst to this change, it is likely that it was only a part of a more fundamental shift in the

wishes of C., and of what now appears to have been the most appropriate residence for her to adopt as her principal one.

[29] I am satisfied that there has been a material change of condition, needs and circumstances in the care and residency of C. since the date of the Corollary Relief Judgements of 2002 (establishing the primary residence and core parenting schedule), and of 2009 (establishing the current child support regime). Further it is a change that could not have been reasonably contemplated at the time of the making of the existing corollary relief provisions.

Issue 2: ***What custody and parenting conditions are in C.'s best interests?***

[30] I am satisfied, on the totality of the evidence, that C.'s current living arrangements are in her best interests. It may be that with time she will want to once again change her principal residence, but that time is not now. Her needs are being met in a supportive and loving environment, much as I am sure they have been and will continue to be, when she is at her mother's house. What primarily distinguishes the choice of residence is the unfortunate relationship issues that developed with the O.s, as well as this now 17 year old's wishes.

[31] C. is an excellent student - athlete, and makes good choices in her social life. I permitted the introduction of a letter from her, over the objection of the respondent. It offers a simple and clear statement of her current schedule and a wish to continue to make her "home base" at her father's house. She expresses her desire to spend time with both parents.

[32] The parties agree that the current parenting schedule should continue, including the flexibility that allows C., on occasion, to move back and forth between them in such a way as to accommodate scheduling issues that any of the three might have. I asked Mrs. O. during her testimony whether it was her wish that I mandate that her daughter spend more time with her than she currently is. Mrs. O. does not ask the court to make such an order.

[33] The divisive question for the parents is whether to characterize the parenting schedule as giving primary care to Mr. S., or whether it is more properly defined as shared custody so as to fall within the provisions of section 9 of the **Guidelines.** How that question is answered will determine the approach to settling the child support issue that is driving this dispute.

[34] The respondent argues that a mathematical analysis of the time being spent by her with C. under the current schedule will support a conclusion that there exists a shared custody arrangement.

[35] The applicant argues that when he was operating under the same schedule it was agreed that Mrs. O., not he, had primary care. The respondent replies to that argument by saying that, in fact, it has been a shared custody arrangement for at least three years and it is now time to recognize that to be a legal conclusion. She is untroubled by the fact that she has, throughout, accepted payment of child support from Mr. S. in accordance with the Guidelines. She is equally untroubled with the previous orders and agreement specifying primary residence with her. Indeed the respondent entered into a revised support order just over a year ago that was based on her having primary care of C. while Mr. S. had the same access with C. that Mrs O. now has.

[36] While Mrs. O. wants to have her parenting time now seen as shared custody, she does not offer to apply this conclusion retroactively to a time prior to January 1, 2010, which would see Mr. S. get the same financial considerations of shared

custody that she now seeks. In essence, Mrs. O. wants child support based on shared custody, but only when it benefits her household. Is she entitled to such a result?

[37] Section 9 of the **Guidelines** states:

> Shared custody
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> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
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> (*a*) the amounts set out in the applicable tables for each of the spouses;
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> (*b*) the increased costs of shared custody arrangements; and
>
> (*c*) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[38] The leading case for calculation of child support under this section is *Contino v. Leonelli - Contino* [2005] 3 S.C.R. 217**.** It reminds that the evidence

must first establish that the 40% threshold has been met, before provisions for the determination of child support payable are considered. *see*, at para. 37.

[39] For guidance as to how to address the first part of the test, I turn to the decision in *Hamm v. Hamm* 1998 NSSC 87, where Goodfellow J., stated, at paras. 17-18:

> [17] The language of Guideline s.9 is clear. In order to establish shared custody, the child must be the responsibility of a parent through the exercise of a right of access or physical presence of the child for not less than 40% (forty percent) of the time over the course of a year.
>
> [18] The child does not have to be in the physical presence of the parent for all the time to be credited to a determination of the time requirement for shared custody. In order for the time to be credited, the child must be the responsibility of that parent during the entire period. The period of time during the exercise of access will be credited, even where this primary responsibility is temporarily delegated, for example, for any reasonable temporary limited period where the child is with a grandparent, babysitter, cub master, etc. A parent seeking credit for any period of time to be included in the calculation for shared custody, must have the primary responsibility of the child during the entire time frame sought to be credited towards the prerequisite 40%.

[40] At para. 21, the court held that "The onus is upon the person seeking consideration on the basis of shared custody to meet this absolute prerequisite of 40% of the time over the course of a year, which is 146 days."

[41] Revisiting the issue some nine years later, in the case of *Gardiner v. Gardiner* 2007 NSSC 186, Goodfellow J. offered that the calculation of the threshold time had still not been "dealt with" by either of the Supreme Court of Canada nor the Nova Scotia Court of Appeal. *see* at para 34. He then summarized his views at paras 47 and 48:

> [47] The legislation, namely s. 9, places an onus on the parent seeking a designation of shared custody to establish the following: 1) a factual exercise of the right of access to or physical custody; 2) a time frame of not less than 40 percent over the course of a year. It must be remembered that the onus to establish the foregoing is upon the person seeking a designation of shared custody and that person must establish the not less than 40 percent time prerequisite. In so doing, it is irrelevant how much time the child is in the custody of the other parent. Take for example, a normal situation of mid week access. The parent alleging shared custody has to do more than say she/he picks the child up and takes the child to school in the morning and picks the child up after school to remain overnight to the following morning whether or not it is an exercise of right-of-access or physical custody depends on the factual situation.
>
> [48] Normally while the child is in school, the parental responsibility/guardianship component of custody *prima facie* rests with the parent who has the primary care/responsibility of the child.

[42] Counsel for the respondent set out a detailed time analysis in support of the argument that the evidence meets the 40% threshold. I will not deal with all components of it, but enough to reflect my general analysis.

[43] Part of the respondent's calculation is uncontroversial. Counsel submits that in a regular 2 week period consisting of 336 hours, C. is in the primary care of Mrs. O. for approximately 113.5 hours, (excluding school time). He suggests this provides almost 90 days per year. This assumes a schedule that is fairly generous in its interpretation of the start and end times of parenting time, but I am prepared to accept it for the purposes of this analysis.

[44] He recounts that statutory holidays are typically split evenly, as is the Christmas- New Year vacation period. March Breaks are alternated annually between the parents. These arrangements are much as set out in 2002 in the parenting time schedule.

[45] The analysis then diverges from the existing agreement and is, in my view, flawed by certain assumptions that on the facts of this case should not be made.

[46] The Agreement allowed for equal times of block summer vacation, but provided that when not on vacation the 2 week parenting schedule was to be

followed. C. now will be working away from home for July and August weekdays and spending weekends with her parents on an equal basis. Paragraph 2 of Schedule B stipulates that Mr. S. had primary responsibility only during those times that the children were "in his care". Applying that principle to the current circumstances, Mrs. O. will have "primary responsibility" for C. on 8-10 days in July and August, not the 31.5 days claimed.

[47] Mrs. O. also claims for times that Mr. S. was away on vacation during time that would otherwise be his. I do not accept this analysis. It is apparent that both parties, over the years, have tried to accommodate each other, sometimes for long periods of time, without "deducting" it from their parenting time. Mrs. O. apparently relied on Mr. S. during long periods of work related absences in 2009. This was never seen as a basis to undermine her role as the primary caregiver or reduce the child support payable to her. In fact the Schedule specifically allowed for such changes, with consent, and as necessary for the well being of the children. *see*, at para 3(a). It is counterproductive to C.'s best interests to start such a time accounting system at this stage as it may cause each parent to become less flexible at a time when more flexibility is likely to be needed.

[48] School time forms the next part of the analysis. The respondent's position is that if no school time is attributed to her, but including all other time set out in the submission, some of which I have already denied, then she has primary care for 149 days and 23.5 hours or approximately 41%. If that is increased to 3 out of 10 school days the number moves up to 44% and if half of the school time is allocated to her, then the time is 47%.

[49] The evidence suggests that C. turns to either parent for advice or assistance, favoring her father for certain things and her mother for others. She is fast approaching adulthood and is and will be relying less and less on her parents to help her in managing her day to day affairs. There is no evidentiary basis on which to conclude that Mrs. O. has primary responsibility for C. at times when C. is not with her mother. It would be arbitrary to allocate time of primary responsibility to Mrs. O. in the way proposed by her argument.

[50] This conclusion is consistent with the parents' own parenting plan that has been in place for 8 years. Notwithstanding the informal variations from time to time, the framework for parental responsibility was well understood by all and

provided structure in the lives of the children which all favored. It did not parse out the parenting time, including time at school, to determine whether it was shared custody, since it was agreed that C.'s primary residence was with Mrs. O. and she had primary care. Child support was structured to reflect that.

[51] Without an allocation for school time, and without 20-22 days of summer time as proposed in the submission, Mrs. O. does not have primary responsibility for C. for at least 40% of the time.

[52] The respondent's suggestion that during the last three years it was intended to be, and was, a "shared custody" regime, is unfounded in fact, not having achieved the 40% threshold, and in law, as reflected by the 2002 and 2009 court orders.

[53] Counsel for the respondent argues that the court should not use the existing agreement and orders as a starting point to the custody analysis, suggesting that they are out of date and inconsistent with the *de facto* arrangements for parenting time. He submits that I can "go behind the order" previously made by this court.

[54] There are many reasons not to do so. The parties entered into an agreement and two court orders, each time with the assistance of legal counsel. Their meaning was clear and unambiguous. Together the parties concluded that it was in the best interests of their children to adopt the schedule and provision for primary residence and support. They lived by the terms, including the financial provisions.

[55] In *Huculak v Huculak* 2000 BCCA 662, Hall J.A. considered the advisability of respecting such agreements:

> 7 ... Generally, if an applicant anticipates the likelihood of a change in circumstances at the time of making the original order, an applicant will not be able to advance such as grounds for varying the order. In the case of *T. v. T.* (1996), 26 B.C.L.R. (3d) 319, Newbury J.A., speaking for this court, stated what is a basic theme running through the cases:
>
> > In my respectful view, there are many policy and practical reasons for according considerable respect to agreements entered into freely and with the appropriate legal advice. If spouses are able to recant their own covenants and attack agreements at will, or if courts treat their applications to vary essentially as initial applications to fix maintenance, there will be little incentive for parties to settle their own matters without resort to litigation. It has always been the policy of matrimonial law to encourage such agreements, provided they are fair and fairly reached.

> 8 For obvious policy reasons, the courts encourage parties to these often difficult and unpleasant disputes to endeavour to settle their affairs in a fashion that is mutually satisfactory or perhaps stated at a lower level, that is not necessarily mutually unsatisfactory in an effort to prevent unnecessary litigation and the unnecessary dissipation of assets in a family situation. A corollary of this is that courts are reluctant except upon substantial grounds being demonstrated to later interfere with consensual arrangements reached between the parties.

[56] There is no evidence that the orders and agreement were entered into as the result of fraud, misrepresentation, or non disclosure of material fact. They are reasonable and not unfair. They were reached with the assistance of legal counsel and they have for a number of years formed the basis of a positive parenting relationship.

[57] The only evidence that could call into question the *bona fides* of either party was for March of 2009. At that point Mrs. O.'s income was represented in the consent Corollary Relief Judgment as $41, 800 in 2007, which, while accurate, did not disclose her income of $65,693 in 2008. Financial disclosure in this application showed Mrs. O. to have a Line 150 income in 2009 of $93,261. While not necessary to the result in this case, it struck me as an aggressive tack for the respondent to suggest that the parties shared custody for the past three years while accepting the **Guideline** amount of support from Mr. S. whose income was

approximately $120,000 during that time. Further Mrs. O. was only required to pay 25% of section 7 expenses which was not an accurate reflection of the respective financial positions of the parties.

[58] I conclude that the respondent has not satisfied the threshold requirement of showing that she enjoys primary responsibility for C. for 40% of the year and reject the argument that section 9 of the **Guidelines** should be the basis of the calculation of child support. The parties will continue to enjoy joint custody of C., with S. S. having primary responsibility for her care.

Issue 3: ***What is the appropriate amount of child support payable?***

[59] I have considered the provisions of sections 17 (4), (6,1), (6.2), (6.3), (6.4) and (6.5) of the **Divorce Act,** together with the evidence adduced on the application and conclude that the respondent should pay to the applicant, for the support of C., the table amount required by the **Guidelines**.

[60] Mrs. O. is employed as a permanent part time * in the * at *. Her 2010 income is $39,978, being prorated at 60% of a full time salary of $66,630.

[61] The applicant seeks to impute an annual income of $66,630 to the respondent pursuant to the provisions of section 19 of the **Guidelines**. The relevant parts of that provision read:

> 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;

[62] The applicant submits that Mrs. O. is intentionally under-employed resulting in less money being available for the support of C..

[63] The respondent has increased her income each year from 2006 through 2009 when it peaked at over $93,000. Her 2010 income is the lowest she has earned since 2006.

[64] Mrs. O. testified that she has a 5 year old son by her current husband. She feels that it is important for her to be available to him after school and for extracurricular activities, just as she had been home to look after W. and C. as they were growing up. She also wants to have the flexibility in her schedule to be there for C. during her last year in high school.

[65] Her work with *, in 2009, required Mrs. O. to be away from home extensively. This interfered with her ability to parent. Her current position allows her to earn income and fulfill her parental responsibilities.

[66] She testified that positions in her * are in demand because it is day shift only. There are no full time positions available.

[67] Finally she indicates that her current employment will allow her to obtain her * in a distance education program offered by the University of * , which program she intends to commence in September 2010.

[68] The applicant argues that the respondent could obtain additional hours working in other * units. It is also argued that there are alternative care programs available for her young son, which would allow Mrs. O. to work more hours. Finally, it is suggested that the demands of the * degree program can be met during non work hours. In sum, I am urged to reject Mrs. O.'s position as unreasonably and negatively impacting on C..

[69] In *Donovan v Donovan* 2000 MBCA 80, Steele J.A., stated:

> 17 While it is not a prerequisite to imputing income under this provision that the payor be intentionally unemployed for the purpose of avoiding one's child support obligation, obviously if such a motive exists, it will be a significant factor to be considered in the decision to impute income. See *Martel v. Martel*, per McIntyre J., at para. 25.
>
> 18 A decision as to whether a person is capable of earning more income than they are presently earning depends on the context. Fundamentally, the court will impute income in the same fashion that it did before the introduction of the *Federal Child Support Guidelines*. Payor spouses are still entitled to make decisions in relation to their career path so long as those decisions are reasonable at the time they are taken considering all the circumstances.
>
> 19 The question is what is reasonable in the circumstances:

> In determining whether to impute income on the basis of intentional under-employment or unemployment, the court ought to have regard to what is reasonable under the circumstances. The age, education, experience, skills and health of the payor are factors to be considered in addition to such matters as the availability of work, the freedom to relocate and other obligations. [See *Martel v. Martel*, at para. 27. See also *Carson v. Buziak* 1998 CanLII 13448 (SK Q.B.), (1998), 166 Sask.R. 8 (Q.B.); *Thompson v. Thompson*, [1998] A.J. No. 1394 (Q.L.) (Q.B.); *Lobo v. Lobo* 1999 ABQB 107 (CanLII), (1999), 45 R.F.L. (4th) 366 (Alta. Q.B.).]

[70] Pugsley J.A., writing on behalf of the court in *Montgomery v Montgomery* 2000 NSCA 1, addressed the question of how to assess what might be considered reasonable in such an analysis:

> [35] Section 19 does not establish any restriction on the court to imputing income only in those situations where the applicant has intended to evade child support obligations, or alternatively, recklessly disregarded the needs of his children in furtherance of his own career aspirations.
>
> [36] The critical word, in my view, is the word "reasonable". It is only the "reasonable" educational . . . needs of the spouse" which should be taken into account.
>
> [37] The issue of reasonableness, in my opinion, should not be confined to an examination of the circumstances surrounding the applicant alone, but of all the circumstances, including the financial circumstances of the children, in order to ensure that they receive a fair standard of support as set out in the objectives to the Guidelines.

[71] I am satisfied that Mrs. O. is not attempting to avoid any obligation she may have to contribute to C.'s support. She is fortunate in that the position she holds offers a reasonable salary by Nova Scotia income standards while not requiring her to work full time. She presented her case for the decision to work part time in a sincere and thoughtful way. On the face of it I find her explanations to be reasonable.

[72] The submission of the applicant pre-supposes the availability of * work outside of the respondent's field of specialization. There has been no evidence adduced to show that to be true and for me to so conclude would be speculative.

[73] The evidence also demonstrates that Mr. S. can adequately care for C., even without support being paid by Mrs. O.. Attached to his affidavit filed April 20, 2010 is a copy of email communications between Mr. S. and Mrs. O.. They reflect Mr. S.'s attempts to resolve this dispute on an out of court basis. In one such email, dated February 21, 2010, Mr. S. wrote to Mrs. O. that if the matter went to court, and as a result she was required to pay support, then his "...suggestion would be that you put that money into an RESP for C. that we could use toward her

post secondary education...". The implication was that he did not need the money to provide for C.'s every day needs.

[74] For all of these reasons, I am not prepared to grant the application to impute income to Mrs. O..

Conclusion

[75] I direct that support payable by Mr. S. to Mrs. O. for C. A. S. is terminated as at December 31, 2009. Any amounts of child support and Maintenance Enforcement Program fees or penalties paid by Mr. S. for the period beginning January 1, 2010 are directed to be returned to him.

[76] I direct that on the basis of her 2010 income of $39, 978, Mrs. O. pay the sum of $348 per month to Mr. S., for the support of the child of the marriage, C. A. S. born November * ,1992, which payment is effective January 1, 2010. Such payments will be made through the Maintenance Enforcement Program, unless Mr. S. consents, in writing, to a different plan for payment.

[77] The parties will continue to exchange annual income information on the terms set out in their existing agreements.

Costs

[78] If the parties are unable to agree as to costs, I will receive their written submissions on the question.

Dated at Halifax, Nova Scotia this 5th of July, 2010.

_____

Duncan J.